A new dawn for the crescent moon: is the fear of an influx of Turkish nationals driving European law?

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Abstract

This paper argues that legally speaking, Turkish service recipients must be granted visa-free access to the EU. The freedom to provide services is covered by Article 41(1) Additional Protocol, and rights in this field should be extended *as far as possible* to Turkish nationals, as outlined in *Abatay and others*. Article 41(1) AP's aim is to ensure no new visa restrictions can be placed on Turkish nationals. Given that the freedom to receive services is, as stated in *Luisi and Carbone*, a necessary corollary of the freedom to provide services, it is logical that this must be extended to service recipients. Furthermore, this paper argues that the extensive body of case law and Treaty law between the EU and Turkey demonstrate a relationship that is far greater than a simply economic one, as suggested by the CJEU in *Ziebell*, conferring greater rights on Turkish nationals.

The CJEU, as outlined in Article 19(3) of the TEU, has a purely legal role within the EU legal order. It should only rule according to the letter of the law, as opposed to bringing invalid considerations into the judgment. In this regard, the Court must rule that Turkish service recipients are entitled to visa free travel. The CJEU has, however, borne political reasoning in mind in the past, especially with regard to association agreements. *Demirkan* potentially has huge ramifications, with the 'erosion of sovereignty' that comes with opening of borders to third countries. This would open the door to 75 million Turkish nationals to move freely in the EU, and given the recent violent protests in Turkey and the strength of anti-Turkish sentiments in the press. This whole issue highlights how the CJEU is often thrust into inherently political matters when its sole mandate is to rule on the law of the European Union.

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Introduction

This paper argues that legally speaking and contrary to the current restrictions, Turkish service recipients[1] should be granted visa-free travel to EU Member States. In the context of EU-Turkey relations, the concept of an individual being a service recipient follows from the removal of restriction on the freedom to provide services, first laid out in Article 14 of the Ankara Agreement (henceforth 'AA'.)

The upcoming *Demirkan* case,[2] currently before the CJEU, forms the central theme of this paper. The stated policy of the EU is that "consumers and businesses should be able to use the services of providers based in other EU countries without needing prior authorisation or facing discriminatory requirements based on the recipient's nationality or place of residence."[3] According to treaties between the EU and Turkey, this must be extended to Turkish nationals so as to include them under the category of service recipients. The CJEU judgment in *Luisi and Carbone*[4] states that service recipients have a right of residence whilst the service they are receiving is provided. Were these rights to be extended to Turkish nationals, as they legally should be, this would allow Turkish nationals the chance to enjoy freedom to provide and receive services, one of the fundamental freedoms of the EU,[5] something that was promised to them over half a century ago.

[1] The concept of a service recipient is somewhat vague, but under Directive 2006/123/EC OJ L376/36, recital 36 as: any EU citizen, or non-EU national who benefits from rights conferred to them by EU legislation, engaged in a service activity in a Member State and who receives a service that is not marginal or ancillary, has a right of residence as long as the service is received.
[2] Case C-221/11 Leyla Ecem Demirkan v Federal Republic of Germany, forthcoming.
[3] Europa.eu, Services (May 2011).
[4] Cases C-286/82 and 26/83, Luisi and Carbone [1984] ECR 377, para. 12, see also Art 1(1)b Directive 73/148/EEC.
[5] Article 21(1) Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

It is, however, very difficult to separate this legal issue from politics. Turkey is demographically and historically very different to the EU. This has been highlighted by the use of lethal force by the Turkish government to the initially peaceful protests in the summer of 2013. Such actions only show the width of the divide between the EU and Turkey, with Turkey already being accused of being undemocratic.[6] The events turn an inherently political matter, the lifting of visa restrictions, into an awkward political judgment. Whilst many of the decisions the CJEU have made are political in nature, the potential opening of the EU's borders to a country that has used lethal force in response to peaceful protests will bring what is intended to be an independent judicial body under immense political pressure from Member States.

According to Professor Harry Flam, "the prospect of large-scale immigration from Turkey…is a source of considerable concern among the EU-15, where it is feared that the immigrants will depress wages, boost unemployment and cause social frictions and political upheavals."[7] This fear could be further exacerbated by the instability in Turkey resulting from the protests in Istanbul's Taksim Square. Opening the border to millions of Turks increasingly fearful for the stability of their country could result in politically-induced migration to the EU on a level never seen before.

[6] T Bacınoğlu, *The Making of the Turkish Bogeyman: A Unique Case of Misrepresentation in German journalism* (Graphis Yayınları 1998).
[7] H Flam, 'Turkey and the EU' [2003] Seminar Paper No. 718, Institute for International Economic Studies, Stockholm University, p. 10.

Regardless of these factors, it appears unjust that Turkey, a country which has waited for over half a century for EU citizenship rights, has seen itself overtaken by other candidate countries, such as Albania, Macedonia, Montenegro and Serbia, partly because of the sheer size of the potential influx of Turkish nationals.[8]

The *Demirkan* case also presents the opportunity for the EU to take away even more border control from Member States, in itself a controversial issue. Indeed, Member States have unwillingly relinquished some control in this field to the EU, which many feel erodes their sovereignty.[9] Opening EU borders to a country that has had three military coups in the last sixty years, and which, given recent events in the region, could be on the verge of a fourth, would be exceedingly unpopular and destabilising.

Turkey has long sought greater engagement with the EU: it was one of the founding members of the Council of Europe[10] and applied for associate membership of the European Economic Community as early as 1959.[11] A number of pieces of EU legislation have come into force seeking to enable the accession of Turkey into the EU, which was first mentioned in 1963 in the preamble to the AA, which granted Turkey the associate EEC membership it

[8] *Ibid*, p. 17: Flam predicts that by 2030, if given free movement rights, there would be over 3.5 million Turks in Germany, compared to 2.2 million in 2000.
[9] See Article 3(1)j TFEU on the AFSJ, a shared competence, also V Guiraudon and G Lahav 'A Reappraisal of the State Sovereignty Debate: The Case of Migration Control' [2000] 33(2) Comparative Political Studies 163.
[10] Council of Europe, 'Turkey' (Council of Europe) <http://hub.coe.int/web/coe-portal/country/turkey?dynLink=true&layoutId=171&dlgroupId=10226&fromArticleId=> accessed 25 April 2013.
[11] Turkish Ministry of Foreign Affairs, 'Turkey EU Relations' <http://www.mfa.gov.tr/relations-between-turkey-and-the-european-union.en.mfa> accessed 25 April 2013.

sought. The Additional Protocol[12] thereto (henceforth 'AP') in 1970 and Decision 1/80[13] that followed sought to fill the gaps in the framework laid down by the Ankara Agreement.

Overall, one could consider that Turkey has been very harshly treated vis à vis its accession to the EU. This is perhaps most evident with regard to the rights its citizens enjoy in the EU, which remain mired in the past, including the fact that Turkey has not even been offered short-term visa-free travel within Schengen.[14]

Turkish citizens appear no closer to gaining the full range of rights enjoyed by European Union citizens, or even the rights conferred upon them by the Ankara Agreement:[15] for example, the envisaged internal market remains unrealised.[16] The existing arrangements are only partially secured by Article 41(1) AP, the standstill clause,[17] and as a result of the judgment in *Soysal*,[18]which ruled that no new restrictions can be placed on service providers. Given that under *Luisi and Carbone,* service recipients are seen as a necessary corollary to service providers, there is no way that Turkish service recipients can have new visa restrictions placed upon them.

[12] Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force [1970] OJ L293/4.
[13] Decision 1/80 of the Association Council of 19 September 1980 on the development of the association.
[14] A Stiglmayer, 'Visa-Free Travel for Turkey: In Everybody's Interest' [2011] 11(1) Turkish Policy Quarterly 99: 100.
[15] 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', [2010] CLEER Working Papers 2010(2).
[16] Article 2 Ankara Agreement [1963] OJ L361/1 .
[17] Additional Protocol [1970] OJ L293/4.
[18] Case C-228/06, *Soysal and Savatli v Bundesrepublik Deutschland* [2009] ECR I-1031, para. 62.

This paper will initially consider the relationship between Turkish citizens and the EU by looking at the general scheme of EU provisions on the freedom to receive services conferred by the AA and the follow-up pieces of legislation.

Given the significant delay in the CJEU *Demirkan* judgment,[19] the paper can only review the facts of the case, and the Opinion of the Advocate-General Cruz Villalon, before offering a critical commentary on the Opinion of Advocate General. It is expected that this will show through analysis of the current position of EU law, that legally speaking, the CJEU must rule that Turkish service recipients are covered by economic EU free movement rights.

As a result, no new visa restrictions can be placed upon Turkish nationals, as has been the situation in Germany. If the CJEU rules against the applicant, this paper argues EU law will have been driven by political factors, including a fear of an influx of Turkish nationals and the ongoing violence in the Middle East, which will be considered in the fifth chapter.

[19] Stiglmayer, *Supra,* no. 14, p. 107: despite the case being lodged in May 2011 and the hearing taking place in November 2012, the judgment, which was expected in late 2012 or early 2013, had still not been published by June 2013.

Chapter One: EU – Turkey Relationship

This chapter will look at the subject matter of the law constituting the association between the EU and Turkey. It will continue to show the fact that a clear legal framework exists conferring a number of rights that can be invoked by Turkish nationals.

1.1 Association Agreements

Association Agreements and their provisions "form an integral part of community law,"[20] and produce "direct effects through the community,"[21] and as such are "capable of conferring upon individual traders rights,"[22] so long as the provisions themselves satisfy the criteria required by European Union law as a whole, as laid out in *van Gend en Loos*:[23] that they are sufficiently clear, precise and unconditional. On top of being capable of having direct effect, as laid out in *Bresciani,*[24] association agreements "must also necessarily bear all the characteristics of Community law, including that of its primacy."[25] As such, individuals can rely on rights conferred by Association Agreements, including when they conflict with incompatible national legislation. This must be seen as the case in *Demirkan*, whereby the framework of EU-Turkey law confers justiciable free movement rights upon Turkish nationals, despite the contrasting German law.

[20] Case 181/73 *R. V. Haegeman v Belgium* [1974] ECR 449, para. 5.
[21] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641, para. 26.
[22] *Ibid,* para. 27.
[23] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
[24] Case 87/75, [1976] ECR 129, para. 23.
[25] Philipp Gasparon, 'The Transposition of the Principle of Member State Liability into the Context of External Relations [1999] 10 EJIL 605, p. 607.

The current Article 217 TFEU provides the legal basis for association agreements, which have the aim of "facilitating and strengthening the gradual economic and political integration,"[26] with third countries, often with a view to accession. The Article itself is flexible so as to permit a range of different types of agreements. The case of *Haegeman*[27] brought Association Agreements within the scope of Union judicial law: factually, a case concerning the EEC – Greece Association Agreement of 1961, and more specifically charges levied on Greek wine. The CJEU stated that, as laid out in Article 177 EEC Treaty,[28] it shall have jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the Community. Given that the agreement in question was concluded by the Council, it constituted an act of one of the institutions of the Community within the scope of the aforementioned Treaty article.[29] When an agreement is mixed,[30] association agreements still come within the scope of this notion and therefore the CJEU can still give preliminary rulings.

1.2 Historical Background

The legal provisions in the EU-Turkey relationship are, according to Phinnemore,[31] the most far reaching out of any association agreement concluded by the with a third country.[32] Not

[26] C Rault, R Sova and AM Sova, 'The Role of Association Agreements within European Union Enlargements to Central and Eastern European Counties' [2007] Forschungsinstitut zur Zukunft der Arbeit, Discussion Paper No. 2769, April 2007, p. 3.
[27] Haegeman, *Supra*, no. 20, para. 5.
[28] Article 267 TFEU after the Lisbon re-numbering.
[29] *Haegeman*, *Supra*, no. 20, paras. 2-4.
[30] The subject matter of the agreement is shared between the EU and Member States under Articles 2-5 TFEU, so the EU is unable to conclude the agreement without the authority of Member States.
[31] D Phinnemore, *Association: Stepping Stone or Alternative to EU Membership?* (Sheffield Academic Press 1999) p. 17.
[32] The Athens Agreement with Greece was conducted on similar terms, but Greece has since joined the EU and as such is subject to EU law.

only does it refer to the specific goal of accession, as laid out in the preamble of the AA, it has a much broader scope and aim than agreements with Cyprus or Malta, or even the Europe Agreements.[33] This section will outline the road to the current legal position: one with specific goals and aims as well as numerous directly effective provisions, with a broader scope than simply economic benefits. These will be explored in the following chapter.

However, the relationship has been shaped, as postulated in the introduction, by many non-legal events which have unfortunately altered the route of association, meaning Turkish citizens cannot enjoy many of the rights they should enjoy. This is partly due to a number of other historical reasons outlined in the fifth chapter.

On the 31st of July 1959, the Turkish government applied for negotiations to enter into an association agreement with the then EEC.[34] After four years of negotiations, the Ankara Agreement was then signed and ratified by all six Member States and a decision enacted by the Council, entering into force in 1964. One could consider that the AA itself is more of an outline which was intended to be built upon at a later date by the Association Council, which is able to make binding decisions having direct effect.[35]

The aims of the AA are clearly laid out in Article 2 AA, whereby in paragraph 1 it states: "the aim of this Agreement is to promote the continuous and balanced strengthening of trade

[33] Phinnemore, *Supra*, no. 31, p. 18.
[34] E Lenski, Turkey and the EU: On the Road to Nowhere? [2003] 63 ZaöRV 77.
[35] Article 22 Ankara Agreement: most famously Decision 1/80.

and economic relations between the Parties." [36] This is to be achieved by "continuous improvement in living conditions in Turkey 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."[37] Buzan and Diez postulate the rationale behind offering associate membership was to "improve Turkey's economic performance and living standards,"[38] re-asserted by the latter part of Article 2(1).

Article 2(2) AA puts Article 2(1) into context: that a customs union shall be progressively established, consisting of three stages: a preparatory stage,[39] a transitional stage[40] and a final stage.[41] In Article 28 AA, the door was left open for Turkish accession to the Community, permitting Contracting Parties to examine the possibility of the accession of Turkey to the Community once it had advanced far enough to be capable of satisfying its obligations. As mentioned above, this shows the openness and broad scope of the association agreement in terms of future potential to accede: something which has not been done since and which must be seen as highlighting the special relationship between Turkey and the EU.

[36] Article 2(1) Ankara Agreement.
[37] Recital 4, Ankara Agreement.
[38] B Buzan and T Diez, 'The European Union and Turkey' [1999] 41(1) Survival 41, p.42.
[39] Article 2(3)a and 3 Ankara Agreement.
[40] Article 2(3)b, 4 and Title II Ankara Agreement.
[41] Article 2(3)c and 5 Ankara Agreement.

The preparatory stage, intended to last five years,[42] sought to allow Turkey to strengthen its economy, funded through a scheme of aid by EEC States, so as to enable it to fulfil the obligations bestowed upon it in the latter two stages.[43] Turkey initiated negotiations to enter into the transitional stage in 1968. Lenski purports this was due to the Turkish desire to abolish the planned economy and foster economic development through European trade, and additionally as the development of external trade with the Community had not grown as quickly as expected.[44]

The Additional Protocol, signed in 1970, entered into force on 1 January 1973. It lays"down the conditions, arrangements and timetables for implementing the transitional stage referred to in Article 4 of the Agreement establishing an Association between the European Economic Community and Turkey."[45] To this end, it lays down ambitious goals concerning the freedom of service rights that Turkish citizens were to enjoy[46] within the EU and the start of the customs union[47] that was to be established. The economic policies of both parties were also to be aligned.[48] Again, this shows the intent on both sides to enjoy a wide range of reciprocal rights, admittedly economic in this case, based on an equal relationship.

[42] Article 3(2) Ankara Agreement.
[43] Article 3(1) Ankara Agreement.
[44] Lenski, *Supra*, no. 34, p. 79.
[45] Article 1, Additional Protocol.
[46] Title II AP: movement of persons and services, also Chapter 3 AA.
[47] Chapter I Additional Protocol.
[48] Title III AP.

Article 4(2) AA, and more specifically, Article 61 AP both lay out that "without prejudice to the special provisions of this Protocol, the transitional stage shall be twelve years." Pertaining to workers and services, the provisions laid out in Title III AP state that freedom of movement of workers between Turkey and the EU shall be secured by the end of 1986.[49]

However, for a number of reasons, this was never realised. In the 1970s, Turkey perhaps experienced its worst economic crisis since the fall of the Ottoman Empire, suffering a balance of payments crisis and only bringing inflation down from three-digit levels in 1980.[50] Turkey's occupation of North Cyprus, coupled with its human rights record attracted a great deal of attention as well, and between 1976 and 1980 the association stood still.[51] A military coup in 1980 by a pro-EU junta led to the implementation of Decision 1/80. The CJEU describes Decision 1/80 as well as Decision 2/76 as being "adopted by the Council of Association in order to implement Article 12 of the Agreement and Article 36 of the Additional Protocol which, in its judgment in *Demirel*,[52] the Court recognized as being intended essentially to set out a programme,"[53] and implement the rights laid out in those provisions. This was to ensure that the rights laid out were justiciable, as they had not been found to be in *Demirel*, because the rights on which the applicant sought to rely were not specific enough.

[49] Article 36 AP.
[50] Y Akyüz and K Boratav, 'The Making of the Turkish Financial Crisis' 31(9) World Development 1549, p. 1551.
[51] E. Esen, *Die Beziehungen zwischen der Türkei und der EG unter besonderer Berücksichtigung der innertürkischen Auseinandersetzungen um die Assoziation 1973-1980* (Centaurus 1990), p. 223.
[52] Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmund* [1987] ECR 3719.
[53] Case C-192/89 *S.Z. Sevinçe v Staatssecretaris van Justitie* [1990] ECR I-3461, para. 21.

Despite this, from 1981 until 1983 the implementation of the Association was suspended due to human rights abuses and the lack of re-democratisation arising from the junta.[54] The long term effect of this meant there was "no schedule agreed to move from the transitional to the final stage, no customs union [and] no free movement of workers."[55] To this end, the EU sought to use financial instruments to exert more pressure on Turkey's restoration of parliamentary democracy, [56] which resulted in the return of civil government in 1983. At this point, Arikan purports that Turkey realised that it had to take the EU's human rights criticism seriously and that it needed the EU for both political and economic reasons.[57]

Turkey's current membership application dates from 1987: Tatham posits that "the Community's enthusiasm for Turkish membership was perhaps evidenced by the more than two and a half years it took the Commission to prepare its Opinion,"[58] on the matter, which was answered in the negative. Only in 1999 at the Helsinki European Council was Turkey officially accepted as a candidate country status and in 2002, the Copenhagen European Council proposed to enter into negotiations with Turkey once it had fulfilled the Copenhagen criteria for accession states.[59]

[54] Lenski, *Supra*, no. 34, p. 79, see also [1981] Bulletin of the EC No. 12, pt.2.2.45 (Decision 1/83 of the Association Council, [1983] OJ L112/2).
[55] A Tatham, *Enlargement of the European Union* (Kluwer Law 2009), p.144.
[56] H Arikan, Turkey and the EU: An Awkward Candidate for EU Membership? (Ashgate 2006).
[57] *Ibid*, p. 128.
[58] Tatham, *Supra,* no. 55, p. 144.
[59] European Council Presidency Conclusions, 12 and 13 December 2002. Brussels, 29 January. <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/73842.pdf> accessed 26 April 2013.

Nevertheless, despite this Turkey has seen the rights promised to it by the EEC a half-century ago remain unfulfilled, with numerous countries overtaking it in the applications process and being granted full EU citizenship rights. Furthermore, many Europeans fear Turkish membership would spark an influx of millions of Turkish migrants into Europe, a major reason why the European public is sceptical about Turkey's accession to the EU, if they were granted full citizenship rights.[60]

1.3 The development of Turkish citizens' rights within the framework of EU-Turkey law

Both the AA and AP constitute primary law, with the Decisions of the Association Council and of the CJEU constituting secondary law. As posited in earlier in this chapter, the legal basis for the AA is Article 217 TFEU, and as with all association agreements concluded under this Article, it forms an integral part of Union law, as outlined by *Haegeman*.[61] Furthermore, Yalinçak states that "since the AA is an international treaty, it has supremacy over secondary EU legislation."[62] The AA has not been found to be directly effective itself, but as discussed below, numerous provisions through CJEU case-law have been found to be.[63] One of these provisions, Article 41(1) AP, the standstill clause, is the provision relied upon by the applicant in *Demirkan*. The following section will detail how this provision, amongst others, has direct effect through a consistent body of CJEU case-law.

[60] Hürriyet, 'Verheugen tries to ease concerns over Turkish influx into the EU' *Hürriyet* (Ankara, 8 February 2005) <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=verheugen-tries-to-ease-concerns-over-turkish-influx-into-eu-2005-08-02> accessed 27 April 2013, see also K Archick, 'European Union Enlargement' (*Congressional Research Service,* 4 February 2012) <http://www.fas.org/sgp/crs/row/RS21344.pdf> accessed 27 April 2013.
[61] *Haegeman, Supra*, no. 20, para. 5.
[62] Orhun Hakan Yalincak, Freedom of Movement Rights of Turkish Nationals in the European Union, [2013] 19(3) Columbia Journal of European Law 391-422, p. 5.
[63] Nicola Rogers, *A Practitioners' Guide to the EC-Turkey Association Agreement* (Springer 1999), p. 8-9.

The first landmark case to come before the CJEU concerning the AA was *Demirel*.[64] The Court initially referenced paragraph 5 of *Haegeman,* re-affirming that association agreements are acts of institutions and as such are indeed subject to CJEU jurisdiction. Mrs. Demirel, a Turkish national, came to visit her husband, a worker in Germany, on a tourist visa,[65] in order to join him there.[66] She remained in the country after the expiry of her tourist visa, and was therefore threatened with expulsion by the German authorities. Demirel sought to rely on provisions (namely Article 12 AA and Article 36 AP) of EU-Turkey law.

Firstly, Advocate General Darmon outlined that the agreement aimed to establish ever closer bonds between the Turkish people and the peoples brought together in the EEC, and outlined the prospect of accession, which in his eyes sufficed for the agreement to be seen as an act under Article 267 TFEU, and therefore eligible for preliminary rulings.[67] The CJEU stated that an agreement such as the AA and AP could be directly effective,[68] but that the provisions on which Mrs. Demirel sought to rely, Article 12 AA and Article 36 AP, were not sufficiently clear, precise and unconditional to be directly effective,[69] as mentioned previously.

[64] *Demirel*, *Supra*, no. 52.
[65] P Eeckhout, *EU External Relations Law* (OUP 2011), p. 125.
[66] Paragraph 3 of *Demirel* outlines that Mrs. Demirel should have been eligible to have joined him for the purposes of family reunification, but the *Land* in which Mr. Demirel was resident, *Baden-Württemberg*, had changed its rules, and he did not satisfy the criteria of having resided there for 8 years, leading to the court proceedings in hand.
[67] Opinion of Advocate General Darmon in *Demirel* [1987] ECR 3737, para. 14.
[68] See Case 181/73 *Haegeman* (supra, no. 20) and 87/75 *Bresciani* (supra, no. 24).
[69] *Demirel, Supra*, no. 52, para. 23.

Perhaps the watershed moment in this field came in *Sevinçe*,[70] turning theoretical, non-justiciable rights, described by Jeremy Bentham as "nonsense upon stilts,"[71] into rights that could be enjoyed by Turkish citizens. The applicant, Mr. Sevinçe, a Turkish national who had been part of the Dutch labour force for a number of years, appealed a rejection of the renewal of his residence permit in the Netherlands. He sought to rely on Article 2(1)b Decision 1/76[72] and Article 6(1) of Decision 1/80.[73] Whilst not constituting primary law as the AA and AP are deemed to be, the CJEU determined that they fall within the scope of the current Article 267 TFEU, as they were directly connected to the AA and AP and thus form an integral part of the Community legal system.[74]

The Court determined that the provisions on which Mr. Sevinçe sought to rely "uphold, in clear, precise and unconditional terms, the right of a Turkish worker, after a number of years' legal employment in a Member State, to enjoy free access to any paid employment of his choice."[75] The Court further stated that despite the provisions in Article 2(2) Decision 1/76 and Article 6(3) Decision 1/80 stating that the provisions on which Mr. Sevinçe sought to rely were subject to national rules, this did not affect their ability to have direct effect as they simply applied to administrative measures, "without empowering the Member States

[70] *Sevinçe, Supra*, no. 53.
[71] J Bentham, *Rights, Representation and Reform – Nonsense upon Stilts and other writings on the French Revolution* eds F Rosen and P Scholfield (Clarendon Press 2002) P Schofield, 'Jeremy Bentham's 'Nonsense upon Stilts' [2005] 15(1) Utilitas 1, p. 1.
[72] A Turkish worker who has been in legal employment for five years in a Member State of the Community is to enjoy free access in that Member State to any paid employment of his choice.
[73] A Turkish worker duly registered as belonging to the labour force of a Member State is to enjoy free access in that Member State to any paid employment of his choice after four years' legal employment.
[74] *Sevinçe, Supra*, no. 53, paras. 9-12, see also Case 30/88 *Greece v Commission* [1989] ECR 3711, para. 13.
[75] *Ibid*, para. 17.

to make conditional or restrict the application of the precise and unconditional right which the decisions of the Council of Association grant to Turkish workers."[76]

The Court further stated that Article 6(1) Decision 1/80 must be interpreted narrowly and strictly,[77] but where a Turkish national carries out work that is more than merely marginal or ancillary,[78] and is thus considered a member of the labour force, as required by Article 6(1) Decision 1/80, applications for residence permits by Turkish nationals cannot be refused.[79] Additionally, any Turkish worker who has been resident legally[80] and pursued a genuine economic activity[81] for at least one year with the same employer, and the same employer wishes to continue the employment, as required by Article 6(1) Decision 1/80, regardless of how they entered the country, they may rely on the rights conferred by Decision 1/80.[82]

The CJEU has determined that discrimination against Turks when in the EU in a number of fields is prohibited through direct effect of provisions of the association agreement, including remuneration and other conditions of work,[83] educational grants[84] and

[76] *Ibid*, para. 22.
[77] Case C-285/95, *Suat Kol v Land Berlin* [1997] ECR I-3069, paras. 20, 26 and 29.
[78] Case 53/81, *Levin v Staatssecretaris van Justitie*, para. 17.
[79] Case C-1/97, *Mehmet Birden v Stadtgemeinde Bremen* [1998] ECR I-7747, paras. 60-62, 64.
[80] *Kol, Supra*, no. 77, paras. 20, 26 and 29.
[81] Case 66/85, *Lawrie-Blum v Land Baden-Würrtemberg* [1986] ECR 2121, para. 21.
[82] Case C-294/*06 R (on the application of Ezgi Payir, Burhan Akyuz and Birol Öztürk) v Secretary of State for the Home Department* [2008] ECR I-203, para. 45.
[83] Case C-171/01, *Wählergruppe "Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG," and Bundesminister für Wirtschaft und Arbeit and others* [2003] ECR I-4301, para. 93 and Case C-152/08 *Nihat Kahveçi v Real Federación Española de Fútbol* [2008] ECR I-6291, paras. 28-32, see also A Gürsoy, *Sports Law in Turkey* (Kluwer Law 2011), p. 17.
[84] Case C-374/03, *Gaye Gürol v Bezirksregierung Köln* [2005] ECR I-6199, paras. 22-23, 26 and 42-45.

healthcare.[85] Furthermore, *Dörr and Ünal* highlights that provisions of EU law should be applied as far as possible to Turkish citizens, both procedurally and substantively.[86] Finally, as suggested above, given the fact that many of the goals of the initial AA remain unfulfilled, it could be considered that Article 41(1) AP acts as a shield, ensuring that no new restrictions can be placed upon the freedom of establishment and services, as upheld by the CJEU in *Savas*,[87] *Tum and Dari*[88] and *Soysal*,[89] which will be discussed in more detail in the following chapter.

[85] Case C-262/96, *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, para. 105.
[86] Case C-136/03 *Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten and Ibrahim Ünal v Sicherheitsdirektion für das Bundesland Vorarlberg* [2005] ECR I-4759, paras. 62-67.
[87] Case C-37/98, *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* [2000] ECR I-2927, para. 69.
[88] Case C-16/05, *The Queen, Veli Tum and Mehmet Dari v Secretary of State for the Home Department* [2007] ECR I-7415, para. 69.
[89] *Soysal*, *Supra*, no.18, para. 62.

Chapter Two: Services

2.1 Services in the EU

Article 26(2) TFEU outlines that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." More specifically, Article 56 TFEU is the central provision governing services, prohibiting restrictions placed upon them "in respect of nationals who are established in a Member State other than that of the person for whom services are intended." Freedom to provide services "entails the carrying out of an economic activity for a temporary period in a Member State where either the provider or recipient is not established."[90]

The *Insurance Services*[91] case suggests that if a person or undertaking has a permanent economic base in a Member State, regardless of whether it is simply an office, it cannot avail itself of the freedom to provide services, but instead falls under the scope of freedom of establishment. Nevertheless, where one must avail themselves of certain infrastructure, such as an office[92] to be able to provide services, this does not necessarily render them outside the scope of Article 56 TFEU. Furthermore, the CJEU has held that the fact that the

[90] P Craig and C de Búrca, *EU Law: Text, Cases and Materials* (5th edn OUP 2011), p. 788.
[91] Case 205/84 *Commission v Germany* [1986] ECR 3755, para. 21.
[92] Case C-55/94, *Reinhard Gebhard v* Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 27.

service is provided over a period of years does not mean Article 56 TFEU is inapplicable.[93] To this end, in *van Binsbergen,*[94]the CJEU determined that Article 56 TFEU has direct effect.

Services themselves are defined broadly, although as with the other freedoms, they require a cross-border element,[95] and shall only be considered services where they are normally provided for remuneration.[96] They do not cease to be a service if the provider is a non-profit undertaking,[97] or if, as in *Schindler*[98] if there is an element of chance involved in the potential return. Indeed, "remuneration need not be money, as long as it can be valued in money: food and drink has been found by the Court to be remuneration in the context of employment,[99] and there is no reason it should take a different stance"[100] on service recipients.

Article 1(1) Directive 64/221/EEC[101] includes service recipients within the scope of services, and Article 1(1)b Directive 73/148/EEC[102] expands upon this by granting service recipients right of residence for the duration over which the services are provided, including to dependents under 21[103] and the spouse.[104] With regards to case law, and as outlined in the

[93] Craig, *Supra*, no. 90, p. 789.
[94] Case 33/74 [1974] ECR 1299, para. 27.
[95] D Chalmers, G Davies & G Monti, *European Union Law* (2nd edn CUP 2010), p. 787.
[96] Article 57 TFEU.
[97] Case C-70/95 *Sodermare v Regione Lombardia* [1997] ECR I-3395, para. 32-34.
[98] Case C-275/92 *HM Customs and Excise v Schindler* [1994] ECR I-1039, para. 32-33.
[99] Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, para. 14.
[100] Chalmers, *Supra*, no. 95, p. 790.
[101] [1964] OJ L56/117.
[102] [1973] OJ L172/14.
[103] *Ibid*, Article 1(1)c.
[104] *Ibid*, Article 1(1)d.

introduction, the CJEU initially found in *Watson and Belmann*[105] that despite the fact that Articles 56 and 57 TFEU do not expressly mention service recipients, the Treaty does indeed cover the passive freedom to provide services as a necessary corollary for freedom of the provider.[106] To this end, restrictions placed on service recipients under the scheme of the Title IV, Chapter III are unlawful, as confirmed in *Luisi and Carbone*.[107]

Article 56 TFEU imposes somewhat of an unfortunate caveat insofar as the persons seeking to provide services must already have a place of establishment within the EU and furthermore, if a natural person, must possess the nationality of a Member State.[108] In the *Scorpio Konzertproduktionen* case, the CJEU stated that the "EEC Treaty does not extend the benefit of those provisions to providers of services who are nationals of non-member countries, even if they are established within the Community and an intra-Community provision of services is concerned."[109]

Broadly speaking, the assumption that non-EU nationals do not enjoy such rights is contested by Carrera and Wiesbrock. They purport that following a string of landmark cases in non-discrimination, such as *Metock*,[110] *Soysal*,[111] *Genç,*[112] *Commission v Netherlands,*[113]

[105] Case C-115/75 *Watson and Belmann* [1976] ECR 1185, para. 16.
[106] P Kent, Law of the European Union (Longman 2009), p. 246.
[107] *Luisi and Carbone*, *Supra*, no. 4, paras. 12-14. See also Case C-17/00 *De Coster v College de Bourgmestre et échevins de Watermael-Boitsford* [2001] ECR I-9445, para. 33, Case 294/97 *Eurowings Luftverkehrs v Finanzamt Dortmund-Unna* [1999] ECR I-7447, Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931 and Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195.
[108] Case C-290/04 *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel* [2006] ECR I-9494, para. 68.
[109] *Ibid*, para. 68.
[110] Case C-127/08 [2008] ECR I-6241.

El-Yousfi[114] and *Chakroun*[115] that third-country nationals do indeed enjoy a range of rights, including equality in some regards, and that these judgments challenge the 'untouched nationalistic gardens' EU Member States retain on citizenship rights.[116]

More specifically, services can be considered to fall within the four freedoms of the EU, given their economic nature. Provisions thus relating to both the active and passive freedom to provide services in EU law must therefore be considered to also apply to Turkish nationals, bearing in mind Article 14 AA, as well as the right to non-discrimination. This should be considered to exist even bearing in mind the narrow reading of the EU-Turkish relationship the CJEU came to in *Ziebell*.[117] From the scheme of law as laid out in this section, it seems inconceivable that under the standstill clause a Turkish national should be rendered unable to enjoy the passive freedom to provide services.

2.2 Services in respect of the EU-Turkey relationship

The freedom to provide services is, to some extent, tied up with the free movement of workers provision within the AA.[118] Article 14 AA states that "the Contracting Parties agree to be guided by [Articles 56, 57 and 59-62 TFEU] for the purpose of abolishing restrictions on

[111] *Soysal*, *Supra*, no. 18.
[112] Case C-14/09 [2010] ECR I-931.
[113] Case C-92/07 [2010] ECR I-3683.
[114] Case C-58/93 [1994] ECR I-1353.
[115] Case C-578/08 [2010] ECR I-1839.
[116] S Carrera and A Wiesbrock, 'Whose Citizenship to Empower in the AFSJ: The Act of mobility and litigation in the enactment of European Citizenship' CEPS, Liberty and Security in Europe, May 2010, p. 2.
[117] Case C-371/08 [2011] ECR I-0000, para. 69.
[118] Articles 12-14 AA.

freedom to provide services between them." However, one could by analogy suggest that this article does not have direct effect given the decision in *Demirel*[119] stating that the materially identical Article 12 AA did not have direct effect, as it did not satisfy the *van Gend en Loos* criteria.

The AP does not specifically refer to services. It only provides a 'standstill clause,'[120] prohibiting new restrictions, concerning which Article 41(2) AP gives the Association Council the power to determine a timetable and the actual shaping of the free movement rights in this field.[121] Article 41(1) AP has direct effect, as confirmed by *Savas*[122] and *Abatay and others*, [123] so as to preclude Member States from implementing new restrictions on service providers and those seeking to establish themselves in a Member State. This provision is also echoed in the materially identical Article 13 of Decision 1/80 on the freedom of establishment. The 'standstill' clause prohibits the application of conditions for access to territory of a Member that are less favourable than the conditions that were applicable on the date of entry into force of the Additional Protocol, namely 1 January 1973.[124]

Idriz notes that standstill clauses in themselves are not exclusive to external relations, but have played an important role in a Community context as well. Not only have they been

[119] *Demirel, Supra*, no. 52.
[120] Article 41(1) AP.
[121] Lenski, *Supra,* no. 34, p. 85.
[122] *Savas, Supra*, no. 87, paras. 46-50.
[123] Cases C-317/01 and C-369/01 *Eran Abatay and others and Nadi Şahin v Bundesanstalt für Arbeit* [2003] ECR I-12301, paras. 58-59.
[124] *Soysal, Supra*, no. 18, para. 29.

used for transitional arrangements, but in one of the seminal CJEU judgments, *van Gend en Loos*, concerned Article 12 EEC, a customs standstill clause. Article 12 EEC had a very similar nature and purpose to Article 41(1) AP.[125]

The case of *Tum and Dari*[126] concerned two Turkish nationals who had been refused entry by the Home Secretary to enter UK territory for the purpose of establishing themselves in business on their own account and were ordered to leave the UK, to which they had only been admitted on a temporary basis.[127] The appellants submitted that the standstill clause would be rendered meaningless and redundant if Member States could effectively whittle it away and make it harder, or even impossible, for Turkish nationals to enter their territory.[128] The CJEU 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 MS,"[129] and that once admitted, they enjoy the same rights as EU nationals.[130]

Soysal[131] concerned two Turkish nationals who worked as lorry drivers for a Turkish company, driving lorries registered to a German company. They were refused visas to enter

[125] N Idriz, 'Free Movement of Persons between Turkey and the EU: The Illusion of Progress Through Standstill' ISA Annual Convention, San Francisco 2013, p. 9-10.
[126] *Tum and Dari, Supra*, no. 88.
[127] *Ibid*, para. 2.
[128] *Ibid*, para. 41.
[129] Yalinçak, *Supra*, no. 62, p. 30, citing 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.
[130] Article 9 AA, Article 10 Decision 1/80.
[131] *Soysal, Supra*, no. 18.

Germany despite the fact that when the standstill clause came into force, Germany had no visa requirements for Turkish service providers.[132]

The CJEU determined the primacy of the AA and AP over secondary law: the conflicting German national law, the *Aufenthaltsgesetz*, implemented Regulation 539/2001.[133] As such, it could not challenge the fact that the visa restriction presented a 'new restriction,' prohibited by Article 41(1) AP. This could not be called into question by the fact that the German legislation merely implemented Union legislation.[134] The Court thus concluded that Article 41(1) AP precluded the introduction of new visa requirements of service providers from Turkey.

As purported above, and through cases like *Luisi and Carbone*, Article 56 TFEU includes the right to receive services as well as provide them:

> "one would expect that the same scope would apply concerning Turkish service recipients as well, especially since the Court already ruled that the principles enshrined in 'the provisions of the Treaty relating to freedom to provide services, must be extended, so far as possible, to Turkish nationals to eliminate restrictions on the freedom to provide services between the contracting parties.'"[135]

[132] The visa requirement in question was only introduced by Germany in 1980.
[133] *Soysal, Supra*, no. 18, para. 59.
[134] *Ibid*, para. 58.
[135] N Tezcan/Idriz *Supra,* no. 15, p. 9-10, citing *Abatay, Supra*, no. 123, para. 112.

The following chapter will outline the focus of this paper, the *Demirkan* judgment, looking at its facts, the Opinion of the Advocate General and will provide a detailed commentary and analysis thereof.

Chapter Three: Facts and Advocate-General's Opinion in the *Demirkan* case

3.1 Facts of the *Demirkan* case

Miss Demirkan, the applicant in the proceedings, is a Turkish national born in 1993. In 2007, together with her mother, they applied for a grant of a Schengen visa to visit her stepfather, a German national, in Germany. The application for a visa was rejected. The applicant and her mother appealed this decision before the *Verwaltungsgericht Berlin*, seeking a declaration that they were entitled to enter Germany without a visa, or requiring that they be granted one. The applicant argues that in light of Article 41(1) AP, Turkish nationals who are service recipients may rely on the law in force at the time the AP entered into effect, which was that Turkish nationals neither seeking to work nor to stay in Germany for more than three months,.[136] It should be noted that the applicant's mother was granted a visa for the purposes of family reunification during the initial proceedings, so the applicant pursued her case alone from thereon in.

The *Verwaltungsgericht* rejected the appeal on the grounds that the standstill clause did not apply for the stay for the purposes of visiting, and thus it was unnecessary to examine whether the clause extended also to the freedom to receive services, which might only suffice if the purpose of entering the country was to receive services. However, the *Verwaltungsgericht* stated the incidental receipt of services in connection with a stay effected for the purposes of visiting did not suffice. The applicant then appealed against this

[136] Under the Verordnung zue Durchführung des Ausländergesetzes (DVAuslG) of 10 September 1965 in the version of 13 September 1972, stays for the purpose of a visit, such as that which the applicant seeks, were exempted from visa requirements. This only changed with the eleventh regulation amending the DVAuslG of 1 July 1980, which introduced a general visa requirement for Turkish nationals.

decision before the *Oberverwaltungsgericht Berlin-Brandenburg*, which asked for a clarification on the following questions:

> (1) Does the passive freedom to provide services fall within the scope of the concept of freedom to provide services within the meaning of Article 41(1) of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey of 23 November 1970 (Additional Protocol)?
>
> (2) In the event that the first question is answered in the affirmative: does the protection of the passive freedom to provide services under the law on the Association Agreement, specifically pursuant to Article 41(1) of the Additional Protocol, also extend to Turkish nationals, who – like the claimant – do not wish to enter the Federal Republic of Germany in order to receive a specific service, but for the purposes of visiting relatives for a stay of up to three months and rely on the mere possibility of receiving services in the Federal territory?

3.2 Opinion of the Advocate General in the *Demirkan* case

The Advocate General's opinion was delivered on 11 April 2013 by Advocate General Cruz Villalon. In his opinion, he outlined in paragraph 30 that he did not feel the passive freedom to provide services was included within the scope of the standstill clause contained in the AP, and, even were it to be covered, a stay of up to three months to visit relatives would not fall within the scope of the AP. The following paragraphs will expand on his logic behind this opinion, and then the next section will offer a critical commentary on his opinion.

The opinion of the Advocate General first starts by providing an overview of the existing case-law on the standstill clause. Cruz Villalon firstly states that, as in a number of cases referred to in Chapter 2 of this paper, Article 41(1) AP has direct effect,[137] but that it does not confer by itself a substantive right to reside or provide services.[138] He then continues to state that it is important there are no new visa restrictions on the freedom to provide services, as otherwise they would interfere with the enjoyment of the fundamental freedom to provide services, bearing in mind the sizeable administrative and financial burdens involved in constantly obtaining time-limited permits.[139]

Cruz Villalon then continues to reject Germany, Greece, the UK and the Council's submission that visa requirements do not impair the freedom to provide services, on the grounds of cost,[140] as well as the lack of legal certainty that a visa will be granted.[141] However, he does entertain the Council's view that applying Article 41(1) of the AP to service recipients would undermine the common visa policy. *Soysal* did not resolve all issues relating to the standstill clause, especially concerning the passive freedom to provide services, as it concerned the active freedom.[142]

[137] Opinion of Advocate General Cruz Villalon in Case C-221/11 *Demirkan* [2013] ECR I-0000, para. 34.
[138] *Ibid*, para. 35.
[139] *Ibid*, para. 36, see also *Soysal*, *Supra*, no. 18, paras. 55, 57 and 63.
[140] Turkish citizens have to pay €60 for a visa, as well as appointment fees and bank charges: IKV, 'Visa Hotline Project Final Report' [2010] Economic Development Foundation Publications.
[141] Opinion of A-G Cruz Villalon in *Demirkan*, *Supra*, no. 137, para. 40, see also Article 30 of Regulation 810/2009 establishing a Community Code on Visas [2009] OJ L243/1.
[142] *Ibid*, para. 42-46.

The Advocate General then continues to distinguish service recipients and providers, despite them appearing the mirror image of one another,[143] stating that they differ rather sizeably. In this regard, he states that service providers relate to a clearly defined group, who have a close link to the protected service, whereas recipients includes service consumers, to which potentially everyone belongs: indeed, "almost every day, everyone consumes a multiplicity of services without one of them being characteristic for consumers as market participants."[144]

Pertaining to the applicability of the passive freedom to receive services, Cruz Villalon seeks to invoke the Vienna Convention on the Law of Treaties to interpret the AP. He continues to question what was understood by 'freedom to provide services' at the time the AP was concluded, as the passive freedom to receive services was not clarified until 1984 in *Luisi and Carbone*. He suggests a number of indicators point to the idea that service recipients had been considered as a corollary of service providers, although was highly controversial.[145]

The Opinion of the Advocate General in this case would appear to, at least to some extent, sidestep the legal question at hand. Initially, the Advocate General uses Article 31(1) of the Vienna Convention[146] to interpret the AP, and in particular and the scope of Article 41(1) AP,

[143] *Ibid*, para. 48.
[144] *Ibid*, para. 50.
[145] *Ibid*, paras. 55-57, see also A-G Trabucci's Opinion in Case Case C-118/75 *Watson and Belmann* [1976] ECR 1185.
[146] "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

as it is an international treaty. Whilst useful, it simply lays down the basic rules of Treaty interpretation,[147] stating that words should be given their ordinary meaning.[148]

Cruz Villalon then highlights that Article 14 AA provides that parties need only be guided by primary law provisions on the freedom to provide services, which does not necessarily require uniformity. However, according to the CJEU in *Abatay and others*, principles relating to the freedom to provide services must be extended *as far as possible* to Turkish nationals.[149] This should be interpreted in line with Article 31 of the Vienna Convention on the Law of Treaties, stating that the possibility of an extension of an agreement to a non-member country is dependent on the objectives of the agreements.[150]

Concerning the second question, Cruz Villalon states that there is no distinction between insignificant and significant services received, so long as they constitute effective activities that are not merely marginal or ancillary, services received fall within the scope of the passive freedom to provide services.[151] As he purports, the freedom to receive services includes sectors as diverse as tourism,[152] medical services,[153] private education[154] and leasing.[155] However, he concludes that if the receipt of services on the trip is merely

[147] A Lindroos and M Mehling 'Dispelling the Chimera of 'Self-contained Regimes' International Law and the WTO [2013] 16(5) EJIL857.
[148] T Voon 'UNESCO and the WTO: A Clash of Cultures?' 55(3) ICLQ 647.
[149] *Abatay, Supra*, no. 123, para. 112.
[150] *Ibid*, para. 60-62, see also Case 270/80 *Polydor and PSO Records* [1982] ECR 329, paras. 14-19 and *Kupferberg*, *Supra*, no. 21, para. 30.
[151] *Steyman*, *Supra*, no. 99, para. 13.
[152] *Luisi and Carbone*, *Supra*, no. 4, para. 16, see also *Cowan*, *Supra*, no. 107.
[153] *Ibid.*
[154] *Ibid.*
[155] *Eurowings Luftverkehr*, *Supra*, no. 107, para. 34.

marginal that the family visit becomes the only purpose, the possibility to receive unspecified services does not suffice to take advantage of the protection afforded by the passive freedom to provide services.[156]

3.3 Analysis of the Advocate General's Opinion

The first part of the Advocate General's opinion seems to try to diverge from the current position of European law rather greatly. He makes a number of distinctions between regimes and rights that simply do not exist within the framework of EU law. This leads one to wonder whether the decision to submit an opinion ruling against the applicant was made first, then the law twisted to fit that argument.

It is rather difficult to concur with Cruz Villalon's statement that the Union has different goals and a greater level of integration compared EU-Turkish relationship, and as such, the rights sought by the applicant should be restricted. Whilst it may make sense to restrict full citizenship rights to Union citizens,[157] it would appear impossible to try to restrict what are, fundamentally, economic rights. The four freedoms are essentially economic in nature, and, given that Cruz Villalon outlines the goals of the EU-Turkey relationship as simply economic,[158] it seems rather peculiar that what are essentially economic rights could be restricted on these grounds.

[156] A-G in *Demirkan*, *Supra*, no. 137, para. 78-79.
[157] Articles 20-25 TFEU on EU citizenship.
[158] A-G in *Demirkan*¸Supra, no. 137, para. 65.

Cruz-Villalon then embarks on a highly selective reading of legal provisions within the EU-Turkey arrangement, much like both the Advocate General and CJEU in *Ziebell*,[159] essentially considering the EU legal order and the EU-Turkey legal order completely different subject matters. This potentially two-tiered system of rights is highly undesirable and difficult to foresee as the intention of the draftsmen when creating the current body of EU-Turkish law, especially bearing in mind its reciprocal nature.

As mentioned above, Cruz Villalon continues to create what one might consider an arbitrary distinction between the two legal orders based on their objectives. Indeed, it has been suggested that whilst he uses the objectives of the Treaties to define the EU legal regime, "for the EU-Turkey AA, he bases his findings on the effective use made of the provisions of the Agreement."[160] One could consider this to be rather hypocritical in a number of ways, not least because there are a number of unfulfilled Treaty goals in EU primary law, as well as the fact that the EU-Turkey arrangement lays out a number of goals which remain unfulfilled due to a number of non-legal reasons, not least due to the EU's reluctance to consider Turkey's application with equal haste and interest to other accession countries.[161]

Another arbitrary distinction invoked by the Advocate General and one that cannot be found elsewhere in European Union law is that between service providers and recipients. It is rather difficult to argue with this stance pragmatically speaking, although this could be

[159] *Ziebell, Supra*, no. 117, para. 69.
[160] European Law Blog, 'AG Cruz Villalon in Case C-221/11 Demirkan: Selective Associationism' (*European Law Blog*, 15 April 2013) <http://europeanlawblog.eu/?p=1713> accessed 19 May 2013.
[161] Tatham, *Supra,* no. 55, p. 144.

considered to be where the Advocate General's Opinion starts to veer off from the legal position laid out by the AA and AP, and indeed the scheme of European Union law. As in *Luisi and Carbone*,[162] the passive freedom to provide service is considered as the necessary corollary to the active freedom to provide services, and as such, no distinction to this end can really be made.

As outlined by Article 14 AA, the parties shall be *guided by* European Union law. Whilst of course uniformity is not referred to in the provision and thus cannot be read into the AA when interpreting Treaties using Article 31 of the Vienna Convention, the current position requires that the freedom to provide services should be extended as far as possible. One could suggest that the rights should be extended until either there are insurmountable barriers to equality, or until Turkish service providers and recipients enjoy equality with EU nationals. This does not give the scope, as one might suggests the Advocate General's opinion suggests, to restrict rights simply because there is no concrete obligation to confer all the rights enjoyed by EU nationals upon Turkish nationals.

With regards to the AA, the CJEU determined in *Ziebell*,[163] its purpose to promote trade and economic relations between Turkey and the EU and has exclusively economic purposes. In this way, he tries to separate it from the EU legal order. Reading the association in this manner, the scheme of EU-Turkey law clearly diverges from the EU legal order, which goes far further than merely economic rights and provides a range of social rights, such as

[162] *Luisi and Carbone, Supra*, no. 4, para. 10.
[163] *Ziebell*, *Supra*, no. 117, paras. 64-72.

citizenship.[164] It also plays a role that the AA is immediately applicable given its programmatic nature,[165] and therefore the Advocate General concludes that the structure and context of the AA that the standstill clause was not "intended, in the absence of any expression provision, to regulate an area of such sensitivity as the free movement of persons so extensively as would be the case were the standstill clause extended to include the passive freedom to provide services."[166]

In such a case, given the sidestepping of a number of legal certainties, it is rather difficult to shake the notion that, as in *Ziebell*, the decision was made first as to which way the case was to be decided, then the legal arguments selected and adapted to fill in the gaps and create an argument to reach a conclusion that was previously reached. Indeed, there are a number of similarities between the CJEU's 'selective reading' approach to the Agreement of free movement of persons between the EC and Switzerland[167] and the AA.[168] Indeed, in the *Grimme* case,[169] the CJEU read the Agreement between the EC and Switzerland (henceforth 'AECS') very narrowly, considering only a small number of provisions to have effect for legal persons, although the arguments appear to pass over a number of elements of the legal

[164] For example, Article 21 TFEU on EU citizenship, introduced by the Maastricht Treaty in 1992, "destined to become the fundamental status of nationals of the Member States," as in Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31.
[165] A-G in *Demirkan* ¸Supra, no. 137, paras. 65-69.
[166] *Ibid*, para. 69.
[167] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons OJ L114/6.
[168] European Law Blog, *Supra*, no. 160.
[169] Case C-351/08 *Grimme* [2009] ECR I-10777, para. 31-33.

framework of the Agreement:[170] almost, as for the A-G Opinion in *Demirkan*, that the decision was made first on which way the CJEU would rule.

However, in a later judgment,[171] the CJEU used a much more open interpretation of the AECS to come to a conclusion more in line with EU law, as opposed to considering such an arrangement a wholly different legal entity within its own confines as it had in *Grimme*. This could be considered rather concerning: that the EU and CJEU almost seem to interpret such Agreements as they please.

With regard to the Advocate General stating that unspecified, albeit marginal, services do not cross the required threshold to invoke the freedom to provide services, whilst perhaps this presents a slightly more logically considered approach, it is still difficult to concur with this viewpoint, bearing the scheme of EU law in mind. Of course, it is indeed plausible that the unspecified services received on the trip may become so marginal that the only purpose is the family visit.[172] In such a scenario, the applicant cannot be considered to fall within the scope of being a service recipient. However, nowhere in EU law does it require the services to be specified, and furthermore, tourism is explicitly covered by *Luisi and Carbone*.[173] Indeed, to this end, it would appear rather difficult to only consume marginal and ancillary services whilst enjoying a trip as a tourist as the applicant appears likely to in the case at hand.

[170] The Court took the meaning of Article 1 of the EU-Switzerland Agreement very narrowly as it used the word 'nationals,' using this logic to exclude legal persons from the benefits of the Treaty.
[171] Case C-506/10 *Graf* [2011] ECR I-0000, paras. 34-35.
[172] Although, as the A-G points out in paragraph 78, this is a matter for the national courts to determine.
[173] *Luisi and Carbone, Supra*, no. 4, para. 10.

The following section will outline the viewpoint that the CJEU should take, but under the letter of the law, must take when deciding this case, as laid out in the first two chapters of this paper.

Chapter Four: Application of the legal situation to the *Demirkan* case

The following section argues that, legally speaking, there is no way that the CJEU can refuse the applicant the right to travel freely in the EU, based on the law in the case at hand explained in the first two sections of this paper. Of course, the CJEU does not exist in a vacuum and there are political implications that could result from a decision in favour of the applicant in this case. These political elements will be considered in the following chapter.

This section argues that the standstill clause should be considered to be operation with regards to service recipients and thus *prohibits* new visa restrictions. Furthermore, this paper argues for a broad interpretation of the current EU-Turkey legal provisions, encompassing a wider range of rights, but even if the CJEU opts for a narrow reading, there is no way that economic rights can be restricted. There also cannot, as was purported by the Advocate General, be considered to be any obligation to specify the services you are planning to receive, so long as they are not marginal and ancillary.

4.1 Is the standstill clause in operation?

As laid out previously, the standstill clause, Article 41(1) AP has direct effect[174] and prohibits the application of conditions for access to territory of a Member that are less favourable

[174] *Savas*, *Supra*, no. 87, paras. 46-50, *Abatay and others, Supra*, no. 123, paras. 58-59.

than the conditions that were applicable on the date of entry into force of the Additional Protocol, namely 1 January 1973, as outlined in *Soysal*.[175]

The law in Germany pertaining to Turkish nationals at the time in question was Paragraph 5(1)1 of the *Verordnung zur Durchführung des Ausländergesetzes* (Regulation implementing the Law on Foreign nationals, henceforth DVAuslG.)[176] The DVAuslG, enacted in 1965 and amended in 1972 stated that Turkish nationals were obliged to obtain a visa prior to entry only if they sought employment in Germany. There was no visa requirement at the time for stays for the purpose of a visit, as the applicant in *Demirkan* seeks. However, in 1980, the eleventh amendment to the DVAuslG brought in a general visa requirement for Turkish nationals, which Germany claims is in line with Paragraph 4(1) of the *AufenthG*[177] and Article 1(1) and Annex I to Regulation 539/2001.[178]

This must be considered a new visa requirement, prohibited by Article 41(1) AP, as well as by *Soysal*.[179] The requirement laid out in the *AufenthG* does clearly restrict the freedom to provide and receive services and is thus forbidden, even though the German government claims that it stems from a provision of EU law. As referred to in the first chapter and in

[175] *Soysal, Supra*, no. 18, para. 29.
[176] *Verordnung der Durchführung des Ausländergesetzes (DVAuslG)* of 10 September 1965, version of 12 September 1972, BGBl. I p. 1743.
[177] *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet* (Law on residence, employment and integration of foreigners in Germany).
[178] [2001] OJ L81/1 Article 1(1): Nationals of third countries on the list in Annex I shall be required to be in possession of a visa when crossing the external borders of the Member States: Turkey is listed as one of the countries in Annex I.
[179] *Soysal, Supra*, no. 18, para. 29.

Bresciani,[180] association agreements bear all the characteristics of primary law, including primacy.[181] As such, in this case, Regulation 539/2001 can be considered to interfere with the rights laid out in a Treaty, and as such cannot be considered compatible with the scheme of EU external relations law relating to Turkey.

Even if, as purported by the *Verwaltungsgericht* in its judgment of 22 October 2009, the standstill clause does not cover stays for the purpose of visiting, the applicant will still receive services, which are covered by the provisions of EU-Turkey law.[182] As such, the standstill clause should be considered to be effective in this case, and that any new restrictions placed on the freedom of movement of Turkish citizens seeking to receive services are unlawful and in breach of Article 41(1) AP.

4.2 EU-Turkey Relationship: Economic Goals Only?

As laid out in *Metalsa,* the interpretation of provisions depends on the aim pursued by each provision in its particular context.[183] This section will state that CJEU can grant the rights sought by *Demirkan*, even if the goals of the EU-Turkey Relationship have an "exclusively economic purpose."[184] Were one to read the goals of the EU-Turkey Relationship narrowly, as was done by Advocate General Cruz Villalon, as opposed to teleologically, one could argue this is the case. Indeed, Article 2(1) AA highlights the goal as the "promotion of

[180] *Bresciani, Supra*, no. 24.
[181] Gasparon, *Supra*, no. 25.
[182] For example, Article 14 AA on services, when read in conjunction with *Luisi and Carbone, Supra,* no. 4.
[183] Case C-312/91 [1993] ECR I-3751, para. 11.
[184] A-G Opinion in *Demirkan*, *Supra*, no. 137, para. 65.

continuous and balanced strengthening of trade and economic relations between parties." This could furthermore be argued by the fact that the key Treaties and Decisions of the relationship itself pre-date the shift from individuals being seen as economic to social beings[185] within the EU. This chance can be considered to have begun in 1990[186] and was implemented in 1992 by the Maastricht Treaty.[187]

Nevertheless, the right that the applicant in *Demirkan* seeks cannot be considered to really relate to citizenship or social rights, which could perhaps on a literal reading be excluded from the scope of the AA. The right the applicant seeks, the passive freedom to provide services, is purely economic in nature, and settled EU case-law since 1984 through the *Luisi and Carbone* decision. It is considered as a necessary corollary for the freedom to provide services, and furthermore, Article 14 AA requires that the rights enjoyed by Turkish citizens are guided by the provisions on service provision in the current TFEU. If, as forwarded the Advocate General, equality where possible is not required as a result of the wording of 'guided by,' there is the scope for a dangerous legal situation.

Although, legally speaking, Turkish nationals are already second-class citizens within the EU, with no EU citizenship, no official status as workers, no general right of free movement or entry, not following the law closely could exacerbate an already undesirable tiered system

[185] Wiener and Della Salle (A Wiener & V Della Salle 'Constitution-Making and Citizenship Practice: Bridging the Democracy Gap in the EU' [1997] 35(4) JCMS 595) suggest that social citizenship has its roots in the US (599), as well as new constitutions in countries such as Canada and South Africa (598).
[186] C. Dc SN/3940, 24 September 1990 in F Laursen and S van Hoonacker (eds.) *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community* (Martinus Nijhoff 1992).
[187] Chalmers et al, *Supra*, no. 95, p. 444.

where Turkish citizens only enjoy a skeleton number of rights. It also threatens an important legal principle, legal certainty, as Turkish citizens seeking to move to the EU could not be sure of what rights the possess and which they do not, meaning that they may choose to move to the EU illegally or simply be dissuaded from going there due to a lack of certainty over what rights they have. This is certainly undesirable, as Turkey possesses sizeable economic power with millions of workers willing to take up roles within the EU. This would provide a powerful partner for the EU in terms of services and establishment, which in turn may help the EU resolve, to some extent, the current economic crisis within the Union.

Furthermore, as in *Abatay*[188] the rights should be conferred to Turkish citizens "so far as possible,"[189] in the case of service providers, and that services should be given its normal meaning within the scope of EU law. Indeed, Peers states that the standstill clause should be considered to operate in the field of services. Furthermore, it would not be going beyond the requirement to extend the free movement provisions laid out in *Abatay* to also extend the scope of the standstill clause to the passive freedom to provide services,[190] when considering a narrower reading of the AA and AP.

4.3 EU-Turkey Relationship: The Road to Accession?

This paper argues, however, that the legal scheme of the EU-Turkey relationship does encompass more rights than simply economic rights, and should be considered, under

[188] *Abatay, Supra*, no. 123.
[189] *Ibid*, para. 112.
[190] S Peers 'EU Justice and Home Affairs Law' (OUP 2011), p. 247.

certain articles to include social provisions as well. Indeed, the EU has in the past changed its mind concerning the scope of Association Agreements, as was the case in the EU-Swiss Association Agreement. The body of case law in that field will be considered during this section and applied to the case at hand, arguing that the AA and AP seek to lay out a broader scheme of provisions than one with purely economic purposes.

As stated above, Advocate General Darmon posited in *Demirel* that the AA aimed to establish ever closer bonds between the Turkish people and the peoples brought together in the EEC, outlining the prospect of accession,[191] as well as the fact that Phinnemore outlines the AA as currently the most far-reaching association agreement currently in force with a third country.[192] This could be considered to show that the CJEU interpreted the agreement rather too narrowly in its *Ziebell* judgment, and that the EU-Turkey relationship goes deeper than simply an economic one.

The AA, signed in 1963, outlines one of the goals of the Agreement itself as "recognising that the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date."[193] To this end, instead of seeing the framework as simply one for economic purposes, the AA and following legislation can be considered something to achieve an end goal: the accession of Turkey to the EU.

[191] A-G Darmon in *Demirel*, *Supra*, no. 67, para. 14.
[192] Phinnemore, *Supra*, no. 31, p. 18.
[193] Preamble to Ankara Agreement, see also Article 28 AA.

To this end, it should be noted that the rights conferred upon Turkish nationals go beyond the purely economic. In *Wählergrüppe Gemeinsam Zajedno/Birlikte*,[194] the CJEU stated that Article 10(1) Decision 1/80[195] enjoyed direct effect, as:

> "a provision in a decision of the EEC-Turkey Association Council must be regarded as having direct effect when, regard being had to its wording and to the purpose and nature of the decision of which it forms part and of the agreement to which it relates, that provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."[196]

This meant that the Austrian "denial of the right to stand as a candidate for election to a body representing and defending the interests of workers, such as the chambers of workers in Austria,"[197] could not be justified by the nature of the chamber of workers nor by the fact that the position could involve the exercise of public powers. Whilst it should be noted that such a right is closely allied to economic rights, it also involves political rights, something which, according to Article 22(1) of the TFEU is restricted to 'citizens of the Union.' In this regard, one could consider that Decision 1/80 does confer what could be referred to as 'citizenship' rights, especially given the potentially broad scope of Article 10(1) Decision 1/80.

[194] *Wählergrüppe Gemeinsam Zajedno/Birlikte, Supra*, no. 83.
[195] The MS shall, as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour force treatment involving no discrimination on the basis of nationality between them and Community workers. This was also extended to general terms of work, as in *Kahveçi, Supra*, no. 73.
[196] *Wählergruppe Gemeinsam Zajedno/Birlikte, Supra*, no. 83, para. 54.
[197] *Ibid*, para. 93.

In *Gürol*,[198] the CJEU determined that Article 9(1) of Decision 1/80[199] guarantees non-discriminatory access to education grants, even when a Turkish national is pursuing education back in Turkey.[200] This could also be considered to extend the scope of the EU-Turkey relationship beyond being purely economic in nature, as purported by A-G Cruz Villalon in *Demirkan*, as well as by the CJEUin *Ziebell*,[201] although again, this right does have an economic element to it. Moreover, as referred to in Chapter 2, Carrera and Wiesbrock state that citizenship rights are not totally restricted to EU citizens.[202] This includes the right to non-discrimination and equal treatment, which even extends to third-country nationals who lack a formal association agreement with the EU.

As purported above, bearing a broad reading in mind, the CJEU should consider the wider aims and intention of the parties to this Agreement. To this end, the AECS shall be looked at, considering the fact that they are both association agreements, and that the CJEU has interpreted them both rather narrowly in the past. The CJEU read the provisions of the AECS very narrowly, as stated in the previous chapter[203] further stating that the rules of the internal market could not simply be applied by analogy.[204]

[198] *Gürol*, Supra, no. 84.
[199] Turkish children residing legally in a MS with their parents who are or have been legally employed in that Member State, shall be admitted to courses of general education, apprenticeship and vocational training under the same education entry qualifications as the nationals of that Member State. They may in that Member State be eligible to benefit from the advantages provided for under the national legislation in this area.
[200] *Gürol*, *Supra*, no. 84, para. 44.
[201] *Ziebell*, *Supra*, no. 117, paras. 64-72.
[202] Carrera and Wiesbrock, *Supra*, no. 116, p. 2.
[203] *Grimme, Supra*, no. 169, para. 31-33.
[204] Case C-541/08 *Fokus Invest* [2010] ECR I-1025, para. 28, *Grimme*, *Supra*, no. 169, paras. 27-29.

However, the Court rather drastically changed its tack in the *Graf* case.[205] It stated that "it is important to note that the [AECS] falls within the more general context of relations between the European Union and the Swiss Confederation."[206] In itself, this is not controversial: Association Agreements do constitute a crucial part of the EU legal order.[207] Despite this, its extension of the goals was something new, stating although Switzerland did not opt to participate in the EEA or internal market, "it is nevertheless linked to the Union by numerous agreements covering a wide range of areas and prescribing rights and specific obligations, analogous, in some respects, to those laid down by the Treaty."[208]

This is an interpretation which can, and should, be applied to the position of Turkey. The AA itself in the preamble lays out the potential for accession, and the general scheme and the aims of the association, as was the case in *Graf*, should be borne in mind in a more teleological reading of the Agreement. As such, not only are economic rights conferred by the current scheme of EU-Turkey law, but so should a number of more social rights due to its analogous nature, in parts, to the European Union legal order.

[205] *Graf*, *Supra*, no. 171.
[206] *Ibid*, para. 33.
[207] *Haegeman, Supra*, no. 20, para. 5.
[208] *Graf*, *Supra*, no. 171, para. 33.

4.4 Unspecified services

A-G Cruz Villalon in *Demirkan* suggested that as the services received were unspecified, they could not fall within the scope of the four freedoms.[209] As was referred to in the previous chapter, this is firstly irrelevant as tourists fall under the scope of being a service recipient in paragraph 10 of *Luisi and Carbone*. Secondly, there is no specific requirement to disclose the services you will be receiving, as long as you actually receive them and they are not marginal or ancillary.

It should be noted that rights conferred by the EU cannot really be abused,[210] but rather that one is seeking to use the rights conferred upon them in the most effective manner, as one would in a single market. In *Centros*, taking the route of least available resistance could not be considered an abuse of, in this case, the freedom of establishment.[211] In *Demirkan*, there cannot be an abuse of the passive freedom to provide services, as purported by A-G Cruz Vilallon, even though the primary purpose of the trip is to see family and that the passive freedom to provide services simply used as a reason behind the trip. One can draw analogies between services and establishment within the scope of EU law as they are very similar; indeed, Jóhannsdóttir states that "close links between the two [are] so close, in fact, that sometimes it can be hard to distinguish between them."[212] Within the sphere of EU

[209] A-G in *Demirkan*, *Supra*, no. 137, para. 78-79.
[210] Case C-212/97 *Centros* [1999] ECR I-1459, para. 27, see also Case C-208/00 *Überseering* [2002] ECR I-9919, para. 41 and Case C-167/01 *Inspire Art* [2003] ECR I-10155, para. 86.
[211] *Ibid* (*Centros*), para. 27.
[212] US Jóhannsdóttir, Free Movement of Legal Professionals within the European Union, Masters Thesis in European Law [2009] University of Iceland.

law, the two fields could be considered almost analogous: indeed, the section in the TFEU on the freedom to provide services even refers back to the freedom of establishment.[213]

As was stated in *Abatay*,[214] the provisions of EU law should be applied as far as possible to the situation of Turkish nationals. As was stated previously in this chapter, it would be highly undesirable, as well as unfair, to create a two-tiered system of rights in the field of services. One thus cannot create, as sought by A-G Cruz Villalon, to almost create a category of 'unspecified' services that only applies to Turkish nationals seeking to exercise their rights and not EU citizens.

One must therefore consider what applies to EU citizens, and then by extrapolation and under the logic forwarded in *Abatay*, bestow them upon Turkish citizens in as similar way as possible. Perhaps the leading case of defining service provision in *Steymann*,[215] that for something to be considered as a service, it cannot be marginal and ancillary.[216] Whilst this should be for the national court to determine, under the current scheme of EU law, it seems unlikely that if the applicant is visiting for a couple of months the services received would be marginal and ancillary.

[213] Article 62 TFEU refers back to Articles 51-54 TFEU.<http://skemman.is/stream/get/1946/3524/10850/1/ttir_fixed.pdf> (accessed 2 June 2013), p. 13.
[214] *Abatay*, *Supra,* no. 123, para. 112.
[215] *Steymann, Supra,* no. 99, para. 13.
[216] *Levin, Supra*, no. 78, para. 17.

4.5 Conclusion

As forwarded by the Polish Institute for International Affairs, the CJEU cannot really decide against the applicant in this case when looking at the letter of the law,[217] regardless of how widely it interprets the framework of law. This would open the door for Turkish nationals to move freely for 3 months within the EU. Idriz also states that as well as opening the door for tourism, it would mean that Turkish nationals could not be discriminated against for the cost of entry for museums, or educational institutions under Article 9 AA.[218]

However, it must be noted that associated with a decision in favour of the applicant in *Demirkan* would entail a number of other political, historical and generally non-legal considerations which will be looked at in the following chapter.

[217] Anadolu Agency, 'EU may lift visa requirements for all Turkish citizens soon' *Anadolu Agency* (Ankara, 25 December 2012).
[218] Idriz, *Supra*, no. 125, p. 22.

Chapter Five: Political elements in the EU-Turkey Relationship

As stated at the start of Chapter 4, the CJEU does not exist in a vacuum, and of course, political elements will play a role in the decision given the potentially enormous ramifications of a decision in favour of the applicant in *Demirkan*. This chapter aims to give an overview of some of the political issues in the background. Particularly of interest are the peaceful protests which turned into rioting after a very heavy-handed response by the Turkish government. This does little to bridge the divide between Turkey and the EU, and indeed to some may indicate that there are irreconcilable differences in the styles of governance.

5.1 A numbers game and the loss of visa control

Perhaps the first consideration is simply what could happen if Turkey is given visa-free travel in line with Article 6(1) of Directive 2004/38.

In terms of size, Turkey has a population of 73.64 million,[219] and furthermore, "if Turkey ever joins [the EU], it is likely on present demographic trends to become the most populous member by 2020."[220] This could be considered to set it apart from other countries which have recently surpassed its rights in terms of visa entry. Albania, Macedonia, Montenegro

[219] 2011: World Bank, Turkey <http://data.worldbank.org/country/turkey> accessed 2 June 2013.
[220] The Economist, 'The Ins and Outs' *The Economist* (London, 15 March 2007) <http://www.economist.com/node/8808134?subjectid=682266&story_id=8808134> accessed 2 June 2013.

and Serbia,[221] all of which have recently had visa requirements lifted, have a total population of 13.2 million.[222] The 28th Member State, Croatia, has a population of 4.4 million.[223]

One can simply reduce this situation to somewhat of a numbers game. Smaller countries like those who have had their visa requirements recently lifted do not really present what Member States might consider a threat of a sizeable population influx. However, visa requirements do go to the core of what Member States consider the heart of their sovereignty,[224] and with it being such a controversial issue, one could ponder whether it is really the place of the CJEU to essentially lift the visa requirements upon Turkish citizens.

Just how fearful Member States are of massive influxes of Eastern Europeans can be demonstrated by concerns over the end of the transitional arrangements relating to Bulgaria and Romania. Segments of the British press feared 'unlimited numbers' entering the UK having a 'disastrous' effect on the job market and housing,[225] with concerns over government secrecy concerning the influx,[226] whilst in Germany, *Spiegel* voiced similar

[221] It should also be considered that were these countries not granted visa-free travel, they could end up being almost 'trapped' in the Balkans, requiring a visa to travel anywhere abroad, something which cannot be considered the case for Turkey.
[222] 2011: Albania: 3.216m; Macedonia: 2.064m: Montenegro, 632,300; Serbia: 7.259m. World Bank, Countries < http://data.worldbank.org/country> accessed 2 June 2013.
[223] World Bank, Croatia <http://data.worldbank.org/country/croatia> accessed 2 June 2013.
[224] V Guiraudon and G Lahav 'A Reappraisal of the State Sovereignty Debate: The Case of Migration Control' [2000] 33(2) Comparative Political Studies 163.
[225] Daily Express, 'Romanian and Bulgarian Influx will be Disastrous' *Daily Express* (London, 5 December 2012).
[226] T Whitehead, 'Estimates of possible Romania and Bulgaria influx may never be published, minster signals' *Telegraph* (London, 11 February).

concerns.[227] Given the widespread fears relating to removing restrictions on 29 million people[228], opening the door to Turkey, with a population of nearly two and a half times the size could be very unpopular, especially if done by the CJEU.

To this end, the EU paved the way for visa-free travel for Turkish citizens following an announcement by Cecilia Malmström in September 2011,[229] and the Polish Institute for International Affairs foresees that as a result of the *Demirkan* case, visa requirements would have to be lifted by mid-2013.[230] This has come in the form of Roadmap 16929/12, seeking to liberalise the visa process. However, to date, Turkey has been rather unhappy with the progress made; with EU Minister Egemen Bağış stating that even non-candidate (including Russia, which has double the population size of Turkey) countries are negotiating visa-free travel,[231] and Economy Minister Zafer Çağlayan describing the restrictions on travel, especially with regards to Turkish businessmen, a violation of human rights.[232] It is clear from the tension on both sides that a well-considered compromise must be arrived at sooner rather than later, and perhaps why a CJEU decision may not be the EU's preferred method of opening the door.

[227] Spiegel, 'German Cities Worried About High Immigration from Romania and Bulgaria' *Spiegel* (Hamburg, 4 February 2013).
[228] World Bank, *Supra*, no. 219.
[229] Hürriyet, 'EU prepares road map to remove visa for Turks' *Hürriyet* (Ankara, 29 September 2011).
[230] Anadolu Agency, *Supra*, no. 217.
[231] G Knaus and A Stiglmayer 'Being Fair to Turkey is in the EU's interest' *EUobserver* (Brussels, 12 March 2012).
[232] EURactiv 'Çağlayan'dan vize uygulamasına tepki: 'AB insanlık suçu işliyor' (in Turkish) *EURactiv.com.tr* (Ankara, 19 September 2012).

5.2 Human Rights

Another issue held up as halting the accession, and indeed the visa liberation, process is Turkey's human rights record. This could be considered to include a number of other contested issues, such as the occupation of North Cyprus and the ongoing struggle with the PKK (Kurdistan Workers' Party.) Turkey was a founding member of the Council of Europe in 1949, but since this has had more cases brought against it than any other contracting party by the European Court of Human Rights.[233]

The unfortunate statistic also holds true for the most cases brought against it concerning Article 3 ECHR, the prohibition of torture. This has been particularly pronounced with regards to suspected PKK members.[234] The refusal of Turkey to capitulate to the PKK is considered as a "primitive form of racism,"[235] as is its failure to recognise the Kurds as a separate democratic entity.[236] This "idealistic view of the Kurdish awakening has real effects in…relations between…[the EU] and the so-called 'non-democratic Turks."[237] It should be noted that such a viewpoint perhaps remains the prerogative of those in an ivory tower: whilst perhaps alleged PKK members have been overly harshly dealt with, the PKK is on the list of Foreign Terrorist Organisations produced by the US Department of State,[238] other EU

[233] HUDOC, Case Law.
[234] ECtHR, App. No. 21987/93 *Aksoy v Turkey* (18 December 1996) and ECtHR, App. No. 36391/02 *Salduz v Turkey* (27 November 2008), see also the treatment of PPK leader Abdullah Öcalan, ECtHR, App. No. 46221/99 *Öcalan v Turkey* (12 May 2005).
[235] H Schlumberger, *Der brennende Dornbusch. Im verbotenen Land der Kurden* (Eichhorn 1991) p. 10.
[236] Bacınoğlu, *Supra*, no. 6 .
[237] A Cooke, 'Has Multiculturalism Failed? A comparative study of attitudes of students in Britain and Germany' (BA Thesis, University of Durham 2012), p. 21.
[238] Bureau of Counterterrorism, Foreign Terrorist Organisations (*US Department of State*, 28 September 2012).

Member States have also breached human rights when faced with supposed terrorist threats.[239]

The requirement of Turkey's human rights record improving is an important bargaining tool, and one which the EU would loathe to lose. However, despite the ongoing war with the PKK appearing to draw to a close, it could have been suggested that this was a genuine step in the right direction for human rights in Turkey. However, one can only ponder the implications of Turkey's heavy-handed approach to the recent Taksim Square rioting.[240]

5.3 Visa-free travel as a bargaining chip

Visa-free travel remains an important bargaining chip for the EU in relations with Turkey: indeed, the EU has insisted that Turkey must sign a re-admission agreement relating to all illegal immigrants entering the EU through Turkey.[241] Were Turkey to gain visa-free travel through a CJEU decision, Turkey would gain what it desired without being forced to sign an agreement which, from a neutral observer's perspective, cannot be seen to benefit it. Around 80% of migrants to the EU currently come through Greece,[242] although most of these migrants "set off from Turkey in tiny boats and wash up on one of Greece's many islands."[243] This would simply shift the burden onto Turkey, as it is the natural point of access for migrants from Asia and Africa. One can understand Turkey's unwillingness to be

[239] See, for example, the UK in ECtHR, App. No. 55721/07 *Al Skeini and others v the United Kingdom* (7 July 2011) and ECtHR, App. No. 27021/08 *Al Jedda v the United Kingdom* (7 July 2011).
[240] Ş Kulu, 'Erdoğan shot himself in the foot in Taksim' (*Today's Zaman*, 1 June 2013).
[241] Today's Zaman, 'EU Insists Turkey to sign readmission before visa deal' (*Today's Zaman*, 14 December 2012).
[242] J Kakissis, Tensions Rise Over Illegal Immigrants to Greece (*NPR*, 14 August 2011).
[243] N Itano, Progress and Backlash in Greece (*Time*, 18 February 2010).

responsible for hundreds of thousands of migrants a year in return for something a number of its neighbours have already been granted, and it could, justly feel it is entitled to.

5.4 Demographics and geography

Another, perhaps more simple, issue is demographics and geography of Turkey itself. In terms of religion, whilst a secular state,[244] Turkey has a Muslim population of around 98%.[245] Europe, as a whole, has a Muslim population of around 5%,[246] and to many who have had little contact with Muslims, this presents a concerning proposition,[247] with Turkey having a "different culture, different approach [and] a different way of life."[248]

Turkey's geographical position, with around 5% of its land in Europe, also has led to concern amongst politicians, with former French President and Head of the EU's Constitutional Convention Valery Giscard d'Estaing stating that "its capital is not in Europe, 95 percent of its population live outside Europe, it is not a European country,"[249] and that opening the doors to it would result in other Middle Eastern and North African states demanding to join.[250] Former President of Bavaria Edmund Stoiber also stated that "Europe cannot end on

[244] Article 2 of the Turkish Constitution of 1982 defines Turkey as a "democratic, secular and social state governed by the rule of law."
[245] Pew Forum on Religion and Public Life 'Mapping the Global Muslim Population' (Pew Research Centre, October 2009), p. 5.
[246] *Ibid*, p. 6.
[247] Cooke, *Supra*, no. 237, p. 65.
[248] T Fuller, Head of EU panel angers Ankara by maligning entry: Giscard: Turkey isn't part of Europe *NY Times* (New York, 9 November 2002).
[249] *Ibid.*
[250] Giscard d'Estaing gives Morocco as an example. This is, however, somewhat of a fallacy given Morocco's failed application in 1987 on geographic grounds, although it does highlight the views of some in politics.

the Turkish-Iraqi border,"[251] with many more EU officials expressing doubts more privately.[252]

5.5 Greek-Turkish relations

As alluded to in Chapter 5.2, the chequered history between Greece and Turkey (prior to 1922, the Ottoman Empire) is another issue lurking in the background of this decision. The two countries first clashed in the Greek War of Independence in 1821, which resulted in a number of massacres,[253] finally leading to the recognition of the Greek state in 1830.[254] The countries have since fought three wars, as well as carrying out a mass enforced population exchange[255] in 1923.[256] Even today, only 25% of Greeks believe Turkey has a place in the EU, and less than 20% of Greek-Cypriots.[257]

Northern Cyprus is perhaps the ongoing divisive issue between the two states, as well as with regards to Turkish EU membership. The EU feels that Turkey is unlawfully occupying a (part of a) Member State,[258] as well as unlawful removal of persons from their property.[259]

[251] Fuller, *Supra*, no. 248.
[252] *Ibid.*
[253] D Brewer, *The Greek War of Independence: The Struggle for Freedom from Ottoman Oppression and the Birth of the Modern Greek Nation* (Overlook Press 2001), p.235–36.
[254] The London Protocol of 3 February 1830.
[255] According to MJ Gibney and R Hansen, *Immigration and Asylum: from 1900 to the Present, Vol. 3* (ABC-CLIO 2005), p. 377 around 1.2 million Greeks had already moved after Turkish successes in the Turkish War of Independence, and the post-1923 exchange involved 192,356 Greeks from Turkey and 354,647 Muslims from Greece.
[256] Convention Concerning the Exchange of Greek and Turkish populations of 30 January 1923.
[257] J Repa, 'Analysis: EU views on Turkish bid' *BBC News* (London, 30 September 2005).
[258] Both ECtHR, App. No. 15318/89, *Loizidou v Turkey* (19 December 1996), paras. 49-56 and ECtHR, App. No. 25781/94 *Cyprus v Turkey* (10 May 2001), paras. 76-77 state that Turkey had effective military control over Northern Cyprus.
[259] *Loizidou, Ibid*, para. 58.

The EU sees the occupation as a violation of the sovereignty in Cyprus, and to this end has refused to acknowledge North Cyprus as a State.[260] This could be considered to exacerbate the already sour relations between Greece and Turkey, which plays a sizeable role in the ongoing conflict.[261] Both the Republic of Cyprus and Greece hold a veto in the EU, and have used this to "veto any easing of restrictions on the north."[262]

Whilst the animosity from the past has to some extent subsided,[263] a number of key issues still remain, especially Northern Cyprus: the Greek President in 2009 stated that "as long as Ankara behaves as an occupying force in Cyprus, we cannot support the Turkish EU membership processes."[264] However, the Greek-Cypriots were the ones to refuse a UN-backed re-unification plan, so it is rather difficult to place the blame squarely in Turkey for the continued problems, especially when it has acknowledged the compensation it must pay for the breach of the right to property[265] could pave the way for a settlement for a united Cyprus.[266]

[260] Indeed, Turkey is the only country to recongise Northern Cyprus.
[261] The Republic of Cyprus has close ties to Greece, with Greek Cypriots making up nearly 80% of the population (Country Studies, Ethnicity of Cyprus).
[262] The Economist 'A Mediterranean Quagmire' *The Economist* (Istanbul, 22 April 2010).
[263] "The two states came very close to war on a couple of occasions, first over the Aegean continental shelf in 1987 and lately over the status of the Imia/Kardak islet in 1996." B Rumelili, 'Transforming Conflicts on EU borders: the case of Greek-Turkish Relations' [2007] 45(1) JCMS 105, p. 107.
[264] A Muezzinler, 'Greek President: "We cannot support Turkey's membership to the EU," *Turkish Weekly* (Ankara, 19 November 2009).
[265] See *Loizidou*, *Supra*, no. 258, ECtHR, App. No. 16219/90 *Demades v Turkey* (22 April 2008), ECtHR, App. No. 46347/99 *Xenides-Arestis v Turkey* (22 December 2005).
[266] E MacAskill, 'Turkey faces huge payout for homes in Cyprus' *The Guardian* (London, 23 December 2005).

5.6 2013: A tough year for Turkey

In June 2013, there was mass protesting in Istanbul following the decision to re-develop one of the few remaining parks in Istanbul into a shopping centre. The protest was initially a peaceful demonstration, but the Turkish police responded in a particularly heavy-handed manner. This caused a huge number of injuries and even deaths, all of which have been broadcast worldwide by the media. One could justly wonder whether the EU would want to grant visa-free travel to a country that responds to protests in such a matter, and highlights the difference in politics and governance between the EU and Turkey. Indeed, the EU and Member States unwilling to remove visa restrictions might be content to bend the law in this scenario to fit more with their political agendas.

However, the ramifications of this could be even greater for Turkey: "following Turkey's own recent anti-government protests, Prime Minister Recep Tayyip Erdoğan's Islamic-rooted government will have been viewing events in Egypt [the *coup d'etat* in July 2013] with concern."[267] A military coup in Turkey, something which has happened before in 1960, 1980 and 1997, would certainly tarnish relations with the EU. Even if this does not happen, the instability that would come from a serious level of unrest, as was the case in Egypt,[268] could lead to widespread political migration. The EU would be a likely destination if visa controls are lifted. For those wary of migration from Turkey, this presents a concerning scenario.

[267] R Fisk, 'What do the neighbours say? Reaction from around the Arab World' *The Independent* (London, 5 July 2013) 4.
[268] A Beach 'The situation is worse than it was for us under Hosni Mubarak' *The Independent* (London, 5 July 2013) 2.

The picture below highlights how the police response has been seen in the media, with the police using CS gas on what appears to be a smartly-dressed passer-by. This reaction has brought widespread condemnation of the government response, with President Erdoğan suffering a large backlash.[269] With Turkey needing to be on its best behaviour bearing the human rights issues it has had in the past, one only need wonder what damage this response will do to Turkey's pleas for visa-free travel. As stated above, such a response not only destroys the notion that Turkey's human rights record is improving, but also the notion that Turkey and the EU share a similar mindset.

[269] Kulu, *Supra*, no. 240.

Chapter Six: Conclusion

From the arguments raised above, it is apparent that the CJEU cannot rightfully refuse Turkish citizens the right to visa-free travel, when considered in the light of the large body of law governing the EU-Turkish relationship. This should ultimately be the decision reached by the CJEU, considering the letter of the law, free from other political considerations which should not form part of its decision-making process.

However, there are a number of 'elephants in the room' that the Court will find rather difficult to ignore. The fear that such a decision would open the doors to what politicians claim would be a mass influx of Turkish service recipients is a very powerful thing. If the CJEU does bend the law to a selective reading of the EU-Turkey provisions, the judiciary of the EU could be considered to be driven by improper factors. This cannot really be in accordance with the CJEU's mandate, even bearing in mind the vague separation of powers that exists in the EU: the CJEU is only to rule on *legal* matters, not *political* ones, as outlined in Article 19(3) TEU.

Concerns of a mass influx along with the current political events in Turkey constitute fears at the forefront of many politicians' minds; this merely compounds the political interest in the forthcoming CJEU judgment. Additionally, there is also the importance to the EU of visa-free travel in accession negotiations, as well as the military conflict and political history between Greece and Turkey. The lethal force used in response to the peaceful protests does little to bridge the divide between the EU and Turkey culturally or politically. These

considerations highlight just how political CJEU decision making can be, especially when faced with the lifting of visa controls, which would be in most circumstances, a political decision at a parliamentary level. These factors further emphasises how the CJEU, a judicial body, is being thrust into the political arena, and how forcing such a body to take what is a huge decision may not result in the most effective outcome for all parties. Indeed, were the CJEU to rule in favour of the applicant and grant visa-free travel, it would usurp the recent careful negotiations between Turkey and the EU.

Amongst the political arguments, there is the belief that the CJEU, in interpreting EU law broadly, is acting to fill in areas of the law where the legislation's intentions were never clearly established. This point is made by Advocate General Cruz Villalon in his Opinion on the *Demirkan* case: that "it cannot be established with absolute certainty what the Contracting Parties understood under the concept of 'freedom to provide services' at the time the Additional Protocol was concluded."[270]

The fact that the CJEU is being asked to rule on these matters forces it into taking what must be considered as a political decision, however much the Court seeks to work within the confines and framework of the law. Whichever way the judgment goes, the ruling will be significant. Either they will rule in favour of the applicant and face calls that they have extended the legislation beyond where it was intended to go, or rule in favour of Germany,

[270] Opinion of A-G Cruz Villalon in *Demirkan, Supra*, no. 137, para. 55.

and be criticised for abdicating from their legal duty to apply the law to the facts of a case before them.

Viewed objectively, there can only be a decision in favour of the applicant, and if EU law in this field is to develop in a rational manner in the future, this is the only appropriate conclusion to reach.

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