TURKISH LAWBLOG

24 February, 2019

The Passive Freedom to Provide Services for Turkish Citizens in the EU

A. Introduction

The subject of this article is the issue of the passive freedom to provide services for non-EU citizens, here especially regarding Turkish citizens. This article questions whether Turkish citizens have a right to asses the EU without any visa or at least getting a visa without high requirements. In particular, the Demirkan judgment of the European Court of Justice (ECJ, C-221/11) from 24.09.2013 – which is still one of the most important judgements regarding this topic - will be discussed. The judgment of the ECJ concerns the visa requirements of Turkish citizens, despite existing provisions in the Association Agreement, which the European Economic Community (***EEC***) had signed with Turkey on 12.09.1963, and the accompanying Additional Protocol of 23.11.1970.

B. The Freedom to Provide Services

The freedom to provide services is governed by Chapter III of the Treaty on the Functioning of the European Union (***TFEU***), here in Articles 56 to 62 TFEU. The TFEU itself does not define what freedom to provide services means. As a rule, the wording of Article 57 (1) and (2) TFEU states that they must be commercial, artisanal and professional activities. Furthermore, the service must be provided against payment and the most important factor is that it has to be temporary. This in fact happens to distinguish it from the freedom of establishment. In its *Gebhard* (ECJ C-55/94) decision the ECJ emphasized the importance of the duration, frequency, regularity and continuity of the service. Another prerequisite, as with all the fundamental freedoms of the TFEU, is crossing borders.

I. The Active Freedom to Provide Services

Only this form of freedom to provide services is expressly standardized in the TFEU. The freedom to provide services enables the service provider to move to another Member State in order to perform there. Article 57 (3) TFEU grants the service provider a right of residence for the duration of the provision of the service. The freedom to provide services does not depend on the nationality of the recipient of the service. Only the nationality of the service provider is important. According to Article 56 (1) TFEU, he must be citizen of the EU. This can be different for third-country nationals. Although third-country nationals could be considered as recipients of services (passive freedom to provide services), they are not eligible for providing such services (freedom to provide services) under Article 56 et seq. TFEU.

II. The Passive Freedom to Provide Services

There is also the possibility that the service recipient himself exceeds the limit to receive a service, which is referred to as passive or negative freedom to provide services. This thus widens the scope of the provisions on the freedom to provide services. The circle of persons falling within the scope of Article 56

et seq. TFEU are now extended: it protects not only the private, but also the business active and thus the antagonist. On the other hand, the passive freedom to provide services does not depend on the characteristic of self-employment, since he is merely the recipient and not the service provider himself, whose autonomy depends on the right to freedom to provide services.

III. Restrictions

The main function of the fundamental freedoms is to prohibit discrimination against EU citizens and thus to prevent unequal treatment. First, the general prohibition of discrimination under Article 18 TFEU should be mentioned here, which should guarantee equal treatment of foreigners and nationals. This covers both direct and indirect discrimination. However, different rules in the Member States do not automatically mean that the principle of Article 18 TFEU is breached. Furthermore, Article 56 (1), 57 (3) TFEU infers a prohibition of discrimination which prohibits both open and covert discrimination. Article 56 TFEU guarantees rights of entry, residence and free movement in the State in which the service is provided. Article 56 et seq. TFEU lays down a prohibition on restricting the state in which the service is provided from taking any action which prohibits or impedes the service provider's performance in order to make the cross-border service so unattractive to the provider of the service. Differentiation according to criteria which in fact leads to discrimination, hidden or indirect, is therefore prohibited. According to the famous *Dassonville* formula (ECJ, 8/74) created by the ECJ, a measure that is not discriminatory but has different effects on nationals and foreigners is also not allowed.

IV. Justification

First, a justification can be made through primary law: By virtue of the reference made in Article 62 TFEU, the barriers of freedom of establishment (Article 51 et seq. TFEU) apply mutatis mutandis. Accordingly, the justifications of public order, safety and health may be relevant. Unwritten barriers like public welfare are to be considered, too.

Member states especially must observe the principle of proportionality. In particular, the measures taken must be appropriate, necessary and proportionate in the strict sense, viz be appropriate.

A justification of a restriction of the freedom to provide services is possible through secondary law, too. The Council and Parliament are empowered to adopt common guidelines on the mutual recognition of diplomas, certificates and other evidence of formal qualifications (e.g. the Directive on Services in the Internal Market).

C. The Problem of the Passive Freedom to Provide Services for non-EU Citizens

A differentiation is made between active and passive freedom to provide services for third-country nationals. It is argued that non-EU citizens should not be included in the scope of Article 56 et seq. TFEU when it comes at least to the freedom to provide services. The judgment of the ECJ in the case *Demirkan* (ECJ, C 221/11) deals with whether Turkish citizens can derive a right to passive freedom to provide services.

I. Legal Background in the Case of Turkey

Turkey has been an official candidate for accession to the EU since 1999 and has signed some agreements with the EU.

The most important agreement is the **Association Agreement** between the EU and Turkey from 12 September 1963. In addition, the **Additional Protocol** was completed on 23 November 1970, which led to discussions and to the judgment to be discussed here. This article will finally have a closer look to the **Regulation (EC) 539/2001** and as an example for national law, **German national law**.

One of the most important treaties is the **Association Agreement**. The preamble of the Association Agreement shows the intention to provide economic assistance to Turkey and to improve its living conditions in order to facilitate Turkey's subsequent accession to the European Union. The Agreement mentiions the gradual establishment of a customs union, which refers to the current Customs Union between the European Union and Turkey existing since 1996. The purpose of the Association Agreement is to remove the obstacles between the European Union and Turkey in order to be able to carry out trade without restrictions. Articles 12, 13 and 14 set out the free movement of workers (Article 12), the right of establishment (Article 13) and the freedom to provide services (Article 14).

The purpose of the **Additional Protocol** is to clarify the details and timing of the transitional phase referred in the Association Agreement. The Additional Protocol should serve as a further step towards the establishment of a customs union. Article 41 (1) (stated in Chapter II, *right of establishment, services and transport*) of the Additional Protocol contains the so-called "***standstill clause***". It stipulates that the

"*Contracting Parties shall not introduce among themselves any new restrictions on the freedom of establishment and the freedom to provide services*".

According to the ruling in the case *Savas* of the ECJ (ECJ, C- 37/9) this article is to be regarded as a clear standstill clause, since it is *"clearly, [...] exactly and not tied to conditions [...]"*. Accordingly, new restrictions are not possible and Article 41 of the Additional Protocol is directly applicable. Therefore, this rule implies that the rules underlying the time of the conclusion of the Additional Protocol apply and that only newer rules apply if they are more favourable to Turkish nationals. Member States are therefore prohibited from introducing regulations restricting the freedom of establishment or the freedom to provide services from the entry into force of the Additional Protocol. This means that the legal status is "preserved", and no deterioration can occur.

The **Council Regulation (EC) No 539/2001** from March 2001 contains a list "*for the establishment of [...] third countries whose nationals must be in possession of visas when crossing the external borders and the list of third countries whose nationals are exempted from this requirement"*. The recitals indicate that the decision to add the countries to the list in Annex I to the Regulation is case-related. This is done based on criteria such as "*illegal immigration, public order and security and the external relations of the Union with third countries*". Turkey lists in Annex I to the Regulation, which imposes on Turkish nationals the obligation to obtain a visa through an act of the European Union. The states listed in Annex I are referred to as "*negative states*". According to Article 1 (2) of the Regulation, nationals of the countries listed in Annex II are exempt from the visa requirement if they do not wish to remain in the European Union for more than three months. This catalogue is called "*positive states*". In May 2014 Regulation (EC) No 539/2001 was amended by Regulation 509/2014 and a number of States in Annex I were inserted in Annex II, thus requiring them a visa requirement when staying in the Community

European Union has been cancelled for less than three months.

As an example, shortly **national German law** shall be stated: At the time of the entry into force of the Additional Protocol in 1973, Turkish nationals did not need a visa. The Law on Foreigners from 1965 allowed Turkish nationals to enter Germany without a visa if they wanted to stay in Germany for a maximum of three months; whereas service providers were only exempted from the visa requirement for two months. The condition was that the stays did not last longer than three or two months and that no gainful employment should be exercised during this period. According the Law on Foreigners from 1971, Turkish nationals needed only a visa in the form of a visa in their passport if they wished to pursue gainful employment in Germany. Thus, there was also the possibility to enter the country legally as a tourist, without obtaining a visa and in the meantime change the intention to stay and only then you needed the approval. In 1980, Turkey was removed from the list of positive states of the Law on Foreigners, which introduced the visa requirement for Turkish nationals.

II. Interim Results

The explanations given above lead to the requirement for a visa for Turkish nationals under national and higher-ranking EU law in order to be able to cross the external borders of the European Union. However, it is questionable how the Association Agreement and Additional Protocol, which are international treaties, affect these regulatory systems. Article 55 (1) of the Additional Protocol provides that '*the Contracting Parties shall not introduce among themselves new restrictions on the freedom of establishment and the freedom to provide services'*. Controversial discussions are held about Article 41 (1) of the Additional Protocol concerning its wording, its history and its purpose. The European Court of Justice has received a preliminary ruling under Article 267 TFEU from the higher administrative court in Berlin-Brandenburg on the question of whether Turkish nationals need a visa to enter the European Union when it comes to a family visit with the potential use of services.

III. The Demirkan Case

After a visa application of 14-year-old Leyla Ecem Demirkan and her mother was denied without any justification the case was brought in front of the administrative court in Berlin where *Demirkan* argued that she not only wanted to visit her stepfather but also planned to receive services in Germany, strengthening her argument with regard to Article 41 (1) of the Additional Protocol. The administrative court in Berlin dismissed the action for lack of economic activity. In fact, business men e.g. can access the EU easier than people wanting to come to the EU for touristic purposes. The alternative claim was also rejected because according to the higher administrative court of Berlin-Brandenburg Article 41 (1) of the Additional Protocol did not apply to family stays. According to the court the standstill clause stated that there is "*no [...] freedom of movement for Turkish nationals independent of any economic activity*". The higher administrative court in Berlin-Brandenburg requested in accordance with Article 267 TFEU a preliminary ruling on whether Article 41 (1) of the Additional Protocol also included the passive freedom to provide services. The ECJ has decided on the questions on 24 September 2013.

The ECJ begun with stating the legal framework it had to study to answer the questions asked by the higher administrative court of Berlin-Brandenburg. After developing that the above-mentioned legal frameworks and in fact the Additional Protocol is most important here, the ECJ stated that in fact Article 41 (1) of the Additional Protocol is essential. The ECJ argues:

"As regards the status conferred on Turkish nationals under the Association Agreement, Article 41(1) of the Additional Protocol lays down – as is apparent from its very wording – ***in clear, precise and unconditional terms, an unequivocal 'standstill' clause, which prohibits the Contracting Parties from introducing new restrictions on freedom of establishment and freedom to provide services with effect from the date of entry into force of the Additional Protocol*** *(see, with regard to restrictions on freedom of establishment, Case C?37/98 Savas [2000] ECR I?2927, paragraph 46)."*

So, this leads to the Conclusion that the standstill clause as stated in Article 41 (1) of the Additional Protocol has immediate effect. Turkish citizens can therefore rely on this clause if the clause is applicable. Furthermore, the ECJ comes to conclusion, that:

"*It should be noted that the '****standstill' clause prohibits generally the introduction of any new measure having the object or effect of making the exercise by a Turkish national of such economic freedoms in the territory of a Member State subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to that Member State*** *(see, to that effect, Savas, paragraphs 69 and the fourth indent of paragraph 71; Abatay and Others, paragraph 66 and the second indent of paragraph 117; and Tum and Dari, paragraphs 49 and 53)."*

After stating this the court is questioning whether this ruling is affecting only the active freedom of providing services or as well the passive freedom of services. All in all, the outcome of the ECJ after discussing the wording, the purpose and the historical backround of Article 41 of the Additional Protocol is that

"[T]he fact that the purpose of the Association Agreement is ***purely economic*** *is reflected in the wording of the agreement. That is apparent from the titles of Chapters 1, 2 and 3 in Title II to the agreement, relating to the implementation of the transitional stage, those titles being, respectively, 'Customs union', 'Agriculture' and 'Other economic provisions'. Moreover, Article 14 of the Association Agreement, which states that '[t]he Contracting Parties agree to be guided by Articles [45 EC], [46 EC] and [48 EC] to [54 EC] for the purpose of abolishing restrictions on freedom to provide services between them', is in Chapter 3 of Title II of the agreement, the title of which, as indicated above,* ***expressly refers to economic matters****."*

This meant that the standstill clause, which had been ruled out widely positive by the ECJ, lost its *eternal effectiveness*.

D. Conclusion and Solutions

The concern of this case law for Turkish nationals is enormous. Especially Germany is particularly affected as one of the most popular host countries and destinations of Turkish citizens.

The ruling of the ECJ in the *Demirkan* case may be regarded as a step backwards, since in the previous judgments of the ECJ rather approximate and positive connected to the Association Agreement. As stated above, the ECJ is of the opinion that Article 41 (1) of the Additional Protocol does not cover the passive freedom of providing service. However, it is questionable whether this view is tenable.

The ECJ is mainly stating its ruling on the wording of the Additional Protocol. But it is notable that the

original EEC Treaties as well did not include the passive freedom to provide services in their wording. It was not until 1984 that the Court ruled this in its judgment regarding *Luisi and Carbone*. Although the terms used in the contracts cannot be transferred to the Association Agreement, nevertheless, it offers a "*dynamic interpretation*". In the view of the ECJ, the purpose of the transfer of the freedom to provide services from the TFEU was to establish a purposeful identity of the two treaties. The Association Agreement and the Additional Protocol, as stated in several court decisions, would pursue purely commercial purposes. By contrast, the EU's founding treaties would not pursue a purely economic purpose. A transfer could therefore not take place. After the Second World War, not only economic goals but increasingly the goal of securing peace in Europe were in the foreground. However, it is very questionable whether the superficial cause of securing of peace has not now developed into a purely economic alliance and is being further developed. If one looks at the preamble of the TFEU, one can deduct from this that more economic interests are in the foreground than, for example, social concerns. The objective of the Association Agreement is "*trade and economic relations*", which is supposed to improve living standards in Turkey. The main objective of the Association Agreement, the customs union, is already existing since 1996. Comparability cannot be rejected because of the wider content of the EU Treaties. The Association Agreement and the Additional Protocol serve as preparation for the accession of Turkey to the EU. It is impossible that back then the parties could have thought of every little part what would have today be important. Also, the intention of the Association Agreement cannot be to introduce a general freedom of movement, such as Article 21 TFEU. The Court considers that the concept of freedom to provide services should be subsumed under Article 41 (1) of the Additional Protocol. Service providers can therefore rely on it before national courts and assert rights in conjunction with other standards. Nevertheless, the Court continues to consider that the concept of passive freedom to provide services does not fall within Article 41 (1) of the Additional Protocol. This is surprising when one considers that the freedom to provide services is the standard case.

It seems more a political than a legal decision to decide whether the passive freedom to provide services can be transferred to Article 41 (1) of the Additional Protocol. The Federal Government of Germany does not want to reveal its own opinion on this topic. On a small request from the FDP (*Free Democratic Party*) Group in 2007, the government referred only to the competence of the European Commission and its current examination of whether adjustments to Regulation 539/2001 were necessary. After a very positive verdict was pronounced in another case (*Soysal and Savatli*, ECJ, C- 228/06), the Federal Ministry of the Interior had even blocked access to the website "Alien Law for the Police" (www.westphala-stoppa.de), because they believed that the visa exemption was not only just for long-distance drivers but also other groups of service providers and service recipients. Why such a censorship was made is very questionable. The question of why Member States are so sensitive to such a case law and whether the ECJ ruling was more a political than a legal decision remains in the air. For me as a Turkish citizen, born in Germany, it is rather a disappointing judgment. Previous judgments were always rated and accepted by the press as very positive. The verdict in the *Demirkan* case, however, is perceived by the Turkish and German media as very negative.