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The Legal Situation of the Turkish Community in the EU after the Long-term Resident Directive: The end of the Matter?

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Abstract

On the latest developments regarding third-country nationals, the directive governs the status of those who are non-EU member state citizens. In that extent, the new directive confers the status of long-term residents, which contains the right to freedom of movement subject to particular conditions. More precisely, a Turkish citizen who established himself in an EU Member State enjoyed specific rights - not free movement – which emanate from Turkey Association law. Now, with the new directive, he can obtain a long-term resident status which confers rights - especially free movement rights - as close as possible to those third-country nationals applicable to the EU Member State citizens. Besides free movement rights, it is also possible to infer novelties from the current EC law. However, with the new directive, some provisions have possible effects which can be deprived of most useful effect of the rights that emanates from the Association law regime. To that end, as regards the legal problems of Turkish immigrants, applicable law will be assessed by comparing provisions of Association law regime on the one hand, and, the EC directive 2003/109 on the other. Accordingly, clarifying these issues is also one of the purposes of this thesis.

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A. Introduction

It is the longest road that goes to Europe, where Turkey has been moving along since the middle of 1959 in order to integrate itself with the European Economic Community (EEC). That approach of Turkey to Europe led to the conclusion of the Association Agreement.[1](Ankara Agreement) in 1963 in which the two parties envisaged the economic and political integration of Turkey as a final objective.

After more than 30 years of integration process, the Customs Union between Turkey and the EU was finally established in 1995. At the Helsinki European Council of December 1999, Turkey was officially recognized as a candidate country; the Council concluded that "Turkey was a candidate state destined to join the Union on the basis of the same criteria as applied to the other candidate states" and held that "if Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay".[2]

In December 2004, the European Council concluded that Turkey sufficiently fulfilled the Copenhagen political criteria regarding democracy, human rights and legal reforms, and adopted a resolution for the opening accession negotiations. Negotiations started on 3 October 2005 when the Council adopted a Negotiating Framework.[3]

Since the beginning of this rocky road, Turkey has continuously been integrating itself with Europe. At the same time, a huge Turkish population[4] has been living in Europe where the Turkish immigrants have become part of the Community with the constant improvement of their rights emanating from the Community law. This is, therefore, the starting point of this academic research, which seeks to comprehensively examine the most important immigration problems and subsequent legal adversities which Turkish immigrants have faced. In EC law, Turkish immigrants' economic, social and political rights have been regulated by the EC-Turkey Association law regime (hereinafter Association law regime) according to which

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[1] Agreement Establishing an Association Between the European Economic Community and Turkey, Official Journal 217 , 29/12/1964, p. 3687 - 3688

[2] Amanda Akcakoca "EU-Turkey Relations 43 years on: train crash or temporary derailment?" European Policy Center issue paper no 50, November [2006] p. 8

[3] http://ec.europa.eu/enlargement/turkey/eu_turkey_relations_en.htm

[4] Parliament Assembly "The situation of Turkish migrant workers in Europe" 25 November 2004 Doc. 10358 Res, paragraph 2 states; "3 038 215 Turkish citizens were living in EU countries at the end of 1999, including one million of working age who were in employment or seeking employment. In terms of geographical distribution, there were over 730 000 in Germany, 76 000 in France, 57 000 in Austria, 51 000 in the Netherlands and 44 000 in the United Kingdom."

Turkish immigrants were legally granted more comprehensive rights in comparison to other third country nationals (TCNs); however, law is not stagnant but, on the contrary, it evolves every day. In EC law, immigration issues were recently handled with the EC directive 2003/109 and in the light of this directive substantial legal problems have arisen from those two regimes, which are the EC-Turkey Association law and the EC law. This research aims to clarify the current *status quo* by comparing and discussing the directive and the current Association law regime.

Although the personal scope of the directive is confined to non-EU citizens who have been legally living for at least five years in the EU. Subject to other applicable conditions, the long-term resident directive will facilitate one of the most important objectives - integration - codified in the EC-Turkey Association Agreement. Therefore, the adoption of the directive 2003/109 on long-term EU resident status is an important step towards the approximation of the legal status of third-country nationals throughout the Union.[5]

However, while conferring rights to those who are in the personal scope of the directive, the directive has provisions which can remarkably restrict the content of the rights conferred on Turkish workers by the EC-Turkey Association agreements and subsequent legislation thereof.

In this paper, the object of discussion will be based on current improvements of those Turkish immigrants' social economic and political rights and the possible derogations of the long-term resident directive on the current legal protection of the Turkish immigrants. In particular, I will make a comparative analysis of the rights conferred on by the Association law regime on the one hand and the impacts of the directive on the other. On the latest developments regarding third-country nationals, the directive governs the status of those who are non-EU member state citizens. In that extent, the new directive confers the status of long-term residents, which contains the right to freedom of movement subject to particular conditions. More precisely, a Turkish citizen who established himself in an EU Member State enjoyed specific rights - not free movement – which emanate from Turkey Association law. Now, with the new directive, he can obtain a long-term resident status which confers rights - especially

[5] Orsolya Farkas, Olga Rymkevitch "Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices" The International Journal of Comperative Labour and Industrial Relations, Volume 20/3, [2004], p. 379

free movement rights - as close as possible to those third-country nationals applicable to the EU Member State citizens. Besides free movement rights, it is also possible to infer novelties from the current EC law. However, with the new directive, some provisions have possible effects which can be deprived of most useful effect of the rights that emanates from the Association law regime. To that end, as regards the legal problems of Turkish immigrants, applicable law will be assessed by comparing provisions of Association law regime on the one hand, and, the EC directive 2003/109 on the other. Accordingly, clarifying these issues is also one of the purposes of this thesis.

Whilst the content of the rights which emanates from either the directive or the EC-Turkey Association law will be examined, since both of these legislations regulate the rights of Turkish persons, in the case of possible conflict, the applicable law will be determined. In that regard, I will evaluate the case law of the ECJ pertaining to the content of the practicing of those conferred rights as well as related documents concerning the EC-Turkey relations in order to find answers to the possible consequences of the long-term resident directive on the rights which are enjoyed by the Turkish community in the Europe. One of the purposes of this research is to guide Turkish immigrants by determining the scope of their rights after the adoption of the long-term resident directive and, providing available legal protection by referring to jurisprudence of the European Courts.

This research intends to discuss and clarify the matter in five chapters. In the first chapter, the institutional framework of the Association Agreement and Council Decisions will be briefly explained.

Following this, I will then analyse the Agreement, Additional Protocol and Council Decision 1/80 in which Turkish workers' most remarkable right – the free movement rights within the one Member State – was established. In doing so, I will attempt to define the borders of the free movement right in the lights of those aforementioned legislations. The EC-Turkey Association law intended to establish a legal framework for those Turkish immigrants, but, without the right to freedom of movement within the European Union. After the immigration agreements were concluded by Turkey and various European countries, a significant amount of Turkish workers had moved to Europe. After concluding the Ankara Agreement and following that European Council Decisions, their legal problems were referred to the ECJ in order to gain its interpretation as regards the concerned articles of Ankara Agreement,

Additional Protocol or European Council Decisions. In this context, I will briefly examine the case law of the ECJ as regards resident Turkish workers in the Europe.

Chapter D will be devoted to the content of the Council Directive 2003/109 EC concerning the status of third-country nationals who are long-term residents (hereinafter the long-term resident directive). To that end, the most important articles of the long-term resident directive will be mentioned. In doing so, possible legal interpretations will be briefly explored.

Finally, in chapter E, an analytical comparison will made concerning Turkish workers' rights which have been conferred by the EC-Turkey Association law on the one hand, and that rights can be derived from the long-term resident directive on the other. To sum up, legal argumentation will be put forward concerning provisions both against and in favour of those who are in the personal scope of these legislations and with this regard effort will be devoted in order to clarify the ambiguity on this issue while staying within the borders of the thesis.

B. Institutional Framework of the Association Regime

The EC-Turkey Association Agreement is a mixed agreement. In Community law, competence for the issues within the scope of the international agreement may be exclusively with the Community, or shared between the Community and the Member States, or exclusively with the Member States.[6] When competence is shared, and where both the Community and the Member States are party to an international agreement, it is known as a mixed agreement[7].

Shared competence between Member States and the Community leads to supervision of the European Courts regarding the provisions of the mixed agreement which may fall within the jurisprudence of the ECJ. The Court held in *Demirel* [8]case;

"Thus the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers does not arise."

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[6] Nicola Rogers "A Practitioners' Guide to the EC-Turkey Association Agreement" Kluwer Law International [2000], p.5

[7] Paul Craig and D Grainnee Burca "EU Law" Third Edition [2002], p. 150

[8] C-12/86 *Meryem Demirel v. Stadt Schwabisch Gmund*, [1987] ECR 3719, para 9

In so doing, the Court has established its competence as regards provisions which establish freedom of movement.

Articles 22 and 23 of the Ankara Agreement provide for the establishment of a Council of Association comprising members of the governments of the Member States of the Community, the Council and the Commission and members of the Turkish Government.
The Association Council has the power to take decisions in order to attain the objectives laid down by the Agreement.[9] Limited in its institutional competencies at that time, the European Parliament (EP) played no role in this procedure. In 1965, however, the Association Council realized one of the agreement's provisions for bilateral parliamentary cooperation: the EP was conferred the right to participate in a newly created mixed parliamentary committee EC–Turkey[10].

Regarding the Ankara Agreement the Court has put forward the opinion it held in respect to the Greek Association Agreement that;[11]
"Since they are directly connected with the Agreement to which they give rise effect, the decision of the Council of Association, in the same way as the Agreement itself, forms an integral part, as from their entry into force, of the legal system." [12]

According to the ECJ, having competence of giving preliminary rulings on the Ankara Agreement indicates also powers for examining and interpreting the content of the decisions adopted by the Council which is set up by the Agreement.[13]

With the Ankara Agreement, an Association Council was formed to meet periodically and discuss matters involving the partnership. This institutional framework was widened with the implementation of the last phase of the Customs Union.[14] It is foreseen that it will meet twice a year at the ministerial level. The Council takes decisions unanimously, and Turkey and the

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[9] N. Rogers, *o.c.,* p.7
[10] Stefan Krauss "The European Parliament in EU External Relations: The Customs Union with Turkey" European Foreign Affairs Review 5:[2000], p.223
[11] N. Rogers, *o.c.*, p.7
[12] C-192/89 *Sevince v. Staatssecrataris Van Justitite* [1990] ECR I-3461, para 9
[13] N. Rogers, *o.c.*, p.7
[14] http://www.deltur.cec.eu.int/default.asp?pId=4&lang=1&prnId=1&ord=0&fop=1

EU side have one vote each. The most recent (44th) EU-Turkey Association Council Meeting was held in Luxembourg on 26 March 2005.[15]

C. Is There a Right to Free Movement of Turkish Workers under the Present Legal Framework?

a. The Right of Free Movement established in the Ankara Agreement

After Turkey's application to be one of the members of the European Community was put forth on July 31, 1959, the parties signed the Ankara Agreement which established an Association with the Community in September 1963. That agreement constitutes the essence and strengthens the legal bonds of the tough relations between the two parties. The Association Agreement and the protocol added in 1970 laid down basic objectives in their relations, such as the continuous and balanced strengthening of trade and economic relations and the establishment, in three phases, of a customs union. Another objective of the Ankara Agreement is the free movement of workers.[16]

In order to ascertain the personal scope of the Agreement it is necessary to determine the definition of a worker. In that regard, the ECJ's decision in *Birden Case*[17] is determining. *"Reference should...be made to the interpretation of the concept of worker under Community law for the purpose of determining the scope of the same concept employed in Article 6(1) of Decision 1/80"*. According to that paragraph, there is no distinction on the perception of the definition of worker.

One of the most conspicuous purposes of the Agreement has been included in the preamble which states clearly that;

Resolved to ensure a continuous improvement in living conditions in Turkey and in the European Economic Community through accelerated economic progress and the harmonious expansion of trade, and to reduce the disparity between the Turkish economy and the economies of the Member States of the Community;

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[15] http://www.deltur.cec.eu.int/default.asp?lang=1&pId=4&fId=6&prnId=2&hnd=1&ord=1&docId=550&fop=0
[16] http://europa.eu/scadplus/leg/en/lvb/e40113.htm
[17] C-1/97 *Birden v. Stadtgemeinde Bremen,* [1998] ECR 07747-I, para 24

The Ankara Agreement envisaged three periods, consisting of a preparatory stage followed by transitional and final stages, through which association between Turkey and the EC would proceed (Article 2(3) of the Agreement). [18]

The agreement aimed at the eventual EC membership of Turkey. This object has been highlighted by stating "*Resolved to preserve and strengthen peace and liberty by joint pursuit of the ideals underlying the Treaty establishing the European Economic Community*" and "*Recognizing 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*" in the preamble.
This intention has been embodied in Article 28 of the agreement which reads as follows;

> *"As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community."*

The Agreement instituted a Council of Association to act within the powers conferred on it by the Agreement in order to ensure the implementation and the progressive development of the Association (Article 6 of the Agreement). It also laid down the procedure under which it would operate (Articles 22-27). According to Article 12 of the Agreement, the contracting parties concurred to be guided by Articles 48, 49 and 50 of the Rome EC Treaty for the purpose of progressively securing freedom of movement for workers between Turkey and the Community.

In *Demirel* Case, the ECJ was asked to interpret the Article 12 of the Ankara Agreement. However the Court concluded in paragraph 23 of the judgment as follows;
"Examination of Article 12 of the Agreement and Article 36 of the Protocol therefore reveals that they essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers."

Therefore the objective set out in the Article 12 has been understood as a programme which should be followed so as to ensure accession rather than clear obligation imposed upon the

[18] Bulent Cicekli "The Rights of Turkish Migrants in Europe under International and European Law" International Migration Review, Vol. 33, No.2 Summer [1999], p. 308

Community. As a consequence of that interpretation of the ECJ, the free movement right of Turkish workers prescribed as in Article 36 of the Protocol is not directly applicable and therefore after the envisaged time period the free movement of Turkish workers has not been started.

Finally, it is necessary to mention Article 7 of the Ankara Agreement, which holds;
"The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement. They shall refrain from any measures liable to jeopardize the attainment of the objectives of this Agreement."

This article clearly imposes obligations upon to both parties. Briefly, those obligations must ensure firstly the establishment of the Customs Union in accordance with the Ankara Agreement and at the final stage to guarantee the membership of Turkey to the Community. Lastly, the parties have to abstain from any possible action which endangers the goals of the association.

b. The Right of Free Movement established in the Additional Protocol

After establishing the relations between parties, a road map plan was drafted which contains three stages in order to complete the process. The first step of that plan, which foresaw four years for completion, was commenced with the Ankara Agreement but was hardly accomplished on 1 January 1973 and subsequently following that, a transitional stage has begun.

In 1970, an Additional Protocol[19]was negotiated in order to set out a timetable for the establishment of the freedom of movement for Turkish workers incrementally, for the dismantling of quantitative restrictions and for the elimination of customs duties starting in 1973, with an aim to harmonize the Turkish customs tariff with the Common Customs Tariff (CCT).[20]

Additional protocol can be deemed as formalizing the Ankara Agreement by setting out conditions and periods. According to the preamble of the Additional Protocol, parties

[19] Additional Protocol, signed at Brussels, 23 November 1970, Official Journal 1973 C 113
[20] B. Cicekli [1999] *o.c.*, p.309

"*resolved to adopt, in the form of an Additional Protocol the provisions relating to the conditions, arrangements and timetables for the implementation of the transitional stage.*"

"Whereas during the transitional stage the Contracting Parties are to ensure, on the basis of mutual and balanced obligations, the progressive establishment of a customs union between Turkey and the Community and the closer alignment of the economic policies of Turkey and the Community in order to ensure the proper functioning of the Association and the progress of the joint measures which this requires", "…Have agreed upon the following provisions, which shall be annexed to the Agreement of Association"

As a related part of that additional protocol, Article 36, set out in Title II, Chapter 1, is relevant for that analysis. Article 36 reads as follows;

"Freedom of movement for workers between Member States of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement of Association between the end of the twelfth and the twenty-second year after the entry into force of that Agreement.

The Council of Association shall decide on the rules necessary to that end."

Notwithstanding that Article 12 can be considered as obligatory and binding for the Member States by virtue of Article 36 of the Additional Protocol, the possible binding effect of Article 12 and obligation imposed upon the Member States has been demolished by the ECJ's decisions in that extent, which will be evaluated below.

Regarding the free movement of persons, it is necessary to mention briefly about the Custom Union.[21] The Customs Union is the one of the remarkable advancements of the relations, which was simply established with a decision of the Association Council in 1995. The foremost purpose of the Custom Union is to eliminate trade barriers between its Members. With that agreement trade barriers were removed between the EU and Turkey while raising the free movement of goods and forcing Turkey to adjust and bring its international trade policies in line with those of the EU. However, no provision regarding the free movement of persons was embraced. [22]

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[21] For more detailed information, see Stefan Krauss "The European Parliament in EU External Relations: The Customs Union with Turkey" European Foreign Affairs Review 5:[2000], 215-237

[22] B.Cicekli, [1999] *o.c.,* p.310-311

In the decision of the Association Council of 6 March 1995 regarding the Customs Union, one could only find one sentence concerning the situation of Turkish immigrants in a single paragraph under the heading "co-operation on social matters," in the form of a resolution. Section 5 of this resolution states that: *"A regular dialogue will be set up on the situation of Turkish workers in regular employment in the Community and vice versa. The two parties will explore all possibilities for a better integration of such workers."*

While abolishing the restrictions on the free movement of goods, to keep the area of free movement of persons untouched and restricted will inevitably worsen Turkish citizens' situation and decrease entrepreneurial capacity because of the already overly-strict application of admission requirements in the EU, *i.e.,* visa regulations. This will, of course, affect the full implementation and proper functioning of the Customs Union adversely.[23]

c. The Right of Free Movement established in the Council Decision 1/80

The first decision concerning the right of free movement of Turkish workers was taken by the Council in 2/76, which was concluded in 1976 for four years temporarily. Decision no 1/80 of the Association Council of 19 September 1980 on the development of the Association has repealed the Decision no 2/76.

Decisions of the Association Council are measures adopted by a body provided for by the Agreement and empowered to the Contracting Parties to adopt such measures. In so far as they implement the objectives set by the Agreement, such decisions are directly connected with the Agreement and, as a result of the second sentence of Art. 22(1) thereof, has the effect of binding the Contracting Parties.[24]

According to Article 25 of the Ankara Agreement, *"The Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey."*

[23] B. Cicekli [1999] *o.c.,* p. 311
[24] Case C-277/94. *Z. Taflan-Met, S. Altun-Baser, E. Andal-Bugdayci v Bestuur van de Sociale Verzekeringsbank and O. Akol v Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1996] ECR I-04085, Summary of the case

The Council in its decision about Article 6, which is located in the Chapter II governing Social Provisions, has ruled on the rights granted to the Turkish workers who are legally residents in the one of the Member States and *"dully registered as belonging to the labour force*" by stating the following;

> *- [They] shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;*
>
> *- shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;*
>
> *- shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment;*

Article 6(2) stipulates that for calculating periods of legal employment, annual holidays, "short absences" due to sickness, and other absences due to accidents at work and maternity leave shall be included as part of legal employment, whereas involuntary unemployment and "long absences" due to sickness will not. However, such events will not jeopardize any acquired rights.

Similar rights have been conferred to family members who legally reside with the Turkish worker by Article 7, which reads as follows;

> *- [They] shall be entitled-subject to the priority to be given to workers of Member States of the Community – to respond to any offer of employment after they have been legally resident for at least three years in that Member State;*
>
> *- shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.*

Article 8 of the Decision reads as follows;

Should it not be possible in the Community to meet an offer of employment by calling on the labour available on the employment market of the Member States and should the Member States, within the framework of their provisions laid down by law, regulation or administrative action, decide to authorize a call on workers who are not nationals of a Member State of the Community in order to meet the offer of employment, they shall endeavour in so doing to accord priority to Turkish workers.

The employment services of the Member State shall endeavour to fill vacant positions which they have registered and which the duly registered Community labour force has not been able to fill with Turkish workers who are registered as unemployed and legally resident in the territory of that Member State.

However, this article was formulated rather ambiguously, stating "*shall endeavour*" in the first paragraph and "*endevaour to fill*" in the second paragraph. It is doubtful whether these statements are binding to Members States because there is hitherto no case law concerned with this article. However, the ultimate goal is that Association Council Decision should facilitate the prescribed objectives which have been stated in the Ankara Agreement and by inferring from the preamble of the Council Decision 1/80 that highlighted economic and social obligations, which reads as follows;

"Whereas development of the Association justifies the establishment of such economic, technical and financial co-operation as will help to attain the objectives of the Association Agreement, in particular by means of a Community contribution to the economic development of Turkey in various sectors"

It may be convincing to conclude that it would be considered as an obligation, and as a consequence it has a self-executing feature.

Article 9 grants Turkish children legally residing with parents who have at some time been legally employed in the host State equal treatment in respect to entry qualification requirements to general education, apprenticeship and vocational training. The same provision, however, rather humbly states that such children "may" be eligible to benefit from the *"advantages provided for under the national legislation in this area"*. This presumably would cover issues such as access to educational grants and tuition fee waivers. Such a large degree of discretion afforded to EU Member States here though would appear to rule out

direct effect.[25] Besides this defect it is also prejudice those Turkish children's rights in the event of their desiring to continue their education in another Member State; briefly they would be stripped of their rights granted in domiciled Member State. It is, however, very clear that to be able to continue their education in a most suitable way would be helpful certainly to reach the objectives laid down in the Ankara Agreement and Council Decisions.

Article 10 obliges EU Member States to ensure equal treatment as regards payments and working conditions and equal access to employment service assistance and Article 13 establishes a standstill obligation in relation to restrictions regarding access to the labour market for Turkish workers and family members.

Decision No 1/80 of the EEC-Turkey Association Council provides in Article 13 that *"Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories."*

As will be seen below in the case law section this article is directly effective and applicable. In its many decisions, the ECJ has affirmed that feature persistently.

Lastly, Article 14 of the Decision has established general limitations on the grounds of public policy, public security and public health while stating as follows;

"The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.

"They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals."

d. Case Law of the ECJ regarding Turkish Workers in Relation to the Long-Term Resident Directive.

[25] Martin Hedemann-Robinson "An Overview of Recent Legal Developments at Community Level in relation to Third Country Nationals Resident within the European Union, With Particular Reference to the Case Law of the European Court of Justice" Common Market Law Review 38, [2001], p. 546-547

In this section, the case law of the ECJ regarding to Turkish workers will be briefly examined by emphasizing the most important features of the cases.

***Meryem Demirel v Stadt Schwäbisch Gmünd* (C-12/86) [1987] ECR 3719**

The *Demirel* case concerns a Turkish woman who married a Turkish national who was working in Germany. Mrs Demirel sought to establish her right to stay with her husband in Germany. This was refused on the ground that German law, since 1982, requires a non-EU member state citizen worker to live for eight uninterrupted years in the state before acquiring any right to be joined by his or her family. The importance of the case is that it is the first case before the ECJ. The court emphasized its case law on that issue in paragraph 7, which reads as follows: *"…the provisions of such an agreement form an integral part of the Community legal system; within the framework of that system the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement."* In this judgment the Court held that Article 12 of the Ankara Agreement and Article 36 of the Additional Protocol read in conjunction with Article 7 of the Ankara Agreement do not automatically confer the right to free movement to Turkish workers after elapsing the prescribed period. The court stated that *"…article 12 of the Agreement and article 36 of the Additional Protocol essentially serve to set out a programme, whilst article 7 of the Agreement, which does no more than impose on the contracting parties a general obligation to cooperate in order to achieve the aims of the Agreement, cannot directly confer on individuals right which are not already vested in them by other provisions of the Agreement."*[26]

Notwithstanding the refusal of the case, it brought significant effects on Turkish workers' future situation by admitting that the agreements concluded with Turkey are a part of Community law.

***S. Z. Sevince v Staatssecretaris van Justitie* (C-192/89) [I990] ECR I- 03461**

This case concerns a Turkish national who had a resident permit from the Dutch authorities which enabled him to live with his wife. Mr. Sevince, however, ceased living with his wife in August 1979; following this his residence permit was not renewed. He started proceedings in September 1980, and the suspensive effect of the proceedings led him to stay in the

[26] Summary part of the judgment para 2

Netherlands almost for six years, until 22 October 1987. In *Sevince* case, the court held that the decisions of the Association Council have direct effect, which confers that Turkish worker can rely on some provisions of the Council Decisions before national courts. The court clarified the notion of "legal employment" in this case. "The term 'legal employment' in … the third indent of Article 6(1) of Decision No 1/80, cited above, does not cover the situation of a Turkish worker authorized to engage in employment for such time as the effect of a decision refusing him a right of residence, against which he has lodged an appeal which has been dismissed, is suspended."[27]

***Kazim Kus v Landeshauptstadt Wiesbaden* (C-237/91) [I991] ECR I-6781**

The case concerns Mr. Kus, a Turkish worker who entered Germany so as to marry a German woman; following that marriage he legally worked for seven years. However, he divorced from his wife two years after starting to work. As a result, his resident permit was withdrawn and Mr. Kus started proceedings. The higher administrative court referred the case to the ECJ. The Court held that "The first indent of Article 6(1) of Decision No 1/80 must be interpreted as meaning that a Turkish national who obtained a permit to reside on the territory of a Member State in order to marry there a national of that Member State and has worked there for more than one year with the same employer under a valid work permit is entitled under that provision to renewal of his work permit even if at the time when his application is determined his marriage has been dissolved."[28] The Court also clarified that those who satisfy the conditions which are embodied in Article 6(1) of Decision no 1/80 can directly rely on those provisions in order to obtain the renewal not only of his work permit but also of his residence permit.[29]

***Hayriye Eroglu v Land Baden-Württemberg* (C-355/93) [1994] ECR I- 5113**

This case related to a Turkish national who legally entered Germany in 1980 where her father had been working lawfully. The Court held that "Article 7 clearly, precisely and unconditionally embodies the rights of those children of Turkish workers who have completed a course of vocational training in the host country to respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State,

[27] Paragraph 33 of the case
[28] Paragraph 26 of the case
[29] Paragraph 36 of the case

provided one of their parents has been legally employed in the Member State concerned for at least three years. Like Article 6(1), the second paragraph of Article 7 has direct effect in the Member States of the European Community."[30] According to the Court "… a Turkish national who satisfies the conditions set out in the second paragraph of Article 7 of Decision No 1/80 and may therefore respond to any offer of employment in the Member State concerned may, by the same token, rely on that provision to obtain the extension of his residence permit."[31] The consequence of this decision is particularly crucial for those Turkish nationals who are not qualified to join their families under the family reunification law of the member state concerned.

Ahmet Bozkurt v Staatssecretaris van Justitie **(C-434/93) [I995] ECR I-1475**

The case concerns a Turkish national who was employed as a lorry driver since 1979 by a Dutch company. In the course of his employment, Mr. Bozkurt resided some time in the Netherlands without any obligation to have a work permit under the Dutch law. In 1988 following an accident at work he became permanently incapable of work and has since then received benefits under the concerned Dutch law. His application for an unlimited residence permit was rejected by the authorities, which in turn resulted in the proceedings before the ECJ. According to the judgment of the Court, "… the existence of legal employment in a Member State within the meaning of article 6(1) of Decision No 1/80, cited above, can be established in the case of a Turkish worker who was not required by the national legislation concerned to hold a work permit or a residence permit issued by the authorities..."[32] More significantly, nevertheless the Court held that "article 6(2) of Decision No 1/80 does not confer on a Turkish national who has belonged to the legitimate labour force of a Member State the right to remain in the territory of that State following an accident at work rendering him permanently incapacitated for work."[33]

Recep Tetik v Land Berlin **(C-171/95) [I997] ECR I-329**

This case involved a Turkish worker employed as a sailor on inland waters in Germany for a period in excess of four years, who then went to Berlin to seek new employment. The Court

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[30] Paragraph 17 of the case
[31] Paragraph 23 of the case
[32] Paragraph 31 of the case
[33] Paragraph 42 of the case

held that; "…the third indent of Article 6(1) of Decision No 1/80 must be interpreted as meaning that a Turkish worker who has been legally employed for more than four years in a Member State, who decides voluntarily to leave his employment in order to seek new work in the same Member State and is unable immediately to enter into a new employment relationship, enjoys in that State, for a reasonable period, a right of residence for the purpose of seeking new paid employment there, provided that he continues to be duly registered as belonging to the labour force of the Member State concerned, complying where appropriate with the requirements of the legislation in force in that State, for instance by registering as a person seeking employment and making himself available to the employment authorities."[34]

***Selma Kadiman v Freistaat Bayern* (C-351/95) [I997] ECR I-2133**

Kadiman established that family members "authorized to join" a Turkish worker under Article 7(1) could only retain their rights to reside if they lived with the worker, at least for the first three years, unless there were "objective circumstances" (such as work or study elsewhere in that Member State) to justify the separation.[35] The Court held as following;
"Article 7 of Decision No 1/80 does not in principle preclude the competent authorities of a Member State from requiring that the family members of a Turkish worker, referred to by that provision, live with him for the period of three years prescribed by the first indent of that article in order to be entitled to reside in that Member State. There may however be objective reasons to justify the family member concerned living apart from the Turkish migrant worker."[36] "The first indent of the first paragraph of Article 7 of Decision No 1/80 is to be interpreted as meaning that the family member concerned is in principle required to reside uninterruptedly for three years in the host Member State. However, account must be taken, for the purpose of calculating the three-year period of legal residence within the meaning of that provision, of an involuntary stay of less than six months by the person concerned in his country of origin."[37]

***Suat Kol v Land Berlin* (C-285/95) [1997], ECR I-3069**

[34] Paragraph 48 of the case
[35] Steve Peers "Case Law Court of Justice: Case C210/97, Haydar Akman v. Oberkreisdirektor des RheinischBergischen Kreises, Judgment of the Court of Justice (SixthChamber) of 19 November 1998, [1998] ECR I7519" Common Market Law Review 36: [1999], p. 1031
[36] Paragraph 44 of the case
[37] Paragraph 54 of the case

In *Suat Kol*, a Turkish man, Mr. Kol, had obtained a permanent residence permit based on false statements concerning his marriage to a German woman. He was later fined for having made the false declaration and an expulsion decision directed towards him was taken.[38]

In this case a Turkish worker claimed that Article 14 of the Association Council Decision 1/80 should be applied in his case. According to that article exceptions to expulsion can be solely grounded on public policy, public security, public health. Nevertheless, the Court held that “article 6(1) of Decision No 1/80 is to be interpreted as meaning that a Turkish worker does not satisfy the condition of having been in legal employment, within the meaning of that provision, in the host Member State, where he has been employed there under a residence permit which was issued to him only as a result of fraudulent conduct in respect of which he has been convicted.”[39]

***Süleyman Eker v Land Baden-Württemberg* (C-386/95) [I997] ECR I-2697**

In this case a Turkish worker tried to rely on Article 6(1) of Decision 1/80 to renew his work permit with the same employer after a year's regular employment. The Advocate General has suggested that a Turkish worker's one-year employment must be a *regular* and *uninterrupted* employment with the same employer so as to bring himself in the province of the provision. The ECJ stated that “first indent of article 6(1) of Decision No 1/80 must be interpreted as making the extension of a Turkish worker's residence permit in the host Member State subject to his having been legally employed continuously for one year with the same employer.”[40]

***Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg* (C-340/97) [2000] ECR I-00957**

Article 14(1) of Decision No 1/80 of the EEC-Turkey Association Council - under which the provisions of that decision relating to employment and freedom of movement for Turkish workers are to be applied subject to limitations justified on grounds of public policy, public security or public health - is to be interpreted as precluding the expulsion of a Turkish national who enjoys a right granted directly by that decision when such expulsion is ordered, following a criminal conviction, as a deterrent to other aliens without the personal conduct of

[38] Anders Kjellgren “On the Border of Abuse” European Business Law Review, [2000], p. 181
[39] Paragraph 29 of the case
[40] Paragraph 31 of the case

the person concerned giving reason to consider that he will commit other serious offences prejudicial to the requirements of public policy in the host Member State.[41] The Court referred to its *Bouchereau*[42] judgment. The Court held that a "Turkish national who has been in legal employment in a Member State for an uninterrupted period of more than four years but is subsequently detained pending trial for more than a year in connection with an offence for which he is ultimately sentenced to a term of imprisonment suspended in full has not ceased, because he was not in employment while detained pending trial, to be duly registered as belonging to the labour force of the host Member State if he finds a job again within a reasonable period after his release, and may claim there an extension of his residence permit for the purposes of continuing to exercise his right of free access to any paid employment of his choice under the third indent of Article 6(1) of Decision No 1/80."[43]

D. Internal Mobility? : Council Directive 2003/109/EC Concerning the Status of Third-Country Nationals who are Long-Term Residents

After many years in which the interests of third country nationals were largely ignored, Community law is increasingly viewing the rights of a third country national lawfully residing in one of the Member States as being much the same as those of a citizen of the Union.[44] This approach can be deduced from the directives regulated under Title IV of the EC Treaty. In this respect, the same attitude can be seen in the case law of the Court of Justice[45].

After a long preparation period finally Council Directive 2003/109 EC concerning the status of third-country nationals who are long-term residents was adopted on 25 November 2003. The directive has aimed to approximate of the legal status of third-country nationals who would be endowed rights almost parallel to those of citizens of the Member States.

After the Tampere 1999 EU Summit, the Commission launched a proposal in which EU Summit's counseling is followed. As a result of that interaction, two important issues were included in the directive. At first glance, the directive sets out the conditions for third-country nationals so as to obtain the status of long-term residents. Secondly, it establishes the conditions which a long-term resident has to meet in order to move to another Member State and acquire residence rights in that Member State without being required to complete all the

[41] Paragraph 64 of the case
[42] C-30/77 *Regina v Bouchereau* [1977] ECR 1999 para 35
[43] Paragraph 49 of the judgment
[44] Robin Ca White "The Citizen's Right to Free Movement" [2005] European Business Law Review, p. 555
[45] C-109/01 *Secretary of State for the Home Department v Akrich*, [2003] ECR I-9607

steps immigrants are normally required to meet in this second Member State. Whilst those who are in the personal scope of the directive fulfil the conditions established in the directive, the most important feature of the directive comes to the surface, which is to acquire the status of the long-term resident.

The primary condition is that the residency leading to the access of this right must be lawful. It is clearly located in Article 3(1). Whilst Article 3(1) defines the personal scope, which is confined to non-EU citizens who legally reside in a Member State, the second paragraph excludes the au pairs, seasonal workers or posted workers from the *ratione personae* of the directive. [46]

The reasons for immigrating to a specific Member State are no longer relevant. This outcome can be considered as following the *Günaydin*[47] judgment in which ECJ made it abundantly clear that the reasons for immigrating to a Member State are irrelevant. Temporary immigration and a consequence of it, admitting intentions to go back to homeland by the immigrant, does not derogate from his right to stay longer lawfully and for humanitarian reasons.

Besides the condition of legal residence, according to Article 4, it is also necessary to domicile five years without interruption in order to obtain the rights set out in the directive. According to Article 5 it is complementary of those mentioned above to supply stable and regular resources so as to prove that the applicants and their dependent family members in any case will not become a burden for the Member State. However, it is stated in the second paragraph that Member States retain the possibility of refusing the application if the immigrant does not comply with integration conditions.

At the same parallel with Article 27 of the directive 2004/38[48], Article 6 of the long-term resident directive stipulates public policy, public security and public health as reasons for

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[46] Mark Bell "Civic Citizenship and Migrant Integration" European Public Law Volume 13, Issue 2, [2007] p. 318

[47] C-36/96 *Gunaydin and others v Freistaat Bayern* [1997] ECR I- 05143 The Court held in paragraph 61 reads as follows: *"…a Turkish worker wishes to extend his stay in the host Member State, although he expressly accepted its restriction, does not constitute an abuse of rights. The fact that he declared his intention of returning to Turkey after having been employed in the Member State for the purpose of perfecting his vocational skills is not such as to deprive him of the rights deriving from Article 6(1) of Decision No 1/80…"*

[48] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. On the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

declining the application. Textual interpretation of Article 6(1) might possibly result in deciding against those who are long-term non-EU residents in a way in which they can be stripped of gaining the status of long-term resident. It convincingly constitutes the major defect of the article by not including the following: *"Previous criminal convictions shall not constitute grounds for taking such measures"*. In that context it should be highlighted that this article should not be interpreted in such a way as infringing the rights of Turkish workers gained by the ECJ's decision in the *Nazli*[49] *Case*. This feature of the case will be examined in the following chapter. According to Article 6(2) economic considerations should be excluded from the content of the proceedings. Article 7(3) holds that *"If the conditions provided for by Articles 4 and 5 are met, and the person does not represent a threat within the meaning of Article 6, the Member State concerned shall grant the third-country national concerned long-term resident status."* This article can be deemed as providing a minimum protection in order to facilitate the attainment of long-term resident status. This also reflects the attitude of the Commission which has been embodied in the launched proposal in 2001.[50] In so doing, mandatory exercise of the administration's power is ensured.

Article 8 ensures the permanence of the granted status, subject to Article 9. As it is highlighted in the Commission's commentary, *"The model long-term resident's residence permit is the same for all Member States, being the model laid down by the Council Regulation laying down a uniform model residence permit for third-country nationals."*[51]

Article 9 establishes the grounds which lead to withdrawal or loss of long-term resident status. According to the third paragraph, in the event of withdrawal or loss of the status, the proceedings should not lead the immigrant automatically to be expelled. Paragraph five ensures a facilitated procedure when applied for re-acquisition of long-term resident status by those who had obtained the status but moved optionally to another Member State and lost their status subsequently. One might argue about whether these grounds for withdrawal or loss are exhaustive. According to the Commission's commentary, "*Long-term resident status*

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amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

[49] See p. 21 of the Thesis

[50] See Commission Proposal for a Council Directive Concerning the status of third-country nationals who are long-term residents on Article 8

[51] Ibid Article 9(2)

must offer its holder maximum legal certainty." and those enumerated should be sole grounds.[52] In that regard this enumeration should be perceived as exhaustive.

Article 11 is devoted to equal treatment provisions. This article reflects the statement in the Conclusions of the Tampere European Council (Paragraph 21). According to this article, long-term residents should be bestowed with the similar rights that citizens enjoy in order to be treated equally in various areas. One might argue that this right can be deprived of its useful effect when taking up employment and establishing self-employment is being subject to restrictions as regards involvement in exercise of public authority. However, it can be stated as a counterview that participation in the public sector is also restricted for those who are European immigrants.[53] This approach can be seen in the Commission's commentary: *"But just like citizens of the Union, they may not be given access to jobs entailing involvement in the exercise of public authority."* It would otherwise result in conferring non-EU citizens more rights while restricting the rights of immigrants who are nationals of EU Member States, which is not justifiable under the present EU law, especially Article 39(4) of the EC Treaty. However, that is inserted in Article 11(3) of the directive, which allows Member States to put restrictions as regards access to employment and self-employment in accordance with the national law or Community law by way of keeping these activities for EU or EEA citizens.

Protection against expulsion is guaranteed in Article 12. This article regulates that the expulsion decision can only be taken in case of *"an actual and sufficiently serious threat to public policy or public security"*. It can be seen in the Commission's proposal where the case law of the ECJ on this issue is reflected[54]. However, personal conduct as a major element of the expulsion has been missed in the final text. As regards economic ends, Article 12 paragraph 2 states that *"The decision referred to in paragraph 1 shall not be founded on economic consideration."* Moreover, paragraph 4 provides a cassation procedure for expelled persons.

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[52] Ibid Article 10

[53] M. Bell, *o.c.*, p. 322

[54] Commission Proposal for a Council Directive Concerning the status of third-country nationals who are long-term residents Article 13(1) reads as follows: *Long-term residents must enjoy enhanced protection against expulsion; the proposal is inspired by existing Community law on free movement for citizens of the Union. The definition of threat to public order or domestic security is taken from the judgment of the Court of Justice in Case 30/77 Bouchereau); it is tightly circumscribed, and the personal conduct of the person concerned is all that counts.*

Chapter III (article 14-23) governs residence rights in the other Member States. Article 14 confers the right upon those who obtained long-term residence status to reside another Member State, subject to the limitations set out in paragraph 3 and 4.[55]

A crucial factor in the integration of third-country nationals regards access to the labour market. In this context, the Netherlands takes an innovative approach. The Act on the Promotion of Labour Participation of Ethnic Minorities provides for proportionate labour market participation of immigrants. The number of immigrants in a given employers' workforce has to be proportionate to their presence in the regional population.[56]

While Article 16 of the long-term resident Directive sets out the rules and procedure for family members referred to in Directive 2003/86 EC[57], Article 17 allows the second Member State to decline the application on the grounds of public policy and public security. Article 18 sets out the public health condition as a ground for declining the application of a long-term resident and her/his family members, which can be justified only for diseases as defined by the relevant applicable instruments of the WHO and other infectious or contagious parasite-based diseases.

Article 21 states that *"As soon as they have received the residence permit provided for by Article 19 in the second Member State, long-term residents shall in that Member State enjoy equal treatment in the areas and under the conditions referred to in Article 11."*
However, *"Member States may provide that the persons referred to in Article 14(2)(a) shall have restricted access to employed activities different than those for which they have been granted their residence permit under the conditions set by national legislation for a period not exceeding 12 months."* Paragraph 3 holds for family members that as soon as they have received the residence permit from the second Member State, the rights set out in Article 14

[55] 3. In cases of an economic activity in an employed or self employed capacity referred to in paragraph 2(a), Member States may examine the situation of their labour market and apply their national procedures regarding the requirements for, respectively, filling a vacancy, or for exercising such activities.

For reasons of labour market policy, Member States may give preference to Union citizens, to third-country nationals, when provided for by Community legislation, as well as to third country nationals who reside legally and receive unemployment benefits in the Member State concerned.

4. By way of derogation from the provisions of paragraph 1, Member States may limit the total number of persons entitled to be granted right of residence, provided that such limitations are already set out for the admission of third-country nationals in the existing legislation at the time of the adoption of this Directive.

[56] Orsolya Farkas, Olga *o.c.*, p. 381

[57] Council Directive 2003/86 EC of 22 September 2003 on the right to family reunification

of the directive 2003/86 EC will be applicable for them. Article 22 governs the conditions of the withdrawal of the residence permit and obligations concerning re-admittance.

E. Analysis for Determining the Possible Effects of the Long-term Resident Directive on the Current EC-Turkey Association Law

In the area of traditional EU policy making, migration issues have been brought closer to the European institutions in the Treaty of Maastricht, which defined immigration as an "issue of common interest" and absorbed the previously existing foray into the so-called "Third Pillar". Although this pillar mixed intergovernmentalism with elements of the Community method in a complicated and cumbersome decision-making process, its results were limited to security concerns. The deficiencies of the diluted intergovernmentalism of Maastricht led the Council and the Commission to agree on the need to bring migration policy under Community competence, which eventually was agreed to in the 1998 Treaty of Amsterdam. The Amsterdam Treaty not only established a new institutional framework including the majority of former third-pillar issues under Community competence, it also extended this competence into areas of immigrant integration. This transfer was to be completed within five years after its entry into force (i.e. by 1 May 2004); however, the Tampere European Council of 1999 transferred the right of initiative to the European Commission and thus strengthened the position of the latter considerably.[58]

Following the Tampere Council in 2003, Council Directive 2003/109/EC Concerning the Status of Third-Country Nationals who are Long-Term Residents was adopted. Whilst the long-term residence directive can be considered on the one hand as an improvement to the current situation of the third-country nationals as regards social rights, family reunification and most importantly freedom of movement, it can be held on the other hand that those conferred rights are limited in certain aspects. At first sight it should be stated that the third-country nationals who have not acquired long-term resident status were excluded from the scope of the directive. In that regard the directive has failed to establish a status in which third-country nationals were not distinctly differentiated within the European Union.[59]

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[58] Bernhard Perchinig "Union Citizenship and the Status of Third Country Nationals" EIF Working Paper Series Number 12, p. 8 available on http://www.eif.oeaw.ac.at/05workingpapers/e_folge05.asp?RECORD_KEY[Papers]=id&id%5BPapers%5D=19

[59] B. Perchinig *o.c.*, p. 10

Notwithstanding that there is no right conferred on Turkish workers regarding long-term residence under the current EC-Turkey association law, the right would be derived from the Ankara Agreement by way of interpretation. While the Ankara Agreement and its subsidiary legislation do not confer individual residence rights within the EU law – subject to status of being employed – nevertheless the issue is left exclusively to the national law of the Member State concerned. However, the Ankara Agreement and jurisprudence of the ECJ clarified that once worker status has been obtained, the right to reside and work is conferred on them. On the other hand there have not been any documents regulating the rights of Turkish workers to stay in a Member State after they obtained the status of employee in the Member State, on the same line with EU workers, as regulated by article 48(3)(d) of the EC Treaty and Commission Regulation (EEC) No 1251/70 of 29 June 1970.[60]

On the other hand, the legal developments envisaged in the Union in respect of third-country nationals in general may also help the integration process of Turkish immigrants. First of all, the recently signed Charter of Fundamental Rights of the European Union[61] may have such a potential. Article 45(2) of the EU Charter on Human Rights envisages the possibility that movement and residence rights "may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State".[62]

In the long-term resident directive, the regulator provisions were included so as to shape the relationship between international treaties and the directive. In order to avoid norm confliction between international treaties on the one hand and provisions of the directive on the other, Article 3 is added into the directive which governs the relationship between those measures.

Article 3(3) reads as follows;

This Directive shall apply without prejudice to more favourable provisions of:

(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;

(b) bilateral agreements already concluded between a Member State and a third country before the date of entry into force of this Directive;

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[60] Bulent Cicekli "Legal Integration of Turkish Immigrants under the Turkish- EU Association Law" The Journal of Turkish Weekly, 02 November [2004], available on http://www.turkishweekly.net/articles.php?id=22 page 16 of 24 in the printed version.

[61] Charter of Fundamental Rights of the European Union, Official Journal C 364/01 2000

[62] B. Cicekli [2004] *o.c*, p. 16

(c) the European Convention on Establishment of 13 December 1955, the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the Legal Status of Migrant Workers of 24 November 1977.

The primacy problem is incorporated in this article, and it comprises the vital importance of the article. In so doing, the article sets out the rule in favour of international treaties which contain more favourable rules as regards particular issues. Accordingly, Article 3(3)(b) implies that the Member States lost their competence on the issue of concluding treaties with third countries as regards the substance of the directive.

In that context, the EC-Turkey Association Agreement and its subsidiary legislation constitute the most famous example. These provisions have vital importance due to their being determinative of the prospective status of Turkish citizens who form the largest population belonging to a third-country in the EU.[63]

The importance of the Association agreement is that it is the most favourable agreement as regards third-country nationals coming after the EEA agreement. In this regard the Association agreement enhances the rights of Turkish workers and their family members comparable to those non-EU citizens as regards residence, work conditions and equal treatment. It is clear, however, that Turkish workers and their family members will stand to benefit in several respects from certain provisions of the Long-term Residence Directive.[64] One observation should be made regarding the rights which stem from the EC-Turkey Association law on the one hand and the Long-term Residence Directive on the other hand. According to the Turkey Association law, Turkish workers were endowed the rights which render Turkish workers able to take up employment freely after a four-year period specifically only in one Member State. However, the Long-term Residence Directive confers internal mobility rights to third-country nationals subject to certain conditions within the European Union.

The ECJ's case law illuminated the rights and its limits of those Turkish workers and their family members, which can be classified briefly;[65]

- four years of legal employment confers access to the labour market and implies a residence right connected with free access rights to employment.
- Standstill clause approved with direct effect.

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[63] Boelart-Suominen *o.c.*, p. 1038
[64] Boelart-Suominen *o.c.*, p. 1040
[65] Boelart-Suominen *o.c.*, p. 1039

- Non-discrimination on grounds of nationality subject to priority given to EU citizens as regards recruitment under certain circumstances.
- Equal treatment concerning the working conditions and earnings.
- Extension of work and residence permits after one year legal work.
- There is no free movement right conferred to Turkish workers.
- The right to take up an employment and education for Turkish workers' children only in that Member State where the Turkish workers legally employed.
- In the event of losing their worker status, Turkish workers are no longer considered within the province of the Agreement and the Association Council decisions.

It can be comparably concluded that Article 11, which governs equal treatment while stating, *"Long-term residents shall enjoy equal treatment with nationals as regards: (a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration;"* produces conflict indirectly with Article 8 of the Association Council Decision 1/80, which reads *"…decide to authorize a call on workers who are not nationals of a Member State of the Community in order to meet the offer of employment, they shall endeavour in so doing to accord priority to Turkish workers."* One can argue that the right which confers Turkish workers precedence has been stripped of its useful effect by the provision of the directive. However, the obligations incumbent upon Member States by the Association regime are still in force and should be deemed as binding. Therefore Turkish workers should have precedence over the other non-EU workers by virtue of Article 8 of the Council Decision 1/80, in conjunction with the article 3(3)(a) of the long-term resident directive on the one hand, and the very aim of the Association Agreement which envisaged the membership of Turkey at the completion of the integration on the other. Therefore, that provision should be considered as a more favourable measure in the sense of article 3(3)(a) which holds;

"This Directive shall apply without prejudice to more favourable provisions of
(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other."

However, it should also be positively emphasized that while putting in Article 11(3)(a) the following; *"Member States may restrict equal treatment with nationals in the following cases:*

(a) Member States may retain restrictions to access to employment or self-employed activities in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens;" the EC legislation established parallelism with Article 8 of the Association Council Decision 1/80 in which the Council set out the rule that, in the sense of reserving vacant positions firstly for the labour force of that Member State, *"Should it not be possible in the Community to meet an offer of employment by calling on the labour available on the employment market of the Member States and should the Member States, within the framework of their provisions laid down by law, regulation or administrative action..."* which clearly puts a priority clause for EU Member State nationals.

Article 6 of the long-term resident directive provides justification as regards declination of the application on the grounds of public policy and public security. Despite the fact that economic considerations were excluded from the evaluation of application, previous criminal convictions according to the text of the article can be assessed. This, however, constitutes a departure from the Commission's proposal regarding to long-term resident directive which can be seen in Article 7(2) of the proposal, reading as follows;
"Criminal convictions shall not in themselves automatically warrant the refusal referred to in paragaph 1."

The question of whether the expulsion of Turkish workers was solely on preventative grounds, as a deterrent to other aliens, and is compatible with Article 14 of Decision 1/80 is a subject of reference from German Courts to the ECJ in the case of *Nazli*.[66] If the provision is to be interpreted uniformly with Article 39(3) of the EC Treaty, then it would appear that criminal convictions in themselves are not enough to justify expulsion and will only be taken into account so far as there is a future threat to public policy.[67] In that regard, expulsion should be made possible only if the concerned person constitutes a sufficient threat to public policy and public security.[68] The Court held in *Nazli* judgment that, as follows in the following paragraphs;

56 It follows that, when determining the scope of the public policy exception provided for by Article 14(1) of Decision No 1/80, reference should be made to the interpretation given to that exception in the field of freedom of movement for workers who are nationals of a

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[66] See p. 20 of the Thesis
[67] N. Rogers *o.c.*, p. 45
[68] Toby King "Migration Control in EU-Turkey Relations" available on www.ces.boun.edu.tr/2/2/may/tobias_**king**.pdf

Member State of the Community. Such an approach is all the more justified because Article 14(1) is formulated in almost identical terms to Article 48(3) of the Treaty.

57 In the context of Community law and, in particular, of Article 48(3) of the Treaty, it has been consistently held that the concept of public policy presupposes, in addition to the disturbance of the social order which any infringement of the law involves, the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society (see, for example, Case 30/77 Regina v Bouchereau [1977] ECR 1999, paragraph 35.)

58 While a Member State may consider ...all derogations from a fundamental principle of the Treaty, must nevertheless be interpreted restrictively, so that the existence of a criminal conviction can justify expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (see, most recently, Case C-348/96 Calfa [1999] ECR I-11, paragraphs 22, 23 and 24)

Therefore, the case law regarding Article 14 of the Decision 1/80 made it explicitly clear that previous criminal convictions should be excluded from the extent of the expulsion. To put it differently, Article 6 of the long-term resident directive cannot be interpreted in such a way that previous criminal convictions constitute sufficient grounds for possible refusal of the Turkish applicant in acquiring long-term resident status. Otherwise such an evaluation definitely infringes the conferred protection to Turkish citizens as regards expulsion on grounds public policy, public security and public health which, according to the ECJ, must be in the same line with those protections granted to Member State citizens.

One important observation should be made as regards family members' movement rights. Article 9 of the Association Council Decision 1/80 provides equal treatment rights to Turkish children reads as follows;

"Turkish children residing legally in a Member State of the Community 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 educational entry qualifications as the children of 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".

As clearly stated in the article, this right is valid only within a particular Member State. Turkish children will therefore automatically face obstacles when they would like to move to

another Member State in order to involve themselves in courses or other educational activities where they may develop their education more properly. This also does not reflect the idea of integration, which can be reached more easily with an educated young generation. In that context, it should be considered that Article 16 of the Long-term Residence Directive, which provides movement rights to those family members when making a long-term resident move to another Member State, indirectly facilitates the situation of those young people who wish to move for educational purposes but loses their "equal treatment" rights. Now, it is possible with the long-term resident directive that in the event of movement to other Member States by a Turkish family, the Turkish children retain the right to equal treatment conferred by Article 9 of the Association Council Decision 1/80, which is in all aspects will facilitate the objectives set out in the Ankara Agreement.

As was explained in the case law section[69], the ECJ in its *Sevince* judgment clarified the standstill clause which is formed in Article 13 of the Association Council Decision 1/80 as unequivocal and having a direct effect in the Member States courts.

In this regard, Member States are obliged not to introduce new restrictions regarding Turkish workers who have legal right of residence and employment within the territory of the contracting states as regards access to work and conditions. Therefore, articles which contain new restrictions, and as a result will deprive the granted right by Association Council Decisions, would not be applicable to those who are in the personal scope of the standstill clause stated in Article 13.

Finally, observations should be addressed as regards international agreements concluded between the EC and Maghreb countries. Turkey is geographically located between the continents of Europe and Asia. The historical relationships and current situation/law between the EC and Turkey can be considered as a suitable reflection of the geographical position of Turkey. Turkey can neither be marginalized nor embraced by the arms of the Europe. Therefore the current EC-Turkey Association law has a different status than the other international agreements, such as concluded with countries of Maghreb region, while the EC-Turkey Association agreement confers Turkish workers rights ranked in priority on certain aspects as highlighted above.

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[69] See p. 17 of the Thesis

The ECJ held in case *El-Yassini*[70] paragraph 47 that; *"Next, as regards the question whether, as Mr. El-Yassini claims, the Court's case-law concerning the rules governing the EEC-Turkey association should be applied, by analogy, to the present case, it must be noted that, according to settled case-law, an international treaty is to be interpreted not solely by reference to the terms in which it is worded but also in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties provides in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraph 14, and Case C-312/91 Metalsa [1993] ECR I-3751, paragraph 12)."*

In paragraph 30 of the aforementioned case, the ECJ differentiated the status of the relationship between the EC and Morocco from the EC-Turkey Association Agreement, in which the very purpose has been defined as an accession of Turkey into EU, concluding, *"Moreover, the fact that the EEC-Morocco Agreement is intended essentially to promote the economic development of the Kingdom of Morocco and that, to that end, it confines itself to establishing a form of cooperation between the Contracting Parties which is not aimed at securing that country's association with, or future accession to, the Community…"*

F. Conclusion

Official discourses emphasize that the full benefits of an area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe. As the Council and the Commission's Action Plan on how best to implement these provisions of the Amsterdam Treaty[71] (paragraph 5) states:

"Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator –people - and one cannot be achieved in full without the other two. Maintaining the right balance between them must be the guiding thread for Union action. It should be noted in this context that the

[70] C-416/96 *Nour Eddline El-Yassini v Secretary of State for Home Department* Judgment [1999], ECR-I 01209
[71] Action Plan of the Council and the Commission on how Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998, 1999/C 19/01

treaty instituting the European Communities (article 61 ex article 73 I a), makes a direct link between measures seeking to combat and prevent crime (article 31 e TEU), thus creating a conditional link between the two areas."[72]

The underlying philosophy of the immigration policies of the EU Member States and the Community in general has been, up to now, that third country immigrants are a category of people that can not expect (or do not deserve) the same treatment as EU-citizens and be treated as fellow country-men. Accordingly, the member states have been rather slow even to incorporate and implement the additional rights and legal safeguards resulting from various instruments concerning Turkish migrants in the EU. [73]

The differentiations as regards conferred rights to EU citizens on the one hand and non-EU citizens on the other are also reflected in the Constitutional Treaty. According to article II-105 CT;

Every citizen of the Union has the right to move and reside freely within the territory of the Member States. Freedom of movement and residence may be granted, in accordance with the Constitution, to nationals of third countries legally resident in the territory of a Member State.

Article II-105 CT clearly codifies that the freedom of movement and residence *may be granted* to non-EU citizens.

The status of long-term resident includes mobility rights that, although limited, go some way towards guaranteeing equal treatment to third country nationals. However, this status is relatively difficult to acquire in many Member States. In some (proposed) systems of selective economic migration, strict distinctions are made between the positions of formally and informally skilled workers. Those not entering in the "skilled" category enter on temporary permits which, although they may be renewed, are very difficult to change into long-term permits. Such barriers mean that this group remains deliberately excluded from equal rights including mobility rights.[74]

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[72] Theodora Kostakopoulou "The Protective Union: Change and Continuity in Migration Law and Policy in Post Amsterdam Europe" Journal of Common Market Studies September [2000], Volume 38 No.3, p. 307

[73] B. Cicekli [2004] *o.c.*, p. 15

[74] Yongmi Schibel "Mobility Rights in Europe" Migration Policy Group (MPG) Available on: http://www.migpolgroup.com/multiattachments/3182/DocumentName/mobility_rights_europe_schibel.pdf

The European Commission lastly proposed an amendment of the current directive as regards the extension of the beneficiaries of international protection the possibility to obtain this status. According to information obtained from the Press Release, the main aim of this Amendment is to close the gap that exists today, so that third-country nationals, who have been granted protection by a Member State, may have the possibility 1) to acquire long-term resident status in the Member State which granted them the protection status; 2) to take up residence in another Member State and 3) to acquire long-term resident status in this second Member State under exactly the same conditions as any other third-country nationals.[75] This basically strengthens the criticisms as regards defects of the Long-term Residence Directive which in turn implies that there is still a need to improve the status of the granted rights to the non-EU citizens.

However, it should be clearly promoted that the long-term resident directive has established provisions which formulates general principles that should strengthen the legal position of non-EU citizens who do not already enjoy similar or more favourable rights pursuant to national law or international law.[76] In this regard, Turkish workers who satisfy the conditions established in the Association regime enjoy most favourable rights now at the same time will benefit from the provisions of the long-term resident directive, which enhances the content of the rights conferred by Ankara agreement and subsequent legislation thereof. The significance of the long-term resident directive is to make possible circulation of third-country nationals within the European Union except England, Denmark and Ireland, which in turn has significant influence regarding to Turkish migrants who constitute the largest legally-resident population within the European Union. In this regard this legislation has the meaning of broadening the scope of the conferred rights with the EC-Turkey Association Agreement.

Article 13 of the Association Council Decision 1/80, in conjunction with Article 3(3) of the Long-term Residence Directive, requires Member States not to enact legal measures against Turkish migrants who fall within the scope of these legislations. Therefore, in order to establish a better integration of Turkish migrants, the examination and application of the most favourable provisions should be established by the Member States. In this regard, Member States have the responsibility for implementation which leads better integration of legally-

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[75] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/228&format=HTML&aged=0&language=EN&guiLanguage=en

[76] Boelaert-Suominen *o.c.*, p.1049

resident immigrants to a Member State on the one hand and facilitates achieving an integrated Europe on the other.

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