



MASTERS THESIS

Under the supervision of

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**“TURKISH DELIGHT? A CLOSER EXAMINATION OF
THE STANDSTILL CLAUSE AND THE PROHIBITION
OF DISCRIMINATION IN THE EEC-TURKEY
ASSOCIATION AGREEMENT”**

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I335452

6 September 2010

27,690 words

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List of abbreviations

AA	Association Agreement
AG	Advocate General
AP	Additional Protocol
Commission	European Commission
Court	European Court of Justice
EC	Treaty establishing the European Community (Consolidated version of 2002)
EEC (1957)	Treaty establishing the European Economic Community
ECJ	European Court of Justice
EU	European Union
OJ	Official Journal
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

CHAPTER 1: INTRODUCTION

1 The Ankara Acquis – content, purpose and development

In 1963, the European Economic Community, which is now the European Union, signed an Association Agreement¹ with the Republic of Turkey.² This Association Agreement (which will be referred to as AA) sought to steadily strengthen the commercial and economic relations between Turkey and the European Economic Community.³ It also aimed to decrease the economic differences between these two parties in order to facilitate at a later stage Turkey's accession to the Community.⁴ The AA, which for its far-reaching implications is surprisingly unknown, was later in the context of the steady strengthening of relations supplemented by several documents. Among these were notably the Additional Protocol (AP)⁵, which was signed in 1970 and entered into force in 1973, and Decision 1/80⁶, which was signed in 1980 and entered into force in the same year.

The AP covered several important economic freedoms, among which prominently the free movement of goods. It also awarded Turkish citizens with rights concerning the movement of persons, upon which this research focuses and which includes rights concerning employment, establishment,

¹ Agreement establishing an Association between the European Economic Community and Turkey, approved and confirmed by Council Decision 64/732/EEC of 23 December 1972 (OJ 1973 C 113). See for a general discussion: Staples (1999).

² For a succinct overview of the Association Agreement, its development, content and context, see Lenski (2003), pp. 78-87.

³ Article 2 AA.

⁴ Preamble to the AA.

⁵ Additional Protocol, approved by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C 113).

⁶ Decision No 1/80 of 19 September 1980 on the development of the Association.

the provision of services and possibly the reception of services.⁷ Articles 41 and 42 AP regulate the right to establishment, the provision of services and, depending on the interpretation, the reception of services by Turkish nationals.

The AP also provides rights and rules for workers (Articles 36 to 40), but as far as this group of migrants is concerned, it is more common to refer to Decision 1/80. This Decision deals in its second chapter specifically with employment and the free movement of Turkish workers. For example, Article 6 of Decision 1/80 allows for the ever increasing rights of Turkish workers the longer they are legally employed in a Member State. Article 7 allows for their family members to take up employment and Article 9 guarantees the educational rights of their children.

Together, the AA, the AP, Decision 1/80 and the case law inspired by these documents will be referred to as the ‘Association Acquis’ or the ‘Ankara Acquis’.⁸ They are binding on all parties concerned, meaning that they impose obligations on the Turkish Republic as well as both the institutions of the European Union and its Member States.⁹

Although EU-Turkey relations have seen some turbulence since the drafting of the Association Acquis in 1963, the intention to move towards Turkish accession to the European Union was reinforced when Turkey submitted its membership application on April 14th 1987.¹⁰ However, twenty-three years later, Turkey is still no Member of the European Union and the Ankara Acquis remains one of the most important legal bases for EU-Turkey relations. It is in this light not entirely surprising that the Acquis should be a

⁷ An example of the reception of services could be a person traveling to another Member State in order to receive medical treatment. In the case of the Association Acquis, it is generally referred to Turkish tourists.

⁸ In doing so, I have been inspired by the approach of Tezcan/Idriz, 2009.

⁹ Article 216(2) TFEU.

¹⁰ EurActiv, ‘EU-Turkey Relations’, available at <http://www.euractiv.com/en/enlargement/eu-turkey-relations/article-129678>.

matter of some political sensitivity on both sides.

The AA and its supplementing documents have led to a string of case law starting with the Court's judgment in *Demirel*, some two years after the Turkish application for membership.¹¹ Mrs. Demirel was to be expelled from German territory after joining her husband there on a visitor visa rather than a visa for family reunification. Apparently, the problem was that her husband had entered Germany for the purposes of family reunification himself. The German laws prescribed in this case that Mrs. Demirel could only validly enter Germany for family reunification once her husband had lived there continuously and lawfully for eight years, a condition which he did not meet.

Mrs. Demirel invoked Article 12 AA, which states that the Contracting Parties will be guided by the free movement rights laid down in the EC Treaty.¹² This refers specifically to the free movement principles that form the core of the European Internal market and are, as far as the free movement of persons is concerned, currently laid down in Articles 45, 49 and 56 TFEU.¹³ Within the context of these free movement rights, she argued, expulsion on these grounds would not be possible. The German Verwaltungsgericht proceeded to ask the ECJ whether Article 12 AA had direct effect, which would mean that Mrs. Demirel could invoke it directly before the national courts. The Court determined that Article 12 AA had no direct effect, but it did provide room for further preliminary questions by stating that it had jurisdiction to rule on matters concerning the Ankara Acquis.

In some of the judgments that followed this case, the Court has laid down

¹¹ Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719.

¹² Treaty establishing the European Community (consolidated text of 24 December 2002) *OJ C* 325/1.

¹³ Consolidated version of the Treaty on the Functioning of the European Union (9 May 2008) *OJ C* 115/47. Before the entering into force of that Treaty, these provisions have been laid down in Articles 39, 43 and 49 EC.

some important ground rules.¹⁴ While the Court found in *Demirel* that Article 12 AA lacks direct effect, it determined in the Case *Bozkurt* that the Ankara Acquis seeks “to go one stage further” towards securing freedom of movement, guided by the fundamental freedoms, indicating the free movements rights found in the TFEU. It follows from the Court’s reasoning in *Bozkurt* that any principles recognised in the context of the fundamental freedoms must apply as much as possible also to Turkish citizens making use of their free movement rights under the Association Acquis.¹⁵

However, the Court has also ruled that rights of EU citizens cannot be completely transposed on Turkish migrants. For instance, whether and under which conditions a Turkish citizen may enter the territory of a Member State and seek employment there remains in principle at the discretion of the EU Member States.¹⁶ Furthermore, Turkish nationals, having obtained the right to enter one Member State, cannot move freely within the EU but are limited to the territory of the Member State that has admitted them.¹⁷

2 The standstill and non-discrimination provisions

In the Court’s case law, some attention has also been given to two sets of provisions that arguably lie at the core of the goal to gradually increase the rights of Turkish migrants and to help secure the steady strengthening of

¹⁴ Consider *Theele* (2005) and *Fehrenbacher* (2008). The latter argues that the Court’s case law has expanded the scope of especially Decision 1/80.

¹⁵ Case C-434/93, *Ahmet Bozkurt v. Staatssecretaris van Justitie*, [1995] ECR I-1475, Para 20. The *Bozkurt* judgment only referred to workers, but it may be assumed that it applies equally to the self-employed. See also Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301; Van der Mei (2009), p. 367.

¹⁶ Case C-36/96, *Günaydin v. Freistaat Bejern*, [1997] ECR I-5143, Para. 23. Note, however, the qualifications in Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031 and Case C-16/05, *Tum and Dari*, [2007] ECR I-7415, described in detail in Tezcan/Idriz (2009), pp. 1627-8.

¹⁷ Case C-171/95, *Tetik v. Land Berlin*, [1997] ECR I-329, Para. 29 .

relations between Turkey and the EU.¹⁸

The first set of provisions concerns two standstill clauses. Having given certain privileges to Turkish citizens, Member States may not limit their effect at a later stage by subjecting them to new restrictions. This would obviously thwart the gradual approaching of the Contracting Parties. For this reason, the drafters of the Acquis have inserted standstill clauses, which amount essentially to a duty not to act.¹⁹ Legislation must be frozen at the entering into force of the Association Acquis in the sense that no new restrictions may be introduced after this point.

The standstill clauses are laid down in the AP and Decision 1/80 depending on the group of migrants concerned. With regard to establishment or the provision of services, the standstill clause is laid down in Article 41(1) AP, which states:

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

This provision is supplemented by Article 41(2) AP, which allows the Contracting Parties to progressively abolish any restrictions on the freedom of establishment and the freedom to provide services. Until now, however, this possibility has not been used.²⁰

¹⁸ Case C-192/89, *Sevince v. Staatssecretaris van Justitie*, [1990] ECR I-3461, Para. 20; Case C-37/98, *Savas*, [2000] ECR I-2927, Paras. 52-3; Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Paras. 77-8; Case C-16/05, *Tum and Dari*, [2007] ECR I-7415, Para. 61; Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 66.

¹⁹ Case C-37/98, *Savas*, [2000] ECR I-2927, Para. 47.

²⁰ Case C-37/98, *Savas*, [2000] ECR I-2927, Para. 15 and Groenendijk and Guild (2010), p. 12.

Where workers are concerned, the relevant provision is Article of 13 Decision 1/80, which reads as follows:

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

Although the two standstill provisions concern different groups of migrants and differ slightly in their wording, the Court has determined that they are equivalent and have the same purpose, and must for that reason be interpreted in the same manner.²¹

The second set of provisions deals with discrimination. The Association Acquis provides that there should be no room for the discrimination of Turkish citizens on the basis of their nationality. This would put them at a significant disadvantage compared to European citizens, thus contradicting the ideals pursued by the EU.²² The Ankara Acquis contains two discrimination prohibitions, the first of which was already laid down in the AA in 1963. It concerns a general non-discrimination right on the basis of nationality in accordance with the prohibition of discrimination as laid down for EU citizens in Article 18 TFEU (formerly Article 12 EC). This right, which is contained in Article 9 AA, reads as follows:

“The Contracting Parties recognise that within the scope of this Agreement and without prejudice to any special provisions which

²¹ Case C-37/98, *Savas*, [2000] ECR I-2927, Para. 50 and Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Paras. 70-71.

²² See the preamble to the AA.

may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community [now Article 18 TFEU and formerly Article 12 EC].”

Article 9 AA is supplemented by detailed rules which are laid down in the protocols and decisions pursuant to the Agreement. One of those rules is the non-discrimination right provided in Article 10 of Decision 1/80. This provision is specifically directed at Turkish workers and reads as follows:

“-The Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers.

- Subject to the application of Articles 6 and 7, the Turkish workers referred to in paragraph 1 and members of their families shall be entitled, on the same footing as Community workers, to assistance from the employment services in their search for employment.”

Next to the general and the employment-related non-discrimination rights, the Ankara Acquis contains a prohibition of what I will refer to as reverse discrimination. The prohibition of reverse discrimination can be found in Article 59 AP:

“In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one

another pursuant to the Treaty establishing the Community”.

Together, these principles mean that Turkish citizens may not be subjected to restrictions which have been introduced since the entering into force of the Ankara Acquis. They may not be discriminated against on the basis of their nationality, but the prohibition of reverse discrimination entails that neither may they receive more favourable treatment than EU citizens.

This can lead to some theoretical problems. What happens when a new restriction is introduced for EU and Turkish citizens alike? Does the standstill clause prescribe that the restriction be disregarded? Or, will the restriction apply nevertheless because disregarding it would create a situation that is more favourable to Turkish nationals than for the nationals of EU Member States? Finally, if a new restriction is introduced only for Turkish citizens, should they invoke the standstill clause, the non-discrimination right or both?

3 Introduction to the case law

It is important to realise that the principles outlined above are more than just academically relevant. Instead, they strike at the very core of immigration policies across the European Union. Consider for instance the Dutch initiative, inspired by an increasingly restrictive national immigration debate, to impose an integration test for third country nationals wishing to receive a residence permit for the Netherlands.²³ Dutch nationals are for obvious reasons exempted from the requirement of passing an integration test, and in accordance with European law, other EU citizens are relieved

²³ Wet van 30 november 2006, houdende regels inzake inburgering in de Nederlandse samenleving (Wet inburgering). Consider also Oosterom-Staples (2004).

from the obligation as well.²⁴

This law on integration has been criticised widely for violating both the standstill and the non-discrimination provisions.²⁵ Critics of the law argue, first, that the prohibition of discrimination is breached because the integration test applies to Turkish citizens wishing to receive a residence permit, but not to EU citizens. Furthermore, opponents see a violation of the standstill clause, as the integration obligation did not exist at the introduction of the Association Acquis and therefore imposes a new restriction on Turkish migrants. On the 12th of August 2010, the Dutch district court of Rotterdam ruled in two cases that the integration requirement violates the standstill clause contained in Article 13 of Decision 1/80 as well as the non-discrimination rights in Article 10 of Decision 1/80 and Article 9 AA.²⁶

The standstill and non-discrimination provisions have also led to some noteworthy judgments by the European Court of Justice which demonstrate how they are applied in practice. Interesting in particular are the Court's judgments in *Soysal*²⁷, *Sahin*²⁸ and *Commission v. the Netherlands*²⁹ – none of which, remarkably, were preceded by an Advocate General's legal

²⁴ This is acknowledged in Article 4(2)(a) and (b) of the law on integration. It can be noted here that EU citizens do have to pass such an integration test upon applying for the Dutch nationality.

²⁵ Landelijk overleg Minderheden (LOM), 'Reactie op het nieuwe inburgering(s)stelsel,' available at <http://www.degeschiedenisvaninburgering.nl/beleid/bel166.html>. More cautiously: Oosterom-Staples (2004), pp. 113-115 and Oosterom-Staples and Woltjer (2009), p. 83 ff.

²⁶ LJN BN3934, Rechtbank Rotterdam, Awb 08/4934, 12 August 2010; LJN BN3935, Rechtbank Rotterdam, Awb 09/3814, 12 August 2010.

²⁷ Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031.

²⁸ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000.

²⁹ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000.

opinion.³⁰

These three Judgments are important because before them, the standstill, discrimination and reverse discrimination principles have never really been closely considered in relation to each other. Considering their practical significance and the theoretical problems that the coexistence of the three principles could create, it becomes very interesting how the Court deals with them. These judgments are all very recent, having been decided in the past two years. Since they are arguably of great influence for the interpretation of the standstill and non-discrimination provisions, it is worth examining them in some detail here, noting that they will be discussed in much more detail in subsequent chapters.

3.1 Soysal

The Case *Soysal* was submitted before the Court in May 2006 by the German *Oberverwaltungsgericht*. It deals with a visa requirement for Turkish lorry drivers wishing to provide services consisting in the international transport of goods by road.³¹ It must be noted that this requirement did not exist at the entering into force of the Association Acquis. The applicants before the national court, Mr. Soysal and Mr. Savlati, were both Turkish truck drivers. They resided in Turkey and worked for a Turkish company for which they transported goods to and from Germany. When their visa applications for the purposes of providing services in Germany were rejected, making it impossible for them to carry out their jobs, they turned to the *Verwaltungsgericht* in Berlin. On the basis of the standstill provision in Article 41(1) AP, they argued that they were

³⁰ In all three Judgments, the Court decided after hearing the Advocates General to proceed without such a legal opinion. In the case of *Soysal* and *Sahin*, the Advocate General was AG Maduro. In the case of *Commission v. the Netherlands*, it was AG Jääskinen. Interestingly, it has been noted that the Court also only briefly dealt with the arguments of the Member States: Hailbronner (2009), p. 267.

³¹ See for an extensive discussion: Groenendijk and Guild (2010).

entitled to enter Germany without a visa since the visa policy had been newly introduced.

If the Court were to agree with Mr. Soysal and Mr. Savlati, it was believed that this could potentially have far-reaching effects, as it would forbid Germany from introducing any visa policy with regards to Turkish citizens. After all, if no visa policy existed before the entering into force of the Ankara Acquis, the standstill clause prohibits any further restrictions by means of such a policy. For this reason, several Member States as well as the German referring court expressed the fear that to interpret the new German visa policy as a violation of the standstill provision would obstruct the legislature's general legislative power.³²

The Court did not accept this argument. It established first that the two standstill provisions prohibit generally the introduction of any new measure having the object or effect of subjecting Turkish citizens to more restrictive conditions than those which applied at the relevant date. However, it did determine that, even if the standstill clause applied, it did not forbid "the adoption of rules that apply in the same manner to Turkish nationals and to Community nationals".³³ In short: if no visa requirement existed for Turkish citizens before the entering into force of the Turkish Acquis, it cannot be introduced thereafter unless a similar policy also applies to EU citizens.

3.2 Sahin

The *Soysal* Judgment was followed some seven months later by the Judgment in *Sahin*³⁴. This case was prompted by preliminary questions

³² Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031, Para. 60. It may be noted that this judgment has also been important for other reasons, which have been set out very comprehensively in Peers (2009). Consider also Groenendijk and Guild (2010).

³³ Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031, Para. 61.

³⁴ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000.

asked by the Dutch *Raad van State* (Council of State). It concerns the Dutch practice of charging administrative fees for the issuing of residence permits to third country nationals. The facts of the case show that Mr. Sahin had entered the Netherlands legally as the husband of a Dutch citizen. His request for renewal of his residence permit was refused because he had not paid the administrative fee of € 169 required by Dutch legislation for the handling of this request. Mr. Sahin invoked the standstill clause in Article 13 of Decision 1/80, maintaining that this excessive fee constituted a new restriction that had not been present in the Dutch laws in force in 1980.

Although it does not appear from the case that Mr. Sahin made any claim concerning the discrimination provisions, the *Raad van State* did request clarity on the relationship between the standstill clause and the prohibition of reverse discrimination. In its third preliminary question, it asked whether these provisions, read in conjunction, should mean in this case that the amount of money to be paid by Turkish citizens for the grant or extension of a residence permit could not exceed the amount of money to be paid by EU citizens for the issue of similar residence documents.³⁵

The Court did not exactly follow the questions asked by the *Raad van State*. In the first part of its judgment concerning Article 13 of Decision 1/80, it reinforced the *Soysal* Case. Stating that the standstill clause forbids the introduction of any new measure with the object or effect of imposing more restrictive conditions on Turkish citizens, it determined that the administrative fees must be considered new. It repeated that the standstill clause does not prohibit totally the creation of measures in so far as they apply equally to Turkish and EU nationals.³⁶ This led the Court to conclude that the imposition of administrative fees on Turkish citizens does not by

³⁵ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Para. 67.

³⁶ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Para. 67.

definition violate the standstill clause, as EU citizens are also subjected to such fees.³⁷

In its next paragraph, the Court stated: “Nevertheless, such legislation must not amount to creating a restriction within the meaning of Article 13 of Decision No 1/80.” According to the Court, it follows from that provision when read in conjunction with Article 59 AP that, whereas a Turkish national may “certainly” not be placed in a position more advantageous than that of EU citizens, neither may he be subjected to “new obligations which are disproportionate” compared with those applicable to EU citizens. The Court concluded that, while a measure that applies both to EU and Turkish citizens is not prohibited, it may not amount to the disproportionately less favourable treatment of Turkish nationals. That conclusion is based on the standstill clause in Article 13 of Decision 1/80 and the prohibition of reverse discrimination in Article 59 AP.

3.3 *Commission v. the Netherlands*

The same administrative practice as was examined in *Sahin* has more recently again been assessed in the Case *Commission v. The Netherlands*.³⁸ This is in itself a remarkable case because it is the first infringement procedure commenced by the Commission that is uniquely concerned with the Ankara Acquis.³⁹ The Commission, clearly considering it to be time to take action, challenged the levying of administrative fees by the Dutch government for the issuing or extension of residence permit for non-EU migrants, including Turkish citizens. The issues in this case are therefore quite similar to those in *Sahin*. However, that case only concerned workers, whereas *Commission v. the Netherlands* also deals with the rights of service

³⁷ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Para. 69. See also Article 25(2) of Directive 2004/38/EC.

³⁸ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000.

³⁹ In Case C-465/01, *Commission v. Austria*, [2004], ECR I-8291, the Commission invoked the AA along with several other Association Agreements.

providers and those wishing to make use of the freedom of establishment.

The Commission started proceedings because it found that the imposition of higher charges for these administrative documents violates both the standstill clauses and the non-discrimination provisions contained in the Association Acquis.⁴⁰ In response, the Court applied the *Sahin* Judgment, noting simply that the charges in this case were even higher than in the context of the previous judgment and extended to persons wishing to avail themselves of freedom of establish or freedom to provide services. In line with *Sahin*, the Court examined whether the charges were disproportionate in relation to those imposed on EU citizens. In this context, the Court rejected the Dutch argument that the higher costs for Turkish citizens represent the higher costs borne by the government and found that the fact that the government paid part of the costs itself was not capable of justifying the imposition of higher charges. Neither did it accept the argument that the situations of Turkish and EU citizens were not comparable since the former took no part in the Internal Market, which would mean that the fees would be non-discriminatory.⁴¹ Thus, the Court found that a violation of the Ankara Acquis existed.

As to the non-discrimination provisions of Article 9 AA and Article 10 of Decision 1/80, the Court found a violation of both. Article 10 applied “to the extent to which those charges are applied to Turkish workers or members of their family”, whereas Article 9 applied “in so far as those charges are applied to Turkish nationals wishing to avail themselves of freedom of establishment or freedom to provide services [...], or to members of their family”.⁴² It was therefore concluded that the Dutch administrative fees violated both the standstill clauses, as read in

⁴⁰ Action brought on 16 February 2007, *Commission of the European Communities v Kingdom of the Netherlands* (Case C-92/07).

⁴¹ See also Case C-171/01, *Wählergruppe Gemeinsam*, [2003] ECR I-4301, Para. 78.

⁴² Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 76.

conjunction with the prohibition of reverse discrimination, and the non-discrimination provisions.

4 Research questions

Having briefly introduced the Judgments in *Soysal*, *Sahin* and *Commission v. the Netherlands*, it appears that a development seems to have taken place. Having determined in *Soysal* that new restrictions for Turkish citizens are allowed so long as similar restrictions are also in place for EU citizens, the Court decided in the next two judgments that the standstill and discrimination provisions taken together actually mean that Turkish citizens may not be treated disproportionately less favourably than EU citizens.

This forces some pertinent questions. Most importantly, what do these judgments mean for the interpretation of the standstill and non-discrimination principles and the prohibition of reverse discrimination? How does the court define the nature of the relationship between the standstill and non-discrimination provisions? Can they interact, and if so, how? In so far as a development has taken place in the interpretation of the provisions, does it expand or limit the scope of the Ankara Acquis? And finally, what does this tell us about the legal position of Turkish citizens in the EU?

5 Structure of the research

Although these questions are raised due to a development that seems to have taken place in recent judgments, it is essential to establish first the Court's approach to the relevant provisions in its earlier case law. Thus, the next chapter will closely examine the two standstill clauses. It seeks especially to answer how broadly or restrictively the Court interprets these clauses and who can benefit from them. The third chapter will discuss the three discrimination provisions separately. As to Article 9 AA, it will focus

on the question whether it has direct effect. In the case of Article 10 of Decision 1/80, it will expand on which persons can benefit from its protection and how far that protection extends. It will also briefly discuss Article 59 AP, which has been the subject of little case law until *Soysal* and will thus be examined in much more detail in later chapters.

Having established the legal context within which the analysis will take place, the next part will delve into some problems in more depth. The fourth chapter seeks to illustrate the legal difficulties that arise in the relationship between the different principles. It presents and analyses two ways in which this relationship has been defined and discusses some of the consequences of these approaches for the interpretation of the different principles. The fifth chapter is devoted to an in-depth discussion of the judgments in *Sahin* and *Commission v. the Netherlands* and considers the implications of these cases for the relationship between the standstill clauses and the discrimination provisions as discussed in the previous chapter. This will be followed in the sixth chapter by an attempt to draw some conclusions as to the influence of the Court's most recent case law on the interrelation between the standstill provision, the principle of non-discrimination and the prohibition of reverse discrimination in order to answer the questions that have inspired this research. Finally, it will seek to map out any practical implications of the Court's treatment of the interrelation between these principles.

CHAPTER 2: THE STANDSTILL PROVISIONS

1 Introduction

As stated, the Ankara Acquis contains two standstill provisions, which forbid both parties from introducing between themselves any restrictions that did not exist at the entering into force of that Acquis. The first provision is Article 13 of Decision 1/80, which prohibits the introduction of 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”. For example, depending on the circumstances of the case, the introduction of a work permit requirement for Turkish citizens where there was no such requirement in 1980, the time of signature of Decision 1/80, would violate the standstill clause.⁴³

Secondly, Article 41(1) AP obliges the Contracting Parties to refrain from introducing any new restrictions “on the freedom of establishment and the freedom to provide services”. An example of such a restriction could be a visa requirement for Turkish citizens performing services in the EU.⁴⁴ Although both clauses are reciprocal – that is to say: both parties are equally obliged to refrain from imposing restrictions on the other party’s citizens on their territory – the case law so far has focussed only on the obligation on the part of the EU Member States.

It has been established in this case law that both standstill clauses have direct effect.⁴⁵ This means that they can be invoked directly before and will

⁴³ Consider Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301. Of course, one must consider the specific circumstances of the case.

⁴⁴ Consider Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031. Of course, one must consider the specific circumstances of the case.

⁴⁵ For Article 13 Decision 1/80: Case C-192/89, *Sevince v. Staatssecretaris van Justitie*, [1990] ECR I-3461. For Article 41(1) AP: Case C-37/98, *Savas*, [2000] ECR I-2927.

be applied by the national courts. According to the Court, they are an indispensable means to achieve the gradual elimination of obstacles to the freedom of movement of Turkish citizens.⁴⁶ However, they do not provide any rights as such. The Court has determined in the Case *Savas* that the standstill clause “is not in itself capable of conferring upon a Turkish national the benefit of the right of establishment and the right of residence which is its corollary”.⁴⁷ In fact, the provisions work in an entirely different manner, which the Court has first made clear in the Case *Tum and Darı*.⁴⁸

A standstill clause, according to this judgment, does not operate as a substantive rule, but as a ‘quasi-procedural’ rule, which determines *ratione temporis* the relevant provisions of a Member State’s legislation.⁴⁹ In practical terms, the rules that will apply to Turkish citizens who fall within the scope of the standstill clauses are those that were in force the year 1980 for Decision 1/80 and the year 1973 for the AP, or, alternatively, the date of accession of the Member State to the EU. It follows that Turkish citizens inevitably face a different legal situation depending on whose territory they reside on.

It is interesting to know that standstill clauses are actually quite rare in European law. In fact, I am aware of only three. One well-known example is Article 108(3) TFEU (previously Article 88(3) EC), which prohibits the implementation of State Aid before it has been approved by the Commission.⁵⁰ Until such approval, Member States must refrain from

⁴⁶ Supra 13.

⁴⁷ Case C-37/98, *Savas*, [2000] ECR I-2927, para. 64.

⁴⁸ Case C-16/05, *Tum and Darı*, [2007] ECR I-7415.

⁴⁹ Case C-16/05, *Tum and Darı*, [2007] ECR I-7415, Para.55.

⁵⁰ Article 108(3) TFEU reads as follows: “The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. *The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*” (Highlighting by the author).

taking action. Another example is Article 17(6) of the 6th VAT Directive,⁵¹ which concerns a transitory rule for the categories of expenditure that are eligible for a deduction of value added tax. Until the Council has determined these categories, “Member States may retain all the exclusions provided for under their national laws”, in so far as these exclusions already existed at the moment the VAT Directive came into force.⁵² Also, the former EEC-Treaty included a standstill clause in Article 53, which read as follows: “Member States shall not, subject to the provisions of this Treaty, introduce any new restrictions on the establishment in their territories of nationals of other Member States.” This provision was, however, removed by the Treaty of Amsterdam in 1997 and has to my knowledge not given rise to any case law.

Having discussed generally what the standstill clauses are, it becomes interesting to examine who and what they cover.

2 The scope of the standstill clauses

2.1 The personal scope

The personal scope of a provision determines which persons or groups are covered by it. It has already been shown that Decision 1/80 applies in principle to workers. The definition of worker follows the definition that has been given to this concept in European law.⁵³ That is to say, any person who, for a certain period of time, performs services for and under the direction of another person and receives remuneration in return.⁵⁴ Such

⁵¹ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, *OJ L* 145/1. An interesting judgment in this context is Case C-40/00, *Commission v. France*, [2001] ECR I-4539, notably Paras. 17-9.

⁵² An interesting Judgment on this matter is Case C-40/00, *Commission v. France*, [2001] ECR I-4539.

⁵³ Case C-188/00, *Kurz*, [2002] ECR I-10691, Para. 32.

⁵⁴ Case C-43/99, *Leclere and Deaconescu*, [2001] ECR I-4265, Para. 55; Kapteyn e.a. (2003), p. 578.

services must be real and genuine, to the exclusion of activities on such a small scale as to be purely marginal and ancillary.⁵⁵

The Court has determined in the Case *Abatay*⁵⁶ that, in order for a Turkish citizen to fall within the personal scope of Article 13 of Decision 1/80, he or she must have a certain link with the labour market of the relevant Member State. This means that the citizen must have stayed in the Member State long enough to be able to gradually integrate there.⁵⁷ Thus, the standstill provision cannot be invoked by truck drivers of Turkish origin who normally live with their family in Turkey but work for a Turkish company in the international transport of goods and for that reason have several short stays on the territory of a Member State. These persons do not have the intention of becoming part of the labour market of the Member State on whose territory they stay and fall outside the scope of Article 13 of Decision 1/80.

The AP applies to service providers and those seeking to establish themselves in a Member State. There is currently still a discussion whether it would also apply to the recipients of services, although the literature seems to be supportive of the extension to service recipients.⁵⁸

In general, it appears that a Turkish citizen would fall within the personal scope of the standstill clause quite quickly so long as he or she satisfies the definition of ‘worker’ as applicable to EU citizens. The limitation introduced by the Court in *Abatay* applied to a very specific situation where

⁵⁵ Case C-14/09, *Genc*, [2010] ECR I-0000, Para. 19, referring to Case 66/85 *Lawrie-Blum* [1986] ECR 2121, Paras. 16 and 17.

⁵⁶ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301.

⁵⁷ The concept of integration does not, however, depend on formal integration requirements imposed by the Member States.

⁵⁸ Dienelt (2009a), p. 2; Groenendijk and Guild (2010), p. 19; Gutmann (2008), point 8. Contrary: Peers (2009), p. 633; Mr. Hirsch-Ballin on behalf of the Netherlands government in Tweede Kamer, ‘Spoeddebat over een uitspraak van het Europese Hof op grond waarvan Turkse dienstverleners zonder visum naar Nederland kunnen komen’, 10 March 2009 (TK 61-4911), p. 61-4919. For an interesting account, See Dienelt (2009b).

the Turkish citizen could be shown to have nearly no ties with the Member State whatsoever. The Court has also determined that, where a Turkish citizen falls within the personal scope of either of the standstill clauses, this applies also to his or her family members.⁵⁹

2.2 The material scope

The scope *ratione materiae* of a provision determines which types of situations are covered by it. It is exactly this material scope that leads to most interpretative problems, because questions arise as to the delimitation between the standstill clauses and other provisions in the Ankara Acquis. There are no indications in the text of the provisions that expressly limit their scope. In fact, according to the Court in the judgment *Tum and Dari*, the standstill clauses apply to any new measure, regardless of its intent.⁶⁰ It has recently been established that the standstill provision applies both to the treatment of Turkish citizens once on Member State territory and to conditions concerning the first admission to that territory.⁶¹ Similarly, it covers measures regardless of whether they are procedural or substantive.⁶² However, five limitations can be distinguished – although not all have been accepted by the Court.

For a matter to be considered a breach of the standstill clause, it must naturally first fall within the scope of the Ankara Acquis. Second, the Court has stated that the standstill provision does not protect the rights of Turkish nationals when these rights are already fully covered by Article 6 of

⁵⁹ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Para. 82.

⁶⁰ Case C-16/05, *Tum and Dari*, [2007] ECR I-7415, Para. 61: “It must be added that Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an *absolute prohibition* on national authorities from creating *any new obstacle* to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the Member States and the Republic of Turkey” (highlighting by author).

⁶¹ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 49.

⁶² Case C-16/05, *Tum and Dari*, [2007] ECR I-7415, Para. 47.

Decision 1/80, which concerns the right to employment of Turkish migrants.⁶³ This could be taken to mean that Turkish citizens who fall within the scope of Article 6 of Decision 1/80 cannot at all rely on the standstill provision,⁶⁴ but the Court has rejected this approach in the case *Sahin*.⁶⁵

Third, it has been suggested by the German government that a *de minimis* approach can and should be taken,⁶⁶ which would entail that new restrictions that are limited in scope do not actually violate the standstill clauses. It may be noted that none of the legal documents relating to the Association provide an explicit basis for *de minimis*. The Court has not expressly discussed this proposition and there is no indication in its case law that it implicitly agrees.

Fourth, the upper limits of the standstill clauses are formed by the reverse discrimination principle in Article 59 AP, which prohibits the more favourable treatment of Turkish migrants as opposed to European citizens. The question arises, finally, how the Court delimits the relative scopes of the standstill provision and the prohibition of discrimination, whereby Turkish migrants may not receive less favourable treatment than EU citizens in several situations. It is these last three points that lead to the interpretative problems that form the core of this research and will be returned to in subsequent chapters.

⁶³ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Para. 81.

⁶⁴ The meaning of the Court's statement was in any case open to different interpretations. See, for example, the Netherlands Government's written submissions to the European Court of Justice in Case C-242/06 *Sahin*, 25 september 2006, Paras. 39-42. See also the Netherlands Government's statement of defence in Case C-92/07 *Commission v. the Netherlands*, 2 May 2007, Para. 43.

⁶⁵ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Para. 52.

⁶⁶ This can be inferred from the German Government's written submissions to the European Court of Justice in Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, Para. 47.

3 Elements of the standstill clauses

Considering the texts of the standstill clauses, it would seem that a violation of the standstill obligation takes place when the three cumulative conditions common to both provisions are met. Consider Article 41(1) AP, which reads: “*The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.*” Similarly, Article 13 of Decision 1/80 provides that “*The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories*”.

Looking purely at the text of these provisions, it can be established that they have three elements in common: There must be a restriction, the restriction must be considered to be new, and it must be introduced. These are cumulative elements, and the way in which they are defined by the ECJ is very important to the rights of Turkish citizens. For example, the sooner a restriction is deemed to exist, the sooner a violation of the standstill clause will be established. Similarly, if the term ‘new’ were to be interpreted in a very narrow manner, it is more likely that one of the elements is not met and the standstill clause cannot be relied on. It thus becomes important to examine in some detail the way in which the Court has dealt with these elements before the Judgments in *Soysal*, *Sahin* and *Commission v. the Netherlands*.

3.1 ‘Restriction’

The first relevant element of the two standstill clauses is that of a restriction. Before entering into a discussion on the exact meaning of the term ‘restriction’ in the Ankara Acquis, it is interesting to note that this concept exists also within the context of the free movement of persons

within the European Internal Market.⁶⁷ In the context of the Internal Market, a distinction is generally made between three types of violation of the free movement of persons. The first is direct discrimination based on nationality, which prohibits any rule that in law and effect creates less favourable situations for those of another nationality. The second is indirect discrimination based on nationality, which means that a seemingly nationality-neutral rule, such as a language requirement, hinders the use of a free movement right because it creates a factually less favourable situation for citizens of other Member States.

The third type is of particular relevance here. It concerns the hindering of market access, or non-discrimination.⁶⁸ This possible violation is far broader than the previous two in the sense that it prohibits any national rule that restricts or hinders the use of free movement regardless of any form of discrimination. The possibility to determine the existence of a restriction to market access is comparatively recent. As early as 1974,⁶⁹ tendencies can be seen in the Court's case law to take into account market access, but this development was far from consistent. For instance, in 1981 a case was decided which determined that a genuinely non-discriminatory measure did not breach the free movement of services.⁷⁰

As far as services are concerned, the case that cemented the concept of non-discriminatory restrictions to market access is *Säger*, which determined in 1991 that the free movement of services prohibits not only discrimination, but also "any restriction even if it applies without distinction to national providers of services and to those of other Member State, when it is liable

⁶⁷ The free movement of persons includes the free movement of workers, the free movement of services and the freedom of establishment. These rights are laid down in Articles 45, 49 and 56 TFEU.

⁶⁸ See Barnard (2007), pp. 293-4 and pp. 373-8.

⁶⁹ Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] ECR 1299, Paras. 10-1.

⁷⁰ One may consider, in the area of services, Case 52/79 *Debauve*, [1981] ECR 833.

to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services”.⁷¹

Similar developments have taken place in the case of the free movement of workers within the Internal Market. Here, the seminal case is *Bosman*, a case concerning football players in which a rule that could “directly affect players’ access to the employment market in other Member States” constituted an “obstacle to the free movement of workers”.⁷² The Court has determined, however, that such a restriction must be substantial. This means in practice that a measure whose effect is “too uncertain and indirect” does not constitute a violation of the free movement principles.⁷³

It seems, then, that in the case of the free movement of persons within the European Internal Market, the concept of ‘restriction’ was really developed in case law during the 1990’s. Since the *Säger* and *Bosman* Judgments, the Court has been far more willing to adopt an approach which does not require any discrimination but simply focuses on the existence of a restriction to market access. It is interesting to note that any early developments in this direction occurred after the initial standstill clause in the AP was signed.⁷⁴

In the context of the free movement of persons, the concept of a restriction is, however, limited to an extent. In the case of the free movement of services, the restriction must be liable to prohibit or otherwise impede the activities of a service provider, whereas the restriction in the case of the free movement of workers may not be too uncertain or indirect.

The question arises how the Court defines the term ‘restriction’ within the

⁷¹ Case C-76/90, *Säger*, [1991] ECR I-4221, Para. 12.

⁷² Case 415/93, *Union royale belge des sociétés de football association and others / Bosman and others*, [1995] ECR I-4921, Paras. 103-4.

⁷³ Case C-190/98, *Graf*, [2002] ECR I-493, Paras. 24-5.

⁷⁴ NB. this does not suggest any causal effect, but simply refers to a chronological fact.

Ankara Acquis. Is its approach similar to that in the context of the Internal Market or does the Court rather adopt a broader or more restrictive definition? Being one of three cumulative conditions of the standstill clause, this definition has a direct impact on the rights of Turkish citizens and the policies of Member States.

Naturally, different parties have suggested both broad and narrow interpretations, depending on whether they wish to extend or limit the impact of the Association Acquis. The main actors are the European Commission and the German government, of whom the first advocates that the existence of a restriction must be assumed quickly, whereas the latter supports a far more narrow interpretation of the term.

3.1.1 In defence of a broad interpretation

In the view of the European Commission, it is clear at a first sight that the term 'restriction' should be interpreted broadly, meaning that its existence is assumed quickly.⁷⁵ The Commission points to the Case *Abatay*, where the Court states that Article 13 of Decision 1/80 “prohibits national authorities from making more stringent the conditions on access to employment for Turkish nationals through the introduction of fresh measures restricting such access”.⁷⁶ Whilst this could be a quite neutral statement without any implication for the definition of the term ‘restriction’, the Commission clearly finds that the Court is referring to the introduction of *any* fresh measure.

The Commission furthermore stresses that the Court does not distinguish in its case law between 'acceptable' and 'not acceptable' restrictions.⁷⁷ As Article 13 of Decision 1/80 and Article 41(1) AP must be interpreted in

⁷⁵ European Commission's written submissions to the European Court of Justice in Case C-242/06 Sahin, 22 September 2006, Para 51.

⁷⁶ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Para. 80.

⁷⁷ European Commission's written observations to the European Court of Justice in Case C-242/06 Sahin, 22 September 2006, Para 51.

much the same manner, a similarly broad approach should be used for measures relating to the establishment of Turkish migrants, Turkish service providers and possibly also service recipients.⁷⁸

This broad definition appears to be supported by the texts of both standstill provisions. According to Article 13 of Decision 1/80, the EU Member States and Turkey “may not introduce new restrictions”, and Article 41(1) AP states in even stronger terms that the Contracting Parties “shall refrain from introducing between themselves *any* new restrictions”.⁷⁹ Since both standstill provisions are equivalent,⁸⁰ it would be logical to assume that the more specific – and coincidentally stronger – terms of the AP prevail over the more general terms of Decision 1/80. Furthermore, these prohibitions are not qualified by any other provision, so that there is initially no ground for adopting a less inclusive definition.

3.1.2 In defence of a narrow interpretation

In spite of this seemingly straightforward case, the German Government has consistently maintained before the Court that a more cautious definition of 'restriction' is both desirable and correct in the light of the case law. Germany reasons that the standstill provisions of Decision 1/80 and the AP must be interpreted within the context of the law governing the Association.⁸¹ As Article 13 of Decision 1/80 aims towards the gradual integration of Turkish migrants into the Member States' labour markets, Germany asserts that a measure cannot be a restriction in the sense of Article 13 if it does not actually influence the access to this market. The logical consequence of this, according to Germany, is that a restriction

⁷⁸ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Paras. 70-71. See also Dienelt (2009a), p. 2.

⁷⁹ Italicized by author.

⁸⁰ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Paras. 70-71.

⁸¹ German Government's written observations to the European Court of Justice in Case C-92/07, *Commission v. The Netherlands*, 12 December 2007, Paras. 5 ff, in case C-242/06 *Sahin*, 18 September 2006, Paras. 22 ff and in Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031, Paras. 42 ff.

occurs only where this access is directly limited ('unmittelbar beschränkt'). In other words: a measure must make access to the labour market impossible or excessively difficult in order to be a restriction within the meaning of Article 13 Decision no.1/80. Again, the same reasoning applies to Article 41(1) AP.⁸²

In support of this line of reasoning, the German government refers to the Court's decision in the Case *Panayotova*⁸³, which concerns the Association Agreement with Bulgaria, Poland and Slovakia.⁸⁴ Although this Agreement contains no standstill provision and the case relates instead to the prohibition of discrimination, Germany finds that the judgment can be applied by analogy.⁸⁵ In *Panayotova*, the Court determined that the discrimination prohibition is only violated when a national measure would strike at the very substance of the non-discrimination rights "by making the exercise of those rights impossible or excessively difficult".⁸⁶ A national measure that does not strike at the very substance of a right cannot then be considered, in the German opinion, to be a relevant 'restriction' in the sense

⁸² See German Government's written observations to the European Court of Justice in Case C-92/07, *Commission v. The Netherlands*, 12 December 2007, Para. 7, referring to Case C-37/98, *Savas*, [2000] ECR I-2927, Para. 50 and Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Para. 71. See for a similar reasoning also the Netherlands Government's written observations to the European Court of Justice in Case C-228/06 *Soysal*, 7 September 2006, Para. 41.

⁸³ Case C-327/02, *Panayotova*, ECR (2004) I-11055, Para. 29.

⁸⁴ The German government specifically refers to the Agreement with Bulgaria: Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, approved by Decision 94/908/EC, ECSC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358/1). The Case *Panayotova* revolves in particular around Article 45(1), which reads as follows: "Each Member State shall grant, from entry into force of the Agreement, for the establishment of Bulgarian companies and nationals and for the operation of Bulgarian companies and nationals established in its territory, a treatment no less favourable than that accorded to its own companies and nationals, save for matters referred to in Annex XVa".

⁸⁵ German Government's intervention in Case C-92/07 *Commission v. the Netherlands*, 12 December 2007, Para. 8.

⁸⁶ Case C-327/02, *Panayotova*, ECR (2004) I-11055, Para. 20.

of the standstill clause.⁸⁷

Whether or not one agrees with this analogy, a valid point can be made for limiting the scope of the term ‘restriction’. After all, it is a very far-reaching commitment to refrain from taking any measures that could be construed as being in any way more restrictive than at the time of the entering into force of the standstill provisions. Member States have in fact already complained before the Court that they are severely restricted in their ability to develop a national immigration policy. So far, they have however been unsuccessful in this regard.⁸⁸

3.1.3 The Court’s interpretation

From its case law regarding the Ankara Acquis, it is quite clear that the Court does not follow the German reasoning. In the case *Savas*, the Court was asked for its opinion in a case concerning two Turkish citizens who had set up a company in the United Kingdom during their (illegal) stay there on an expired tourist visa. The UK administration found that the plaintiffs in the case, Mr. And Mrs. Savas, could no longer legally reside in the UK and should be expelled from it. Mr. and Mrs. Savas invoked both standstill clauses and argued that, on their basis, they were entitled to the protection of an old UK law that allowed tourists to request permission to remain in the UK in order to set up a company there. These facts prompted the referring court to ask several questions about the proper interpretation of the standstill clauses. Although it did not expressly define the term, it is apparent that the Court has considered so far that the existence of a restriction should be assumed quite quickly:

⁸⁷ German Government’s intervention in Case C-92/07 *Commission v. the Netherlands*, 12 December 2007, Para 10.

⁸⁸ Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031, Paras. 60-61. Unfortunately, no opinion has been written on this case. Although the Court has rejected the Member States’ argument, it is still heavily debated. See, for instance, ‘spoeddebat’ of 10 March 2009.

*“It should also be noted that the ‘standstill’ clause in Article 41(1) of the Additional Protocol precludes a Member State from adopting any new measure having the object or effect of making the establishment, and, as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to the Member State concerned”.*⁸⁹

It follows that, contrary to the German Government’s arguments, a restriction can be found in any new measure rather than only measures that make the exercise of rights impossible or excessively difficult. This is a very broad interpretation of the term ‘restriction’. In fact, it is even irrelevant whether the measure intends to create further restrictions, as measures having either the object or the effect (or both) of making the exercise of rights more difficult will lead to an infringement of the standstill clause.

3. 2 'New' restriction

Next to determining that a restriction exists, it must be established that it is also new. Some uncertainty has existed over the exact meaning of the term ‘new’ in the standstill clause. This discussion seemed most important in the Case *Abatay*. The case concerned Turkish truck drivers who were employed by the Turkish subsidiary of a German company. Their work consisted of the international transport of goods between Turkey and Germany, for which they had received work permits that had been valid until September 30th, 1996. However, due to an amendment in German law on the same

⁸⁹ Case C-37/98, *Savas*, [2000] ECR I-2927, Para. 69. The same statement appears in Case C-16/05, *Tum and Dari*, [2007] ECR I-7415, Para. 49.

date, the German administration refused to extend these permits beyond this point.

The plaintiffs, Abatay and Others, argued that no work permit could be required in any case, since such a requirement had not existed at the time of entering into force of Decision 1/80 and this would constitute a violation of the standstill clause. The Bundesanstalt retorted that since the plaintiffs were not legally resident in Germany but rather in Turkey, they could not rely on the standstill clause in Article 13 of Decision 1/80.

In the light of these facts, the referring German court asked three preliminary questions, of which the first is of interest here. In short, it asked whether Article 13 of Decision 1/80 should be interpreted either as a prohibition to lay down new restrictions on the access to the employment market in comparison to the rules applicable on the date when it entered into force or rather in comparison to the time when a worker is first legally resident and employed.

In its submissions to the Court in the Case *Abatay*, The Netherlands argued that a restriction is only ‘new’ when it has been introduced after a Turkish migrant has become part of the Member State’s legal labour market.⁹⁰ The German government reasoned along similar lines.⁹¹ This would mean that a different legal regime would apply to a Turkish citizen depending on the moment that he or she entered the labour market of a Member State. Advocate-General Mischo, interestingly, proposed that restrictions concerning the entry into the territory of a Member State could be

⁹⁰ Among these Member States is the Netherlands, in the Netherlands Government’s intervention in Joined Cases 317/01 and 369/01, *Abatay and others*, 6 February 2002, Para. 18. It states, in short, that Article 13 of Decision 1/80 grants protection in so far as no new measures may be taken that are more restrictive than the measures in force at the time the Turkish worker was admitted to the legal labour market.

⁹¹ The German Government’s written submissions in Joined Cases C-317/01 and C-369/01, *Abatay and others*, 26 January 2002, Paras. 4-6. See also the Netherlands Government’s written submissions to the European Court of Justice in Case C-242/06, *Sahin*, 25 September 2006, Para. 40.

introduced even after 1980, but that “such restrictions cannot affect workers who have already obtained legal employment and a right of residency in the Member State in question at a time which preceded the introduction of these new restrictions.”⁹²

The Court responded in its Judgment by stating that “it cannot be maintained that Article 13 of Decision No 1/80 is only applicable to Turkish nationals already integrated into the employment market of a Member State”.⁹³ The Court concluded that both standstill clauses generally prohibit new restrictions on the right of establishment, the freedom to provide services and freedom of movement for workers “from the date of the entry into force in the host Member State of the legal measure of which those articles are part”.⁹⁴ This means that the definition of the term ‘new’ is related not to the moment a worker entered the labour market, but simply to the moment of entering into force of the relevant part of the Ankara Acquis.

In later case law, the Court has rejected arguments that a restriction cannot be considered to be new because it merely implements a Community measure. It similarly dismissed arguments that restrictions were not new because they also introduce some new advantages.⁹⁵

3.3 Article 13 of Decision 1/80: “legally resident and employed”

The Judgment in *Abatay* determined that the novelty of a restriction does not depend on the moment a Turkish worker has entered the labour market of a member state. Having stated this, the ECJ continued by determining that “the ‘standstill’ clause can benefit a Turkish national only if he has

⁹² Opinion of AG Mischo in Joined Cases 317/01 and 369/01, *Abatay and others*, delivered on 13 May 2003, Paras. 55-6.

⁹³ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Para. 82.

⁹⁴ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, holding.

⁹⁵ Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031, Para. 58.

complied with the rules of the host Member State as to entry, residence and, where appropriate, employment and if, therefore, he is legally resident in the territory of that State”.⁹⁶ This refers to the wording of Article 13 of Decision 1/80, which limits its personal scope to workers and members of their families “legally resident and employed in their respective territories”.

This statement of the Court led to some questions on how the concept of legal residency should be interpreted. Although the Judgment in *Sahin* will be discussed in much more detail later, it is interesting in this context to focus on the Dutch referring court’s first question, which concerned the ECJ’s reasoning in *Abatay*. The court wished to know how the matter of legal residency should be defined.

The ECJ reminded the referring court that the standstill clause in Article 13 Decision 1/80 “is not subject to the condition that the Turkish national concerned satisfy the requirements of Article 6(1) of that decision”.⁹⁷ That provision specifically provides rights to Turkish workers who are duly registered as belonging to the labour force of a Member State. Thus, it was established that “the scope of that Article 13 is not restricted to Turkish migrants who are in paid employment”.⁹⁸ If the concept of legal residency and employment would be restricted to migrants in paid employment, this would essentially mean that protection under Article 13 of Decision 1/80 is only available to those Turkish migrants who receive protection under Article 6 of the same Decision. Since the latter provision provides by itself sufficient rights to workers who fall within its scope, the standstill clause must naturally have a broader scope.⁹⁹ Thus, the standstill provision seeks

⁹⁶ Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Para. 83.

⁹⁷ As stated, Article 6(1) of Decision 1/80 concerns itself with the rights of those “duly registered as belonging to the labour force of a Member State”. One of the requirements is the legal employment of the worker. See for a lucid discussion thereof: Theele (2007), pp. 148-151.

⁹⁸ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Paras. 50-1.

⁹⁹ *Ibid*, Para. 51

specifically to protect those Turkish migrants who may not have obtained any rights on the basis of another provision in the Ankara Acquis and the concept of legal residency may not be interpreted so as to limit the standstill clause to those that can claim rights under Article 6 of Decision 1/80.

3.4 'Introduction' of a new restriction

A question that has not really been taken up yet, but might provide an interesting basis for further discussion, is which actions may actually qualify as the introduction of a new restriction. Another way of asking this question is: can any law, rule or practice qualify as a restriction or is this only the case where a measure is introduced into a state's legislation by a formal legislative body. It is clear that a law created by a democratically legitimated body could be in violation of the standstill clause. However, does (and should) this also apply to the internal policy of a lower administrative body, or even an informally developed practice, provided that the Turkish migrant can prove that this policy or practice is more restrictive than in 1973 or 1980? In other words: is it necessary to look at the legal situation or the practical situation relevant to Turkish citizens at any point in time? These questions extend beyond the scope of this research, but valid arguments can be made for either side.

4 Justification grounds?

The text of the standstill clauses does not provide for any justification grounds. Still, the German Government makes a strong and engaging case for the possibility of justifying new restrictions.¹⁰⁰ In order to do so, Germany draws an analogy with the fundamental freedoms awarded to EU citizens, which according to the AA and the Court's case law serve to guide the interpretation of the Ankara Acquis.

¹⁰⁰ See German Government's intervention in Case C-92/07 *Commission v. the Netherlands*, 12 December 2007, Paras. 14-19.

Within the context of the internal market, the breach of one of the fundamental freedoms has traditionally presupposed some form of discrimination.¹⁰¹ This can be justified by the exhaustive list of grounds provided by the Treaty in the case of direct discrimination and, additionally, by unwritten justification grounds in the general interest in the case of indirect discrimination.¹⁰² Since the judgment in *Säger* and *Bosman*, the Court will also see a violation of the Treaty where a national measure restricts the possibility to make use of a fundamental freedom, even if it applies without any distinction. This general prohibition of restrictions may also be justified by the justification grounds explicitly mentioned in the Treaty and unwritten justification grounds in the general interest.¹⁰³

The Court has made clear in the case *Abatay* that the principles developed in the context of the European fundamental freedoms must also be applied, as far as possible, to the Ankara Acquis.¹⁰⁴ Inferring from this that the possibility of justification should according to consistent case law apply also to the Association Acquis,¹⁰⁵ Germany finds it barely defensible that the standstill clause, if it is to be read as a general prohibition of any restriction, could not be justified in any way. Similarly, even if the standstill clause should be held to include a discriminatory element, it still cannot be justified under the Ankara Acquis, even by an exhaustive list of grounds.

Not mentioned by Germany, but nevertheless intriguing, is the fact that the Member States' inability to justify their restrictions could constitute a violation of Article 59 AP, the prohibition of reverse discrimination. If a new restriction is prohibited regardless of possible justification grounds for

¹⁰¹ Barnard (2007), p. 294.

¹⁰² Kapteyn e.a. (2003), p. 592.

¹⁰³ Case C-415/93, *Union royale belge des sociétés de football association and others / Bosman and others*, [1995] ECR I-4921, Paras. 121 ff.. See also Barnard (2007), p. 294.

¹⁰⁴ Case C-434/93, *Ahmet Bozkurt v. Staatssecretaris van Justitie*, [1995] ECR I-1475, Para. 19.

¹⁰⁵ *Ibid.* See for a strong defence of this point: Van der Mei (2009), p. 373.

Turkish citizens, where a European citizen might have to accept a restriction because the Member State was able to justify it, the Turkish citizen in fact receives better treatment than the European citizen. Interesting as such reasoning may be, the Court has not yet explicitly reacted to it.

5 The standstill provisions: a summary

The two standstill obligations contained in the Ankara Acquis cover the situation of Turkish citizens as concerns employment, the provision and possibly reception of services and establishment in the EU. To violate one of the standstill clauses, a new restriction must be introduced after 1973 or 1980 ('the critical date'), depending on the legal document that is invoked. Until the Judgments in *Soysal*, *Sahin* and *Commission v. the Netherlands* that will be discussed in more detail in subsequent chapters, the Court has had several opportunities to provide interpretations of these clauses, which are generally to be interpreted in the same manner.

The standstill clauses do not provide any substantive rights but have instead been described as being 'quasi-procedural'. That is to say: they determine *ratione temporis* which rules apply to Turkish citizens. This will mean that they will be subject to the rules applicable in 1980 for Decision 1/80, in 1973 for the AP or, alternatively, on the date of the Member State's accession.

As stated, Decision 1/80 applies to workers, which follows the interpretation given to that term under EU law. These workers must additionally have developed a certain link with the labour market of the Member State, but this requirement is applied rather permissively. It is not necessary for Turkish nationals invoking the standstill clause to be able to invoke the rights contained in Article 6 of Decision 1/80 in order to receive protection from that clause. Article 6 provides specific rights to Turkish

workers duly registered in the Member States' labour markets and therefore provides a different type of protection than Article 13 of Decision 1/80.

Turkish citizens seeking to establish themselves or provide services in the EU are covered by the AP. Whether the standstill clause contained therein extends to recipients of services such as tourists remains a point of discussion. Both provisions extend their scope to family members of those using the free movement of workers, services and establishment.

As concerns the material scope of the standstill clauses, they apply to substantive as well as procedural rules concerning the first admission of Turkish citizens to the territory of a Member State and beyond. It has been suggested that a *de minimis* approach might apply, which would mean that restrictions of a minimal scope do not violate the standstill provisions. However, the Court has made no conclusive statement on that point.

The two standstill clauses have three cumulative elements in common. First, it must be established that there is a restriction, as to whose interpretation there has been a fair amount of discussion. While the European Commission has defended that the existence of a restriction must be established quickly, the German government advocated a more narrow approach. The Court seems to adopt a broad interpretation, precluding any new measure having the object or effect of making the use of the free movement rights subject to stricter conditions. According to the second element, the restriction must be considered new, which has been established to mean that it has been introduced after the date on which the relevant part of the Ankara Acquis entered into force. Third, the new restriction must be introduced. This raises some interesting and as yet unanswered questions as to whether the legal rules or the practical situation in a Member State are conducive towards establishing whether a new measure has been introduced that can be considered restrictive.

The German government has proposed that it should be possible to justify a violation of the standstill clause despite the fact that no justification grounds have been explicitly provided for in the Ankara Acquis. For this purpose, it draws an analogy with the free movement rights in the Internal Market, which also prohibit restrictions to the exercise of those rights. That is to say, they prohibit the hindrance of market access regardless of the existence of direct or indirect discrimination. In such cases, EU law allows Member States to invoke unwritten justification grounds. It would be reasonable to assume that such reasoning should also apply to the standstill clauses in the Association Acquis. In fact, not to do so might constitute a restriction of Article 59 AP, which prohibits the more favourable treatment of Turkish citizens as opposed to EU citizens.

It has been indicated, finally, that the most important limitation of the standstill clause is arguably formed by the prohibition of reverse discrimination and that its relation to the non-discrimination rights remains unclear. The next chapter will therefore turn to a detailed examination of these principles.

CHAPTER 3: THE PRINCIPLES OF NON-DISCRIMINATION

The Ankara Acquis contains several provisions concerning discrimination, although the Court has unfortunately not yet elaborated on all of them in great detail. In relation to the movement of Turkish citizens, the AA, AP and Decision 1/80 contain three such provisions. Their contents, scopes and legal effect differ so substantively that it is necessary to discuss them separately. One can distinguish between the general non-discrimination right (Article 9 AA), the employment-related non-discrimination right (Article 10 of Decision 1/80) and the prohibition of reverse discrimination (Article 59 AP).

1 The general non-discrimination right

The general non-discrimination right was already laid down in the AA in 1963, specifically in Article 9 of that Agreement. It refers expressly to the non-discrimination right that is laid down in Article 18 TFEU (formerly Article 12 EC), which within the context of the European Internal Market establishes in general terms the prohibition of discrimination on the basis of nationality.

Article 9 AA provides the following:

“The Contracting Parties recognise that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to Article 8,¹⁰⁶ any discrimination on grounds of nationality shall be prohibited in accordance with the

¹⁰⁶ Article 8 AA allows the Contracting Parties to create any special provisions in order to realise the aims of the Agreement.

*principle laid down in Article 7 of the Treaty establishing the Community.*¹⁰⁷”

As can be seen, the text of this provision is very broad in the sense that it prohibits “any discrimination on grounds of nationality”, without limiting its scope to a particular group of beneficiaries. As far as discrimination is concerned, it may thus be said that Article 9 AA offers the broadest possible scope of protection for Turkish citizens. However, this is the case only in so far as Turkish citizens can invoke that right before the courts of the Member States.

2 Direct effect of the general non-discrimination right

The most pertinent question with regard to the general non-discrimination right is thus whether it has direct effect. When a rule has direct effect, it can be considered as legally perfect from the point of view of its enforcement because individuals can invoke it before a national court and request effective remedies.¹⁰⁸ So far, the Court has not made any explicit statement concerning the direct effect of Article 9 AA.¹⁰⁹ However, its case law provides some guidelines for determining whether provisions in an agreement between the EU and another party have direct effect. Additionally, some indications on the existence – or lack thereof – of direct effect may be inferred from the case law on the Ankara Acquis itself.

2.1 The Court’s approach towards the direct

¹⁰⁷ Article 7 of the Treaty establishing the Community refers to the non-discrimination principle that is now laid down in Article 18 TFEU.

¹⁰⁸ Eeckhout (2004), p. 279.

¹⁰⁹ German Government’s intervention in Case C-92/07, *Commission v. the Netherlands*, 12 December 2007, Paras. 21-27.

effect of international agreements

In the area of international agreements (of which the AA is one), the Court generally uses a two-step test to determine the direct effect of a provision.¹¹⁰ First, the nature and structure of the agreement must be examined. For instance, famously the GATT Agreement¹¹¹ was denied direct effect because it was based on ‘reciprocal and mutually advantageous arrangements’ and was very flexible, whereas direct effect is associated with rigidity.¹¹² Second, it must be determined whether the specific provision, interpreted in the light of the objective of the agreement and of its context, is clear, precise and unconditional.

It is considered that the Court rather easily accepts the direct effect of international agreements to which the Community is a party, except in the case of the GATT and WTO Agreements.¹¹³ For instance, the Court has accepted without problems the direct effect of the Partnership and Cooperation Agreement (PCA) with Russia in the Case *Simutenkov*¹¹⁴ and the Association Agreement with Greece in the Case *Pabst & Richarz*¹¹⁵.

2.2 Application to the Association Agreement

Although the Court appears to generally accept the direct effect of international agreements, the German government has forcefully argued

¹¹⁰ Eeckhout (2004), p. 287, referring to Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641. See also Case C-262/96, *Sürül*, [1999] ECR I-2685, Para. 60; Holdgaard (2008), p. 249; Cheyne (2000); and McGoldrick (1997), p. 127.

¹¹¹ General Agreement on Tariffs and Trade 1947. This agreement has been superseded by the WTO Agreement.

¹¹² Joined Cases 21-24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219. See also Case 9/73, *Schlüter v. Hauptzollamt Lörrach*, [1973] ECR 1134, Para. 28.

¹¹³ Jacobs (2008), p. 16; Holdgaard (2008), pp. 298-9; Keukeleire (1998), p. 84; Eeckhout (2004), p. 284, as supported by the discussion of case law in Cheyne (1997). Contrary, McGoldrick (1997), p. 126.

¹¹⁴ Case C-265/03, *Simutenkov*, [2005] ECR I-2579.

¹¹⁵ Case 17/81, *Pabst & Richarz v. Hauptzollamt Oldenburg*, [1982] ECR 1331, Paras. 25-27.

against the direct effect of the AA.¹¹⁶ The Turkish Association Agreement, according to the German government, only generally refers to the aims of the Association and limits itself to establishing guidelines for the attainment thereof without itself establishing specific rules.¹¹⁷ In fact, Article 22 AA authorises the Association Council that has been created for this purpose to take further decisions needed for the realization of the Agreement's aims and to make recommendations thereto.¹¹⁸ Among such further decisions are the AP and Decision 1/80, which provide further rules on various aspects of the customs union. Only the provisions in these decisions can, according to Germany, be directly applicable.

This reasoning is interesting if one bears in mind that it has been considered that Association Agreements generally produce direct effect.¹¹⁹ This conclusion is based on the Case *Pabst & Richarz*, in which the Court was very quick to award direct effect to Article 53 of the Association Agreement with Greece.¹²⁰ This warrants a further look at the EEC-Greece Association Agreement (Greek Agreement), which was not only concluded around the same time as the Turkish AA, but is also deemed of the various Association Agreements to resemble this particular agreement most.¹²¹ In fact, it is striking that the preambles of these Agreements are identical but for one

¹¹⁶ German Government's intervention in Case C-92/07, *Commission v. the Netherlands*, 12 December 2007, Paras. 21-27.

¹¹⁷ *Ibid*, Para. 23.

¹¹⁸ Article 22(1) AA reads as follows: "In order to attain the objectives of this Agreement, the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the parties shall take the measures necessary to implement the decisions taken. ..." The same text is contained in Article 65 of the Greek Agreement.

¹¹⁹ Eeckhout (2004), p. 284. See also *supra* 112.

¹²⁰ Agreement establishing an Association between the European Economic Community and Greece, signed at Athens on July 1961, and concluded and approved on behalf of the Community by the Council Decision of 25 September 1981 (OJ English special edition, second series, I External Relations (1), p. 3). Again, no official English translation is available. Interestingly, this Association Agreement is not to be found on the list of Association Agreements provided by the Commission (http://ec.europa.eu/external_relations/association/docs/agreements_en.pdf), even though this list does include some other Association Agreements that no longer exist because the country in question has since acceded to the EU.

¹²¹ For instance, see Phinnemore (1999) pp. 42-45.

sentence, which refers to the Turkish economic situation.¹²² However, looking at the content of these agreements, it becomes apparent that the text concerning Greece is much more far-reaching.

In Title I of both Agreements ('general principles'), it is stated that an Association is created that aims for the gradual and balanced strengthening of the commercial and economic relations between the Parties, taking into account the necessity to develop the Greek and Turkish economies, to increase employment and to improve the life circumstances of the Turkish and Greek people.¹²³ However, the Greek Agreement goes on to establish a customs union (Article 2(1)(a)) and creates detailed provisions for the free movement of goods (Article 6 *ff*), agriculture (Article 32 *ff*), the free movement of persons and services (Article 44 *ff*) and economic policy (Article 58 *ff*). Clearly, this agreement intends to create precise and rigid obligations, and it is thus not surprising that the direct effect of one of its provisions should be accepted quite quickly.

The Turkish AA, on the other hand, provides only for the gradual creation of a customs union and lays down conditions for the implementation of the transitional phase. The intended scope of this agreement must then be seen as far less extensive, in line with the German government's arguments. It must however be noted that the German reference to Article 22 AA in its reasoning against direct effect does not prove to be significant, as the same text can also be found in Article 65 of the Greek Agreement.

Of course the mere fact that the AA is less far-reaching than the Greek Agreement does not mean that the reasoning of *Pabst & Richarz* cannot be

¹²² It has been considered that the preambles, especially with regards to the statements about future accession, are nearly identical because this was the only condition under which Turkey was willing to sign the AA. See ConsHist.Com « *Histoire interne de la Commission européenne 1958-1973* » Interview mit Axel HERBST (25.05.2004), p. 19 and ConsHist.Com « *Geschichte der europäischen Kommission 1958 – 1973* » Interview mit Klaus MEYER (16.12.2003), p. 34. For another view, see Phinnemore (1999), p. 16.

¹²³ Articles 1 and 2(1) AA (Greece) and AA (Turkey). Loosely translated from the Dutch by author.

applied to it. However, considering the programmatic nature of the AA, relying on transitional phases to allow for a gradual creation at a later stage of a customs union, the existence of direct effect is not immediately obvious.

2.3 Demirel and the Commission: the indirect case against direct effect

A similar conclusion follows indirectly from the Case *Demirel*,¹²⁴ in which the Court determined that Article 12 AA¹²⁵ lacks direct effect. Since it could conclude straight away that the programmatic nature of the provision itself precluded it from having direct effect, the ECJ did not rule based on the nature and structure of the Agreement as such. It did, however, make the following statement concerning the Agreement in general:

*“In structure and content, the Agreement is characterized by the fact that, in general, it sets out the aims of the Association and lays down guidelines for the attainment of those aims without itself establishing the detailed rules for doing so. Only in respect of certain specific matters are detailed rules laid down by the protocols annexed to the Agreement.”*¹²⁶

From this it might be inferred that the AA as such only sets out a general framework.¹²⁷ This would preclude it from having direct effect, meaning that Article 9 AA cannot be invoked by individuals before the national

¹²⁴ Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719, Para. 23.

¹²⁵ As stated, Article 12 AA provides that the Contracting Parties will be guided by the free movement principles of the EC Treaty – now the TFEU.

¹²⁶ Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719, Para. 16.

¹²⁷ In this context also Bozkurt (2004), p. 84.

courts.¹²⁸

Perhaps in the light of this Judgment, the European Commission seems to work from the assumption that Article 9 AA does not have direct effect at all. In any case, it appears to prefer to sidestep the matter of the direct effect of that provision. A petition brought before the European Parliament on behalf of Ms. Kizarin, a Turkish citizen, challenged the Dutch rules which required her to follow an integration course and to pay € 285 for the renewal of her residence permit. This fee had been sharply increased for third country nationals in 2003 and remained at the low price of € 28 for European citizens. Ms. Kizarin argued that these rules infringed both standstill clauses and the general non-discrimination right of Article 9 AA. In its response, the Commission stated that both Article 13 of Decision 1/80 and Article 41 AP had direct effect, touched briefly on the direct effect of Article 9 AA but did not pursue the matter. Instead, it concluded: “Given that Articles 13 and 41 referred to above apply to the Dutch laws in issue, it is not strictly necessary to rely on Art. 9.”¹²⁹

In its submissions to the Court in the Case *Sahin*, which will be discussed in detail in subsequent chapters, the Commission entered into a lengthy discussion of the general prohibition of discrimination. However, it subsequently turned to the standstill clause and stated that this clause ‘leads to’ the application of Article 9 AA. In spite of its extensive discussion of the non-discrimination provision, it concluded that the Dutch laws in question, which it considered to be discriminatory, violated the standstill clause. The Commission made no further reference to Article 9 AA in its conclusions,

¹²⁸ On the other hand, the provision has been invoked before a Dutch court of first instance in The Hague. This court refused to discuss Article 9 AA – not because it lacked direct effect but because of its relationship with the standstill clause. LJV BK6039, *Rechtbank 's-Gravenhage (zittingsplaats Rotterdam)*, Awb 09/26195, 10 December 2009.

¹²⁹ European Parliament (Committee on Petitions), Petition 20/2003 by Ali Durmus (Dutch) concerning discrimination between Turkish and EU citizens in the Netherlands, 3 February 2004 [PE 339.405].

again preferring to avoid applying Article 9 directly.

It seems odd that the Commission should feel compelled to use a construction whereby the standstill clause leads to the application of the non-discrimination clause. In doing so, the Commission apparently utilises the first principle in order to be able to indirectly apply the latter. Although the preliminary question in *Sahin* did not address Article 9 AA as such, the Commission could just as well have reminded the Court of its violation. If the Commission used this construction because it believed on the basis of *Demirel* that Article 9 AA is not directly effective, it could be asked why it did not instead consider the Judgment in *Öztürk*, which may provide an indirect case for direct effect.

2.4 *Öztürk*: The indirect case for direct effect

Where the Judgment in *Demirel* could be regarded as an implicit denial of the direct effect of Article 9 AA, the opposite case can be made on the basis of *Öztürk*¹³⁰, a case concerning social security. In that case, the Austrian authorities had refused to grant Mr. *Öztürk*, a Turkish citizen, an early old-age pension in the event of unemployment because he had not previously received unemployment benefit in Austria. Mr. *Öztürk* invoked two provisions, namely the principle of non-discrimination as laid down in Article 9 AA and Article 3(1) of Decision 3/80,¹³¹ a specific prohibition of discrimination in the area of social security benefits.

In its Judgment, the Court drew a comparison with the general non-discrimination right in Article 18 TFEU, which is explicitly referred to in Article 9 AA and which, in the context of the European Internal Market, has direct effect. It is established case law that Article 18 TFEU applies only

¹³⁰ Case C-373/02, Case C-373/02, *Sakir Öztürk v. Pensionsversicherungsanstalt der Arbeiter*, [2004] ECR I-4605, Para. 49.

¹³¹ Decision No 3/80 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families (OJ 1983 C 110, p. 60).

where no more specific discrimination rule can be invoked.¹³² In *Öztürk*, the ECJ applied this same reasoning to Article 9 AA. Thus, the general prohibition of discrimination in Article 9 AA “does not apply independently if the Association Council has adopted a specific non-discrimination rule, such as Article 3(1) of Decision 3/80 in the particular field of social security”.¹³³ The Court then held that the specific provision in Decision 3/80 applied and did not return to examine Article 9 AA.

Given that the general non-discrimination right cannot according to the Court apply independently where there is a specific non-discrimination right, it should logically follow that where there is no specific non-discrimination right, Article 9 AA may apply independently. This was in fact also the reasoning of Advocate General La Pergola in *Sürül*, another case in the area of social security.¹³⁴ Thus, the Court’s reasoning in the *Öztürk* Judgment may provide a strong indication for the existence of the direct effect of Article 9 AA.

2.5 Direct effect of Article 9 AA, a tentative conclusion

Unfortunately, no clear answer can be reached on the question of the direct effect of the general non-discrimination principle of the Ankara Agreement. While it is considered that Association Agreements are quickly awarded direct effect, the *Pabst Richarz* Judgment supporting this conclusion is based on an Agreement that is more far-reaching than the AA. Similarly, while the Court has described the AA in such a way in the *Demirel*

¹³² Case 1/78, *Kenny*, [1978], ECR 1489, Paras. 9-11; Case C-302/02, *Effing*, [2005] ECR I-553, Para. 50.

¹³³ Case C-373/02, Case C-373/02, *Sakir Öztürk v. Pensionsversicherungsanstalt der Arbeiter*, [2004] ECR I-4605, Para. 49.

¹³⁴ Opinion of AG La Pergola in Case C-262/96, *Sürül*, delivered on 12 February 1998, Para. 17. The Court did not pursue this issue in its Judgment. Case C-262/96, *Sürül*, [1999] ECR I-2685.

Judgment that the existence of direct effect seems unlikely, its reasoning in *Öztürk* should logically entail that Article 9 AA can in fact be applied directly.

So far, only one case before the ECJ has been decided explicitly on the basis of this provision, namely *Commission v. the Netherlands*, which will be discussed in more detail below. However, while that case may provide interesting insights on the content of Article 9 AA, it concludes nothing about its direct effect. Direct effect is necessary to allow individuals to invoke their rights, but it does not have to be established in cases commenced by the Commission.¹³⁵ Thus, the matter will remain undecided until the Court makes a clear statement on the existence or lack of direct effect of Article 9 AA.

3 The employment-related non-discrimination right

The general non-discrimination right is supplemented by detailed rules laid down in the protocols and decisions pursuant to the Agreement. One of them is Article 10 of Decision 1/80. This provision, which will be referred to as the employment-related non-discrimination right, pertains specifically to Turkish workers. In short, it obliges EU Member States to refrain from discrimination on the basis of nationality of Turkish workers “duly registered as belonging to their labour forces”. This prohibition of discrimination extends specifically to “remuneration and other conditions of work”.

The employment-related non-discrimination right is clear and precise, and has been recognised by the ECJ to have direct effect.¹³⁶ This makes it a very strong non-discrimination right awarded to Turkish citizens, although it has

¹³⁵ Lenaerts, Arts and Maselis (2006), p. 169.

¹³⁶ Case C-171/01 *Wählergruppe Gemeinsam*, [2003] ECR I-4301.

only led to judgments of the ECJ on four accounts.¹³⁷ Of course the extent of protection awarded by Article 10 of Decision 1/80 is limited by its scope – namely remuneration and conditions of work for Turkish workers who are duly registered as belonging to the labour force.

Thus, large groups of Turkish nationals who fall within the scope of the Ankara Acquis go without the protection of Article 10 of Decision 1/80. These include workers who do not belong at the relevant date to the legal labour market of a Member State,¹³⁸ family members of such workers,¹³⁹ service providers and those seeking establishment. Additionally, one might think of other Turkish migrants who have legally entered the territory of a Member State, such as asylum seekers or Turkish nationals who have married an EU citizen who has not made use of his or her free movement rights.¹⁴⁰

Similarly, workers can only claim their non-discrimination right in the area of remuneration and other conditions of work. These terms, however, should be interpreted broadly in accordance with the case law of the ECJ concerning Directive 2004/38. For instance, in the Case *Wählergruppe Gemeinsam*, the Court followed its case law in *ASTI I*¹⁴¹ and *ASTI II*¹⁴² in ruling that a law that excludes Turkish citizens from voting or running as candidate for the general assembly of the chamber of workers affects conditions of work in contravention of Article 10 of Decision 1/80.¹⁴³

¹³⁷ Joined cases C-102/98 and C-211/98, *Kocak and Örs*, [2000] ECR I-1287; Case C-171/01, *Wählergruppe Gemeinsam*, [2003] ECR I-430; Case C-4/05, *Güzeli*, [2006] ECR I-10279; Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000.

¹³⁸ Case C-4/05, *Güzeli*, [2006] ECR I-10279, Paras. 48 and 50.

¹³⁹ Article 10(2) of Decision 1/80 *a contrario*.

¹⁴⁰ See for example Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000.

¹⁴¹ Case C-213/90, *ASTI*, [1991] ECR I-3507.

¹⁴² Case C-118/92, *Commission v Luxembourg*, [1994] ECR I-1891 (*ASTI II*).

¹⁴³ Case C-171/01, *Wählergruppe Gemeinsam*, [2003] ECR I-4301. See for a more detailed discussion: Theele (2005), pp. 157-8.

4 The prohibition of reverse discrimination

Although, unlike Decision 1/80, the AP contains no non-discrimination rights for Turkish citizens, it does include a provision prohibiting the more favourable treatment of Turkish citizens as opposed to EU citizens. This counterpart to the non-discrimination rights will be referred to as the ‘prohibition of reverse discrimination’. It is laid down in Article 59 AP, which reads:

“In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community”.

Since the Protocol covers the free movement of goods and all persons, the application of this prohibition of reverse discrimination is however not limited to service providers and those seeking to establish themselves in the European Union, but extends also to workers.¹⁴⁴

5 Non-discrimination and reverse discrimination: a summary

The right to non-discrimination forms an essential part of the Ankara Acquis. It is laid down in general terms in Article 9 AA and, more specifically with regard to remuneration and other conditions of work for Turkish workers, in Article 10 of Decision 1/80. Although Article 9 AA is broadly worded, it is as yet unclear whether or not it has direct effect, which would mean that it could be invoked directly before the national courts. To determine the direct effect of a provision of an international agreement such

¹⁴⁴ See for instance Case C-325/05, *Derin*, [2007] ECR I-6495.

as the AA, the Court examines the nature and structure of the agreement as well as the extent to which the provision is clear, precise and unconditional.

Although the Court has tended to accept the direct effect of international agreements quite easily, it nevertheless remains possible that the AA does not fulfil these requirements. Importantly, the Court found in *Demirel* that the AA was limited to laying down guidelines without itself establishing any detailed rules. On the other hand, in *Öztürk* the Court drew a direct analogy with the case law concerning the prohibition of discrimination in Article 18 TFEU, which undeniably has direct effect. While the German government has vigilantly argued against the direct effect of Article 9 AA, the Commission seems to avoid making any clear statement and the matter thus remains undecided until the Court settles it.

The specific employment-related non-discrimination right of Article 10 Decision 1/80 does undeniably have direct effect, although it is more limited in scope than Article 9 AA. It applies to the remuneration and conditions of work of Turkish workers who are duly registered as belonging to the Member States' labour markets. Their family members do not benefit from the same protection. Whereas the personal scope of Article 10 Decision 1/80 is limited, the concepts of remuneration and conditions of work are interpreted permissively.

The final provision, which until *Soysal* and subsequent judgments has received very little attention in the Court's case law, is the prohibition of reverse discrimination laid down in Article 59 AP. This provision forbids the treatment of Turkish nationals that is more favourable than that awarded to EU citizens. These three principles, together, mean that the Ankara Acquis forbids the more favourable treatment of Turkish citizens as opposed to EU citizens, as well as the more favourable treatment of EU citizens as opposed to Turkish citizens. To put it in other words, the legal situations of these two groups of persons are linked rigidly. This creates the

interesting situation whereby the legal situation of a Turkish migrant within the scope of the AA must follow that of an EU citizen, but whereby that situation may also not be subject to new restrictions in violation of the standstill clause. The next chapter thus seeks to shed some light on the problems raised by the interaction of the standstill and discrimination principles.

CHAPTER 4: INTERACTION BETWEEN STANDSTILL, NON-DISCRIMINATION AND REVERSE DISCRIMINATION

1 The difficult marriage of non-discrimination and standstill

What makes it difficult to work with the two concepts of non-discrimination and standstill is that they both prohibit less favourable treatment as against a certain point. In the case of standstill, this point is static, being linked to the relevant date. In the case of non-discrimination, it is dynamic, as it depends on the legal position of EU citizens on the contested date. This situation may be the same, better or worse than the situation at the relevant date. On the other hand, the principle of reverse discrimination prohibits more favourable treatment as against the same – dynamic – points as the principle of non-discrimination. Within this range of reference points, there is bound to be some conflict.

Possibly the simplest solution to resolving this conflict would be to propose a distinction between the standstill clause and the prohibition of discrimination based on the relevant point in time. That point in time is determined by the entering into force of the relevant part of the Ankara Acquis, after which point no more restrictions may be introduced according to the standstill clause. This solution would thus entail that where a restriction exists that has been newly introduced since the entering into force of the Ankara Acquis, it falls within the scope of the standstill clause and no comparison to the situation of EU nationals is necessary. It is prohibited merely for having been newly introduced. Where the restriction already existed at the time of entering into force, the non-discrimination

provision applies and the restriction is forbidden in so far as it creates a situation that is less favourable for Turkish citizens than for EU citizens.

However, as will become apparent, this approach is somewhat inexact and possibly at odds with the prohibition of reverse discrimination. After all, if a restriction is imposed after the critical date and is consequently disregarded with respect to Turkish migrants in accordance with the standstill clause, this would put those migrants in a more favourable position than EU citizens when that restriction has been similarly imposed on them. This difficult marriage has led to some interesting approaches to the interrelation between the prohibition of discrimination and the standstill clause.

2 Situations where the standstill and non-discrimination principles are mutually exclusive

One of the most remarkable approaches to the relationship between the standstill clause and the prohibition of discrimination is that they are to an extent mutually exclusive. This is a conclusion reached by the Dutch district court of The Hague in December of 2009.¹⁴⁵ This judgment deserves a discussion among others because it is one of the very few cases that directly address the relationship between the two clauses.

The case was brought by a Turkish migrant who sought to challenge the refusal by the Dutch authorities to award him a residence permit for the purpose of self-employment.¹⁴⁶ This refusal was based on a rule that requires the existence of a 'real Dutch need'¹⁴⁷ in order to be considered for this type of permit. To support his case, the applicant invoked both the standstill clause of Article 41 AP and the general discrimination prohibition of Article 9 AA.

¹⁴⁵ LJN BK6039, Rechtbank 's-Gravenhage (zittingsplaats Rotterdam), Awb 09/26195, 10 December 2009.

¹⁴⁶ 'Verblijfsvergunning voor bepaalde tijd voor het verrichten van arbeid als zelfstandige'.

¹⁴⁷ 'Wezenlijk Nederlands belang'.

In its verdict, the Dutch court rejected the argument that the requirement of a ‘real Dutch need’ violated Article 41 AP, as the applicant could not demonstrate that the contested requirement had been introduced after the relevant date. Having determined this, the court then turned to consider the application of Article 9 AA. After stating that the prohibition of discrimination in the AA should be read in conjunction with the standstill clause because the provisions form part of the same Treaty, the court continued that, having found no breach of the standstill clause, it was no longer possible to determine that the discrimination provision of Article 9 AA had been violated.

This conclusion may be a little unexpected, but the court did offer an explanation. To accept a violation of Article 9 AA where none had been accepted for Article 41 AP, the court reasoned, would make the latter provision both void and counter-productive.¹⁴⁸ There would be no sense in having a standstill clause when a restriction is already prohibited on the basis of Article 9 AA alone, thereby depriving the standstill clause of any independent purpose. Furthermore, if the court would find a breach of the non-discrimination principle in this case, the standstill clause would be counter-productive by allowing a condition that would then be prohibited by another provision. So before examining whether there has been a case of discriminatory treatment, it must first be determined whether there exists a new restriction in the sense of the standstill clause.

3 Situations where the standstill provision is limited by the prohibition of discrimination: Soysal

Another approach becomes apparent in the ECJ’s Judgment in *Soysal*. This Judgment is significant because it is the first in which the Court deals directly with both the standstill and the non-discrimination provisions. As

¹⁴⁸ ‘Zinledig en averechts’.

stated, the case was submitted before the Court in May 2006 by the German *Oberverwaltungsgericht*. It concerned a visa requirement that was introduced into German law in 1980.

3.1 Facts of the case and preliminary questions

The applicants in the case, Mr. Soysal and Mr. Savlati, were according to the facts of the case Turkish nationals resident in Turkey working for a Turkish company. They were engaged in the international transport of goods as drivers of lorries that were owned by a German company and registered in Germany. The German law required that the applicants regularly apply for visas in order to carry out their activities in Germany. It may be noted that the German visa requirement was in accordance with European law, as the same requirement was apparent in Article 1(1) of Council Regulation 539/2001.¹⁴⁹ Until 2000, these visas were in fact awarded to the applicants without problems, but their applications in the course of 2001 and 2002 were refused.

Unable to carry out their activities without a visa, the applicants brought actions before the German *Verwaltungsgericht* and argued that the German law violated the standstill clause of Article 41(1) AP. After all, the visa requirement was introduced in 1980, after the entering into force of the AP in 1973. When the *Verwaltungsgericht* dismissed their claims, Mr. Soysal and Mr. Savlati lodged an appeal with the *Oberverwaltungsgericht*, which proceeded to refer two preliminary questions to the ECJ on the interpretation of Article 41(1) AP.

First, the *Oberverwaltungsgericht* wished to know if the visa requirement for Turkish citizens under the German law and Regulation 539/2001 constituted a restriction on the freedom to provide services in the sense of

¹⁴⁹ Council Regulation 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, *OJL* 18/1.

Article 41(1) AP, given that such a requirement had not existed when the AP entered into force. Interestingly, the court's second question was whether, in case of an affirmative answer to the first question, Article 41(1) AP must be interpreted as meaning that Turkish nationals such as the applicants would not require a visa to enter Germany.

The *Oberverwaltungsgericht* did include some of its own reasoning in the referring judgment. As to the interpretation of Article 41(1) AP, it noted that, although the Judgment in *Savas* supports the interpretation that Article 41(1) AP imposes “a general prohibition on the worsening of a situation even in respect of the right to enter and reside, [...] an argument against such an interpretation is that Article 41(1) of the Additional Protocol cannot obstruct the general legislative power of the Member States that may affect the position of Turkish nationals in one way or another”.¹⁵⁰ The suggestion being that a Member State's visa policy constitutes such a fundamental part of its legislative power that the standstill clause cannot forbid a significant part of that policy. This explains the German court's second question, which asks essentially whether, if the visa requirement violates the standstill clause, this means that the requirement must consequently be lifted.

3.2 The Court's Judgment

In its judgment, the Court recalled that Article 41(1) AP has direct effect and that it can be invoked by the employees of an undertaking established in Turkey on the ground that they are indispensable to enable that undertaking to provide its services.¹⁵¹ It then repeated that the standstill clause prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national subject to

¹⁵⁰ Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031, Para 35.

¹⁵¹ *Ibid*, Para 46, referring to Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Paras 106 and 117, fifth indent.

stricter conditions than those which applied at the entering into force of the AP.

While examining these conditions, the Court established that the visa requirement did not exist at the time of entering into force of the AP but was only introduced in 1980. It acknowledged that the German law in which the requirement was laid down at the time of the proceedings merely implemented secondary EU legislation, namely Regulation 539/2001, which introduced a requirement for non-EU citizens to apply for a so-called Schengen visa to enter a Member State. It similarly recognised that this Schengen visa also presents its holder with certain advantages compared with the conditions that applied in Germany when the AP entered into force.¹⁵²

However, the Court considered that the introduction of a visa requirement “is liable to interfere with the actual exercise” of the freedom to provide services under the AA, “in particular because of the additional and recurrent administrative and financial burdens involved in obtaining such a permit which is valid for a limited time”.¹⁵³ Thus, the Court determined that the German legislation had “at least the effect” of making the freedom to provide services subject to conditions that are stricter than those that existed in 1973. It concluded that the German visa requirement constituted a restriction in the sense of Article 41(1) AP.

The fact that this requirement implemented a provision of secondary EU legislation could not alter the Court’s conclusion because of the established primacy of international agreements over secondary EU legislation.¹⁵⁴

¹⁵² Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031, Paras 49-54.

¹⁵³ *Ibid.*, Para. 55.

¹⁵⁴ The Court refers to Case C-61/94, *Commission v. Germany*, [1996] ECR I-3989, Para. 52. K. Hailbronner regrets that the Court did not explore this issue further, since according to him the primacy of international agreements does not cover the question asked by the referring court completely. Hailbronner (2009), p. 763.

Similarly, albeit without further explanation, the Court dismissed the objection that the application of the standstill clause would obstruct the general legislative power devolved to the legislature.¹⁵⁵

In its next paragraph, the Court went on to make one of its most important statements for the purpose of this research, which is worth quoting completely:

61 “The adoption of rules that apply in the same manner to Turkish nationals and to Community nationals is not inconsistent with the ‘standstill’ clause. Moreover, if such rules applied to Community nationals but not Turkish nationals, Turkish nationals would be put in a more favourable position than Community nationals, which would be clearly contrary to the requirement of Article 59 of the Additional Protocol, according to which the Republic of Turkey may not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty.”

On the basis of these considerations, the Court concluded that Article 41(1) AP prohibits the introduction of a visa requirement for the provision of services if such a requirement did not exist at the entering into force of the AP.

3.3 Initial reflections on Soysal

Although the Court made several noteworthy statements in its judgment, for the purpose of the interrelation between the standstill and non-discrimination it is most interesting to examine its comment that rules that apply equally to Turkish and EU citizens do not violate the standstill clause.

¹⁵⁵ Case C-228/06, *Mehmet Soysal and Ibrahim Savlati v Bundesrepublik Deutschland*, [2009] ECR I-1031, Para. 60.

In principle, this conclusion is a logical one. After all, if new restrictions are introduced for Turkish and EU citizens alike, but they cannot be held against Turkish citizens because of the standstill clause, this would create an asymmetry in contravention of Article 59 AP. In its submissions in a later case, the Dutch government provided the useful example of a tax increase, which might constitute a new restriction but is evidently not in violation of the Ankara Acquis.¹⁵⁶ After all, both Turkish and EU citizens will be subject to a tax increase. Not to impose the higher tax on the former group because this creates a new restriction would run contrary to the principle of reverse discrimination. As Article 59 AP forms the upper boundary of the standstill clause, situations that may violate that principle will thus not violate the standstill clause.

The Court's reasoning, put into other words, means that non-discriminatory rules do not violate the standstill clause, or, even more directly, that the standstill clause applies not to any new measure, but only to new *and discriminatory* measures. This means that the interpretation of Article 41(1) AP as applying to any measure having either the object or the effect of making the freedom to provide services subject to stricter conditions should be supplemented with the statement 'in so far as this measure is not equally applied to EU citizens'. It also means that the standstill clauses have apparently been augmented with the elements of discrimination.

This conclusion could have already been inferred from the position of the prohibition of reverse discrimination within the Ankara Acquis, but *Soysal* is the first Judgment in which it has been made explicit. Perhaps because the outcome of the case follows reasonably from the structure of the Ankara Acquis and the position of Article 59 AP, the literature has spent relatively little attention to the statement that measures applying equally to EU and

¹⁵⁶ The Netherlands Government's statement of defence in Case C-92/07, *Commission v. the Netherlands*, 2 May 2007, Para. 42. Consider also Kurzidem (2010), p. 126.

Turkish citizens do not contravene the standstill clause.¹⁵⁷

4 Practical consequences

The Dutch court's decision and the ECJ's judgment may be very different, but they show some interesting ways of approaching the interaction between the three principles. The Dutch court finds the standstill and non-discrimination provisions mutually exclusive and sees no purpose in examining Article 9 AA when it has already been determined that there is no breach of the standstill clause.

Admittedly, this reasoning is somewhat counter-intuitive. It would seem all but normal to accept a violation of one provision in spite of the fact that another provision has not been violated. By analogy, it would be senseless to argue that a criminal could not be convicted on murder charges because the court had determined that he was not also guilty of theft (leaving issues of evidence aside). This example is so clear because it is generally obvious that theft and murder are not necessarily related. It is in fact common in the practice of law to conclude that one provision has been violated whereas another is not, and it makes no sense to argue in those cases that this makes one of the provisions void or illusory and that the provisions are now deprived of any independent purpose.

Under the assumption that the court is aware of this fallacy, why would it follow such a line of reasoning? A possible reason is that it believes that the standstill clause takes precedence over the discrimination provision. In short: there can be no case of discrimination if it does not also impose a new restriction in the sense of the standstill clause.

This conclusion is diametrically opposed to that reached in *Soysal*. In that judgment, the Court determined on the basis of Article 59 AP that a national

¹⁵⁷ For instance, the extensive commentary in Welte (2009) does not even mention Article 59 AP.

practice is only prohibited by the standstill provision when it is also discriminatory. Without discrimination, there is no breach of the standstill provision.

4.1 A distinction based on time?

It was suggested in the introduction to this Chapter that a distinction between the standstill and non-discrimination could be drawn based on the date on which the relevant part of the Ankara Acquis entered into force. Any measure introduced after that date would be prohibited by the standstill clause if it constituted a restriction that did not exist before. As to measures that were already in existence before that date, these would be prohibited by virtue of the non-discrimination right if they presented less favourable treatment for Turkish citizens as compared to EU citizens. Naturally, it would also be possible to invoke the non-discrimination right for measures that were introduced after the critical date, but to do so would require evidence that these measures amounted to discriminatory treatment, whereas in the case of the standstill clause it is sufficient to prove that the restriction has been newly introduced.

This approach has been rejected by the Dutch district court as well as by the ECJ. As stated, the Dutch court implied that a new restriction in the sense of the standstill clause must be established before it is possible to invoke the principle of non-discrimination. The ECJ in *Soysal* also rejected this distinction, as this would contravene the prohibition of reverse discrimination in Article 59 AP.

4.2 Soysal as a melting pot

Although both decisions are interesting for academic purposes, it is clear legally that the *Soysal* judgment is more important, being binding on all the courts of the Member States. The question that naturally arises from this judgment is: if the standstill clause is to be interpreted as including a test of

discrimination, what is now the independent value of Article 9 AA and Article 10 of Decision 1/80? Is there still any discernible difference between the standstill and non-discrimination clauses when Article 59 AP seems to have augmented the elements of the standstill clause with the elements of non-discrimination? This question is difficult to answer and benefits from an example.

Imagine that Turkish workers in 1980 did not have to pay for the issue of residence permits. Suppose that, currently, they have to pay € 30, but that this fee applies also to EU citizens for similar documents. The *Soysal* judgment dictates that, since these fees apply equally to EU and Turkish nationals, they are not in breach of the standstill clause. In fact, they may in no case be lower than those paid by EU citizens. In so far, non-discriminatory measures do not violate Article 13 of Decision 1/80.

Imagine, however, that Turkish citizens must pay € 100 while EU citizens are only charged € 30. This will constitute a discriminatory restriction that will violate the standstill clause. As stated, this is in itself a logical conclusion. However, in order to reach the same conclusion, Turkish citizens might just as well have invoked Article 10 of Decision 1/80, which is explicitly designed for that purpose, or even Article 9 AA.

So has *Soysal* completely eradicated the differences between the standstill clauses and the non-discrimination right or are there still significant differences? Even if both sets of provisions include a discrimination test, some differences still exist in their personal, temporal and material scope. As to the personal scope, it has been demonstrated that the two standstill clauses and the two non-discrimination rights cover the free movement of workers, services and establishment, as well as the family members of those making use of these free movement rights. However, if it were determined that Article 9 AA does not have direct effect and can thus not be invoked before the national courts, the prohibition of discrimination with regards to

services and establishment loses much of its practical value. In that case, the standstill clause will have a broader personal scope. On the other hand, the standstill clause still has a narrower temporal scope than the non-discrimination right. In order for a measure to fall within its scope, it must be shown to have been introduced after the entering into force of the relevant part of the Association Acquis. This criterion does not apply for Article 9 AA and Article 10 of Decision 1/80.

With regard to the material scope, it must be recalled that the standstill clauses prohibit new restrictions whereas the non-discrimination rights prohibit discriminatory treatment. Although often, discriminatory treatment will also create a restriction, this is not always the case. Consider the example where both Turkish and EU workers are subject to an administrative fee of € 100. After the entering into force of Decision 1/80, this fee is dropped altogether for EU citizens. Although this creates discriminatory treatment, there is no new restriction for Turkish citizens and they cannot therefore invoke the standstill clause.¹⁵⁸

4.3 Conclusions

It is clear that the interrelation between the standstill clause, the non-discrimination right and the prohibition of discrimination leads to some difficulties. If the legal situation of a Turkish citizen must follow rigidly the situation of EU citizens but may at the same time not be subject to less favourable conditions as of a certain time, this leads to conflicts between the different provisions involved. The Dutch district court proposed, somewhat unnaturally, that the non-discrimination right could only be invoked if the elements of the standstill clause were also met. Another solution was to differentiate between the standstill clause and the non-discrimination right based purely on a temporal element. This approach,

¹⁵⁸ It may be noted that such a measure would be allowed if one were to follow the reasoning of the Dutch district court.

however, failed to take into account the prohibition of reverse discrimination.

Underscoring the supremacy of that principle, the Court in *Soysal* determined that the standstill clause does not prohibit new restrictions that apply to both Turkish and EU citizens. Although this is a natural consequence of the application of Article 59 AP, it seems to result in a drastic limitation of the extent to which the standstill clause awards protection, by determining that it applies only to discriminatory new restrictions. This has as an added effect that the difference between the standstill clauses and non-discrimination rights have by virtue of Article 59 AP been blurred. Although some differences remain regarding their scopes, in essence the two sets of provisions seem to have become very much similar.

CHAPTER 5: FROM DISCRIMINATION TO PROPORTIONALITY - SAHIN AND COMMISSION V THE NETHERLANDS

Since the influential and controversial *Soysal* Judgment in February of 2009, the Court has expanded on the interrelation between the principles further in the cases *Sahin* and *Commission v. the Netherlands*, which led to Judgments in September 2009 and April 2010 respectively. It is again useful to examine these latter judgments in some detail.

1 Minister voor vreemdelingenzaken en integratie v. Sahin

1.1 The facts of the case and preliminary questions

The *Sahin* Judgment was prompted by preliminary questions submitted by the Dutch *Raad van State* on 11 May 2006 – an interesting detail being that this pre-empted by a week the preliminary questions submitted by the German court in *Soysal*. Mr. Sahin was a Turkish national who as of 14 December 2000 had legally resided in the Netherlands with his Dutch wife and was in possession of a residence permit that was valid until 2 October 2002. He failed to apply for an extension of that residence permit until 10 February 2003, and when he did, the Dutch administration refused to consider the application on the ground that he had not paid the administrative charges of € 169.

Mr. Sahin in due course did pay the charges and subsequently filed a complaint with the Minister against the refusal to consider his application. When the Minister rejected the complaint as unfounded, Mr. Sahin

challenged that rejection before the Dutch district court, arguing that the administrative fee had been newly introduced in contravention of the standstill clause of Article 13 Decision 1/80 on the ground. It might theoretically have been easier for Mr. Sahin, as the husband of an EU citizen, to make use of the rights provided in Directive 2004/38¹⁵⁹. However, apparently his wife had not made use of her free movement rights under European law and the matter remained a national one, leaving the Association Acquis as the most viable option.

After the district court ruled in Mr. Sahin's favour, the Minister lodged an appeal before the *Raad van State*, arguing that the situation of Mr. Sahin fell outside the scope of Article 13 of Decision 1/80. That court noted that, while the Dutch administrative charges must without doubt be considered as 'new' within the meaning of the standstill clause, it must still be determined whether they also constitute 'restrictions' in the sense of that clause, "having regard, inter alia, to the fact that the amount of the charges levied in relation to such applications significantly exceeds that imposed on Community nationals and to members of their families".¹⁶⁰

Uncertain about the proper interpretation of Article 13 of Decision 1/80, the *Raad van State* referred several preliminary questions to the Court. The first question was concerned with the concept of legal residence, one of the elements in Article 13. It asked essentially whether a person such as Sahin, who had legally resided in the Netherlands but failed to apply in time for the extension of his residence permit – meaning that in the intermediate time he was under national law neither legally resident nor entitled to work –, could validly rely on the standstill clause.

¹⁵⁹ Articles 24 and 25(5) of 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 (OJ 2004 L 158, p. 77).

¹⁶⁰ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Para. 45.

Secondly, the Dutch court asked if the term “restriction” included the requirement to pay administrative charges for the extension of a residence permit, where failing this payment the application would not be considered. It wished to know particularly if the reply to this question would be influenced by the fact that the charges levied did not exceed the costs of processing the application.

The third question was whether the standstill clause, when read in conjunction with Article 59 AP, should be interpreted as meaning that the amount of administrative charges paid by Turkish nationals should not exceed the amount of the charge that is levied on EU citizens for similar documents.

1.2 The Commission’s submissions

In its at first sight confusing submissions in this case, the Commission took the referring court’s questions one step further. It began its argumentation by stating that the standstill-clause does not absolutely forbid a Member State to create a system whereby a migrant must pay a larger proportion of the costs involved in the processing of certain requests when it has charged a nominal fee before.¹⁶¹ This statement is arguably a little surprising, as the Commission had so far maintained strongly that these clauses prohibited *any* restriction.¹⁶²

However, the Commission continued by arguing that, while the standstill clause contains no absolute prohibition, it does lead to the application of the non-discrimination principle of Article 9 AA. According to the

¹⁶¹ European Commission’s written submissions to the European Court of Justice in Case C-242/06, *Sahin*, 22 September 2006, Para. 50. This statement seems to be diametrically opposite to the Court’s decision in the Case C-16/05, *Tum and Dari*, [2007] ECR I-7415, Para. 61.

¹⁶² It could be argued that the Commission’s hesitant approach towards an extensive interpretation of the standstill and non-discrimination clauses can be explained by its attempts to negotiate readmission agreements with Turkey, for which it will have to give some rights in return. See Senol (2009) and EurActiv: Interview with Professor Haluk Kabaalioglu.

Commission, this meant in practice that, when the standstill provision applies, the general principle of Article 9 AA is activated and it follows that the Member State may not treat a Turkish migrant less favourably than an EU citizen.¹⁶³

1.2.1 Soysal avant la lettre?

It is interesting to note that the Commission submitted its observations well before the ruling in *Soysal*, which might have significantly influenced its reasoning. As it is, an interesting parallel to the *Soysal* Judgment can be found in the Commission's conclusions, although its reasoning is construed in a different manner. This parallel can be found in the fact that, in both cases, it is determined that the standstill provision does not prohibit legislation which applies equally to Turkish and EU citizens. As has been shown, the Court established as much in the *Soysal* Judgment on the basis of the prohibition of reverse discrimination laid down in Article 59 AP.

Remarkably, the Commission does not apply Article 59 AP in its submissions despite the referring court's explicit reference to that provision in its preliminary questions. Instead, it employs a construction whereby the standstill clause "leads to" the application of Article 9 AA and thus prohibits the less favourable treatment of Turkish nationals as compared to EU citizens. Rather than determining as much on the basis of Article 9 AA, the Commission proposes that this interpretation can be reached directly on the basis of Article 13 of Decision 1/80, read apparently in the light of the general non-discrimination right.

Had the Commission had access to the *Soysal* Judgment at the time of writing its observations, it would likely not have made use of Article 9 AA

¹⁶³ European Commission's written submissions to the European Court of Justice in Case C-242/06, *Sahin*, 22 September 2006, Para. 51. See also the Netherlands Government's statement of defence in Case C-92/07, *Commission v. the Netherlands*, 2 May 2007, Para. 40 ff.

in such a manner.¹⁶⁴ It has been proposed above that the ruling in *Soysal* effectively added the element of non-discrimination to the standstill clause. So what makes the Commission's submission's noteworthy is that it does precisely that, albeit perhaps more directly and less logically.

1.2.2 Acceptable restrictions and *de minimis*: a possible opening

In its submissions, the Commission reminds the Court that it has so far not distinguished between 'acceptable' and 'non-acceptable' restrictions, and that it has neither accepted a *de minimis* approach to the standstill clauses.¹⁶⁵ As stated, a *de minimis* approach would mean that substantial restrictions would violate the standstill clause but that minimal restrictions could be exempted from it. This enforces the Commission in its reasoning that the Dutch administrative fees violate the standstill clause regardless of their height.

It is thus remarkable that the Commission also states that the standstill clause does not absolutely forbid Member States from creating a system whereby a migrant must pay a larger proportion of the costs involved in the processing of the application for a permit – when it has charged a nominal fee before. From the submissions of the Commission, then, there seems to be some room to accept an increase in the fees levied to Turkish citizens, within reason, so long as some fees have existed previously.

1.3 The Court's decision in *Sahin*

Some three years after the Commission had submitted these observations, the Court published its decision, which proved to be largely in Mr. Sahin's favour. In the first part of its Judgment, the Court discussed the personal

¹⁶⁴ It might be noted that the Commission's submissions in *Soysal* make no reference to discriminatory treatment – despite having been drafted within the same month as the submissions in *Sahin*. European Commission's written submissions to the European Court of Justice in Case C-228/06, *Soysal*, 8 September 2006.

¹⁶⁵ European Commission's written submissions to the European Court of Justice in Case C-242/06, *Sahin*, 22 September 2006, Para. 51.

scope of Article 13 of Decision 1/80. In response to the question whether that provision applied to Mr. Sahin given the requirement of legal residency, the Court stated that, under Dutch law, from the date of his belated application, Mr. Sahin's residence in the Netherlands had again to be regarded as legal. Furthermore, it was undisputed that Mr. Sahin would have obtained an extension of his residence permit if he had paid the administrative charges and it could be concluded from this that his stay was also legal. After all, residence permits as such have only declaratory value and to determine that a person's residence is illegal on the basis of a belated application for a residence permit would be disproportionate.¹⁶⁶

Having dismissed this issue, the Court continued to examine the scope of the standstill clause. It reiterated that Article 13 of Decision 1/80 has direct effect and that it prohibits generally the introduction of any new measure having the object or effect of making the exercise of the freedom of movement for workers subject to more restrictive conditions than those which applied at the entering into force of Decision 1/80.¹⁶⁷ Referring to *Soysal*, the Court stated "that the adoption of new rules which apply in the same way both to Turkish nationals and to Community nationals is not inconsistent with any of the standstill clauses".¹⁶⁸

The Court then established that, while Turkish citizens applying for (the extension of) a residence permit were subject to an administrative fee, Dutch nationals must also pay administrative charges for their identification documents. Likewise, EU citizens have to pay for similar documents when residing in the Netherlands, although according to European legislation such payment may not be higher than the charges imposed on Dutch

¹⁶⁶ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Paras. 57-9.

¹⁶⁷ *Ibid*, Paras. 62-3.

¹⁶⁸ *Ibid*, Para. 67.

nationals.¹⁶⁹ Since both EU and Dutch citizens are also in some way subject to administrative fees, the Court deduced that “Turkish workers and members of their families cannot validly rely on one of the standstill clauses [...] in order to insist that the host Member State exempt them from payment of any administrative charge”.¹⁷⁰ Any other interpretation would, the Court stressed, be inconsistent with Article 59 AP.

The next two paragraphs deserve to be quoted in full:

70 “The standstill clause in Article 13 of Decision No 1/80 therefore does not, as such, preclude the introduction of legislation of that type which makes the granting of a residence permit or an extension of the period of validity thereof conditional on the payment of administrative charges by foreign nationals residing in the territory of the Member State concerned.”

71 “Nevertheless, such legislation must not amount to creating a restriction within the meaning of Article 13 of Decision No 1/80. Read in conjunction with Article 59 of the Additional Protocol, Article 13 implies that although a Turkish national to whom those provisions apply must certainly not be placed in a position more advantageous than that of Community nationals, he cannot on the other hand be subjected to new obligations which are disproportionate as compared with those established for Community nationals.”

Having decided that a Member State may not, under the Association

¹⁶⁹ Article 25(2) of 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 (OJ 2004 L 158, p. 77).

¹⁷⁰ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Para. 69.

Acquis, subject a Turkish citizen to obligations that are disproportionate compared to the obligations of Community nationals, the Court continued by explaining how that finding could be applied in this case. Given that EU citizens paid administrative fees of € 30 whereas Turkish citizens were obliged to pay € 169 for residence permits with a shorter period of validity, the financial impact on the latter group was considered to be significant. The Court considered this difference to be unjustified even in the light of the Dutch argument that the cost of issuing permits to Turkish citizens was higher compared to that of issuing permits for EU citizens.

The Court thus concluded that Article 13 of Decision 1/80 prohibited the introduction of national legislation making the granting or extension of a residence permit conditional on the payment of administrative charges, “where the amount of those charges payable by Turkish nationals is disproportionate as compared with the amount required from Community nationals”.¹⁷¹

1.4 Reflections on *Sahin*

This Judgment was of great importance because it forced the Netherlands to reconsider its system of administrative fees – which it did actually adapt in accordance with *Sahin* on the day the judgment was published.¹⁷² So far, it has been suggested that such a revision might have to take place in Germany also.¹⁷³ However, *Sahin* is also a significant judgment in the context of the interrelation between the standstill clause and the discrimination principles. In fact, its conclusion is surprising on three accounts: First, the Court appears to introduce a two-step test, distinguishing between the application of the standstill clause (which does not ‘as such’ preclude the introduction of the administrative charges) and

¹⁷¹ Ibid, Para. 74.

¹⁷² See Case C-168/03, *Commission v. Spain*, [2004] ECR I-8227, Para. 24.

¹⁷³ Ünal Zeran (2010), p. 1.

the creation of a restriction in the sense of this clause (which includes the previously unused concept of proportionality). Second, the Court suggests that it is reconsidering its limitation of the standstill clause in *Soysal* while in fact doing the exact opposite by introducing the novel concept of proportionality. Third, even more so than in *Soysal*, the Court has bended the prohibition of reverse discrimination into a principle of non-discrimination.

1.4.1 The two-step test for standstill

Paragraph 71 quoted above could lead to some confusion. It seems to suggest that, after having determined that the standstill clause is not violated, it remains still to be examined whether the contested measure creates a restriction in the sense of the standstill clause. Thus, a two-step test is created of which the first step would be to check for a violation. Such a violation will in principle not exist if a restriction is new but has been introduced for EU citizens and Turkish citizens alike. The Court after all establishes that the standstill clause do not ‘as such’ preclude legislation that introduces administrative fees for the granting or extension of a residence permit where these apply to both Turkish nationals and EU citizens (Paragraph 70). A measure that would violate the standstill clause at the first step might be a visa requirement, which does not apply to nationals of EU Member States.

When a measure impacts on both groups of persons and is thus not ‘as such’ precluded, it appears that *Sahin* introduces a second step whereby it is examined whether this measure nevertheless creates a restriction in the sense of the standstill clause. In that case, that clause would prohibit a national rule only in so far as it creates obligations for Turkish migrants that are disproportionate compared to those applicable to EU citizens. Applying this two-step test in *Sahin* means that the fees, which apply to both groups of persons but are significantly higher for Turkish nationals, withstand the

first part of the test and are thus not precluded as such, but fail the second part of the test for being so much higher as to be disproportionate.

This apparent distinction between a violation and a restriction of the standstill clause is dogmatically somewhat baffling given the fact that the existence of a restriction is a component of the standstill clause itself.¹⁷⁴ It is also confusing given that the second step would not have been necessary in order to answer the preliminary questions. After determining that the standstill clause does not ‘as such’ preclude measures that apply to both EU and Turkish citizens, the Court could on the basis of *Soysal* have concluded that the measures in question were less favourable to Turkish nationals than to EU citizens and established that the standstill clause had been violated.

1.4.2 *Soysal* reconsidered?

The *Sahin* Judgment is the first case in which the Court has applied its ruling in *Soysal*. It is worth its while to examine closely how exactly it does this. Having reiterated some of its previous case law on the standstill clauses, the Court repeats its ruling in *Soysal* that “the adoption of new rules which apply in the same way both to Turkish nationals and to Community nationals is not inconsistent with any of the standstill clauses laid down in the fields covered by the EEC-Turkey Association”. Furthermore, it recalls that “if such rules applied to nationals of Member States but not to Turkish nationals, Turkish nationals would be put in a more favourable position than Community nationals, which would be clearly contrary to the requirement of Article 59 of the Additional Protocol”.¹⁷⁵

The Court might have determined at this point that this reasoning did not

¹⁷⁴ It is nevertheless reproduced without comment in Kurzidem (2010), p. 126.

¹⁷⁵ Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Para. 67.

apply to the Dutch administrative fees because they did not apply in the same manner both to Turkish nationals and EU citizens. It has however already been seen that the Court instead established that, given that some form of fee was imposed on Turkish and EU citizens alike, the former group could not rely on the standstill clause to be exempted from that fee altogether. This in turn led to the conclusion that the standstill clause did not ‘as such’ preclude the Dutch rules in question. It may be noted that this line of reasoning is perfectly logical, yet it seems to be a far cry from the assertion that the standstill clause prohibits any rule having either the object or the effect of making the exercise of the rights of a Turkish national subject to stricter conditions.

When the Court starts Paragraph 71 with the word “nevertheless”, then, it might have been expected that it was about to soften its conclusions somewhat. Instead, the Court determines that “nevertheless, such legislation must not amount to creating a restriction within the meaning of Article 13 of Decision No 1/80” and considers that such a restriction would be formed by “new obligations which are disproportionate as compared with those established for Community nationals”. In so far as a softening of the previous case law is implied, it turns out to be misleading.

Paragraph 71 of *Sahin* does not moderate the impact of *Soysal*, but strengthens it. Where it followed from *Soysal* that the standstill only covers discriminatory new restrictions, it is apparent from *Sahin* that in fact it merely prohibits disproportionately discriminatory restrictions. A discussion could have arisen as to the exact meaning of the term ‘disproportionate’, which the Court has not used in this context before, but this discussion only really took place in the more recent case *Commission v. the Netherlands*. Perhaps the reason for this is that the administrative fees for Turkish citizens have already been lowered by the Dutch government to the same

levels as the fees for EU citizens.¹⁷⁶

1.4.3 Reverse discrimination becomes non-discrimination

What makes *Sahin* a somewhat difficult judgment to work with is that the Court does not clearly distinguish between the two principles that are under scrutiny in that case, namely Article 13 of Decision 1/80 and Article 59 AP. Although the Commission's submissions were to an extent confusing, they did maintain a dogmatic distinction between the principles by stating that the application of the standstill clause could 'lead to' that of the general discrimination prohibition in Article 9 AA. The ECJ, on the other hand, just as in *Soysal*, uses a provision that forbids the better treatment of Turkish citizens to stop them from being treated disproportionately less favourable than EU citizens. Although this reasoning is in itself valid, as the discussion in *Soysal* has shown, it blurs the boundaries between the discrimination and reverse discrimination prohibitions. The non-discrimination right and the prohibition of reverse discrimination seem to become two sides of the same coin that limits the impact of the standstill clause.

2 Commission v the Netherlands

The conclusions reached above have been tested in a case almost identical to that in *Sahin*, namely *Commission v the Netherlands*, which was decided in April 2010.¹⁷⁷ This is the first infringement procedure commenced by the Commission in the area of the Ankara Acquis and it concerns the same administrative practice that was subject to the Court's scrutiny in *Sahin*. The Commission brought its action before the Court on 16 February 2007, challenging the Dutch law requiring the payment of administrative charges

¹⁷⁶ Brief van de staatssecretaris van Justitie, 'Leges en Associatierecht met Turkije' (3 November 2009), TK 30573, nr. 28.

¹⁷⁷ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000.

for the issue or extension of residence permits. Whereas that law was only examined with regard to Turkish workers in *Sahin*, the Commission also challenged its application to Turkish service providers and those wishing to make use of the freedom of establishment. According to the Commission, the existence of these higher charges violated both standstill clauses as well as the general and specific non-discrimination rights contained in the AA, the AP and Decision 1/80.

In discussing the standstill clauses, the Commission recalled that they have direct effect and apply to substantive and procedural requirements as well as the first admission of Turkish citizens to the territory of a Member State, and that they were not subject to a *de minimis* rule. Furthermore, it acknowledged that the standstill clauses are limited by Article 59 AP and concluded that, in spite of this limitation, the Dutch law still violated both clauses.

As regards the discrimination clauses, the Commission argued that the administrative fees constituted a condition of work in the sense of Article 10 of Decision 1/80. Failing that, the charges should in any case be considered discriminatory under Article 9 AA.

It is important to realise that the Commission had started proceedings before the Court some two years before the publication of the *Soysal* and *Sahin* Judgments. For this reason, during the hearing before the Court, the Commission had an opportunity to react to *Sahin*. It argued that the concept of ‘higher charges’ to which it had referred included ‘disproportionate charges’ and could be understood in that sense.¹⁷⁸

2.1 The Dutch response

As was the case for the Commission, the Dutch government submitted its written arguments before the Judgments in *Soysal* and *Sahin* were decided,

¹⁷⁸ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 27.

meaning that some of its responses reacted to arguments that are no longer in line with the case law.¹⁷⁹ For that reason, it also made use of the hearing before the Court to expand on its arguments in the light of recent legal developments. The Dutch government did not dismiss the Commission's claims altogether but tried to limit their scope. For instance, recognising that the standstill clauses concern both substantive and procedural rules, the Netherlands argued that, unlike Article 41(1) AP, Article 13 of Decision 1/80 does not apply to the first admission of a Turkish worker to a Member State. It reasoned that Decision 1/80 presumes a right of residence which depends on whether there is a right of access to the labour market of a Member State. Therefore, before being able to invoke Article 13 of Decision 1/80, a Turkish migrant must already have entered the territory of the Member State and belong to its regular labour market.¹⁸⁰

Furthermore, the Netherlands submitted that it had reduced the amount of the administrative charges with effect from 17 September 2009 – the day on which the *Sahin* Judgment was passed – so that Turkish and EU citizens in most cases now paid the same amount of fees. Differences remained in the case of the first admission of workers and to a lesser extent for the first admission for the purpose of establishment and the provision of services.

The arguably most important submission was that the amount of the charges could be justified. The Netherlands relied on the Judgment in *Panayotova*¹⁸¹, which concerned the Association Agreements with Bulgaria, Poland and the Slovak Republic (the so-called Europe Agreements), but could according to the Netherlands be applied by analogy. The Europe Agreements contain no standstill clauses, but they did include a quite

¹⁷⁹ See The Netherlands Government's rejoinder in Case C-92/07, *Commission v. the Netherlands*, 20 August 2007. Since during the oral proceedings several issues were clarified or dropped altogether in the light of the more recent case law, this account relies on the summary provided by the Court in its Judgment.

¹⁸⁰ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Paras. 29-30.

¹⁸¹ Case C-327/02, *Panayotova and others*, [2004] ECR I-11055.

extensive prohibition of discrimination. *Panayotova* sought to clarify Article 45(1) of the Agreement with Bulgaria,¹⁸² which read as follows:

‘Each Member State shall grant, from entry into force of the Agreement, for the establishment of Bulgarian companies and nationals and for the operation of Bulgarian companies and nationals established in its territory, a treatment no less favourable than that accorded to its own companies and nationals, save for matters referred to in Annex XVa.’

This non-discrimination right was limited in its extent by Article 59(1) of the Europe Agreement with Bulgaria, which provided the following:

“For the purpose of Title IV, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement.”

Having been asked in *Panayotova* to determine the exact extent of these provisions, the Court had established that any restrictions on the right of establishment imposed by a Member State must be appropriate for achieving the objective in view and must not constitute measures which

¹⁸² The Agreements with Poland and the Slovak Republic contained equivalent provisions, which are equally subject to the ruling in *Panayotova*.

strike at the very substance of the rights granted. In its submissions in *Commission v. the Netherlands*, the Dutch government added that its laws, in order to be justified, must not make the exercise by Turkish citizens of their rights under the AA impossible or excessively difficult, that the charges must be non-discriminatory, proportionate, compliant with fundamental rights and reasonable in their amount.¹⁸³

Having proposed this justification test, the Netherlands argued that it satisfied all the requirements because, first, the charges were no more than a simple formal requirement that in no way undermined the substance of the right of access to the labour market as guaranteed by Decision 1/80.

Second, given that the AA does not create an internal market, the situation of Turkish and EU citizens is according to the Netherlands fundamentally different, meaning that the charges imposed are not discriminatory. To determine otherwise, the Dutch government argued, would wrongly extend the far-reaching rights granted to EU citizens in Directive 2004/38 to Turkish nationals. The Netherlands thirdly considered the charges to be proportionate because Turkish nationals normally had sufficient means to pay for them and could borrow money if necessary. As to the fourth criterion, it was submitted that exemptions were provided for Turkish citizens who could rely on Article 8 ECHR¹⁸⁴ concerning respect for private and family life, meaning that the charges were in accordance with fundamental rights. Finally, the Netherlands advocated that the charges were reasonable because they were based on an analysis of the cost price of issuing the permits, whereby 30% of those costs was still met by the State.

Interestingly, the Netherlands also invoked the Commission's statement in its submissions in *Sahin* that Member States who have charged a nominal fee for the processing of the application for a permit may subsequently

¹⁸³ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 32.

¹⁸⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

require a migrant to pay a larger proportion of the costs involved. This, according to the Netherlands, is exactly what it had done. As to the Commission's allegation that the concept of 'higher' charges includes disproportionate charges, the Netherlands disagreed and argued on that basis that the Commission's action, which challenged the higher charges, was unfounded.

2.2 The German government's intervention

Although the case was directed against the Netherlands, the German government intervened in its favour and did so in far stronger terms than the Dutch government. In its submissions to the Court, Germany maintained that Article 9 AA lacked direct effect and that Article 10 Decision 1/80 was too limited in scope to cover all the situations challenged by the Commission. If the Commission were to invoke Article 9 AA despite its lack of direct effect, Germany argued, this would artificially increase the scope of Article 10 of Decision 1/80, which was designed as a specification of the general principle contained in Article 9 AA.¹⁸⁵

As to the possible combination of Article 9 AA with the standstill clauses – a line of reasoning that had also been apparent in the Commission's submissions in *Sahin* – Germany strongly contended that Article 9 AA does not provide for an all-encompassing right to non-discrimination for Turkish citizens, even in combination with the standstill provisions.¹⁸⁶ To decide otherwise, it stressed, would lead to an interpretation so broad that it would amount to the *de facto* accession of Turkey to the EU in contravention of Community law.

Similarly to the Netherlands, Germany argued that the charges could be

¹⁸⁵ German Government's intervention in Case C-92/07, *Commission v. the Netherlands*, 12 December 2007, Para. 24.

¹⁸⁶ German Government's intervention in Case C-92/07 *Commission v. the Netherlands*, 12 December 2007, Paras. 26-27. Germany refers to Case C-171/95, *Tetik v. Land Berlin*, [1997] ECR I-329, Para. 29 and Case C-37/98, *Savas*, [2000] ECR I-2927, Para. 59.

justified. As has been outlined above,¹⁸⁷ Germany reasoned that, although neither of the standstill clauses provides an explicit basis for justifications, such a policy must exist if the standstill clauses are to be interpreted as prohibiting *any* new restriction. Given that within the European Internal Market, non-discriminatory restrictions to the free movement of persons can be justified by unwritten objective justification grounds, it would be illogical if such reasoning were not also to apply in the context of the Association Acquis – which is after all less far-reaching than the Internal Market.¹⁸⁸ The German government also suggested a justification ground, namely the necessity to verify the entry and purpose of stay of migrants.

2.3 The Court's judgment

In a relatively long judgment, the Court rejected the Dutch argument that Article 13 of Decision 1/80 does not apply to the first admission of workers. It recalled its Judgment in *Sahin*, in which it had determined that the standstill clause in Article 13 of Decision 1/80 was designed also to protect Turkish workers who do not yet qualify for the rights in relation to employment.¹⁸⁹ It followed that both standstill clauses prohibit the introduction of any new restrictions on the exercise by a Turkish citizen of the free movement of persons, relating to both substantive and procedural conditions governing the first admission to the territory of a Member State and beyond.¹⁹⁰

Having determined as much, the Court continued by examining the existence of a failure to fulfil obligations resulting from the standstill clauses. This required an interpretation of the concept of proportionality that had been introduced in the *Sahin* Judgment, on the exact consequences

¹⁸⁷ See supra Chapter 2, part 4.

¹⁸⁸ German Government's intervention in Case C-92/07 *Commission v. the Netherlands*, 12 December 2007, Paras. 15-6.

¹⁸⁹ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 45.

¹⁹⁰ *Ibid*, Para. 49.

of which the different parties were divided. While the Commission had found that the concept of disproportionate charges was included within the concept of higher charges, the Netherlands disagreed. It argued that charges which are not exactly equal to those applicable to EU citizens are not necessarily disproportionate. In this respect, it attached importance to the fact that the charges imposed on Turkish nationals represented only a part of the real costs.

In response, the Court limited itself to a reiteration of its observations in *Sahin*, in which it had found the Dutch administrative fees to constitute a disproportionate restriction. It could therefore suffice by stating that since the situation that had given rise to that Judgment, the amount of these charges had actually increased. From this, the Court concluded that it could validly continue to examine the existence of a failure to comply with the standstill clauses in Articles 13 of Decision 1/80 and 41(1) AP.

It may be noted that the lowering of the fees in 2009 did little to change this conclusion, as this had taken place after the period laid down in the Commission's reasoned opinion and could thus in accordance with settled case law not be taken into account during the Court proceedings.¹⁹¹

The Court next established that the restrictions in question were new in the sense of the standstill rules, but that "the imposition of any new measure in that context is not prohibited".¹⁹² After all, the adoption of measures that apply equally to Turkish and EU citizens is not inconsistent with the standstill rules, as to determine otherwise would contravene Article 59 AP.

In order to establish whether the measures in this case were prohibited, the Court found it necessary "to determine whether the contested charges impose on Turkish nationals new obligations which are disproportionate in

¹⁹¹ Case C-168/03, *Commission v. Spain*, [2004] ECR I-8227, Para. 24.

¹⁹² Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 59.

relation to those provided for citizens of the Union”.¹⁹³ In this context, it did not accept the Dutch argument that the higher fees for Turkish citizens could be explained by the higher costs involved in processing their files. Such a ratio, the Court held, did not justify such a significant difference between the different charges.¹⁹⁴ It concluded that “the argument of the Kingdom of the Netherlands that the contested charges represent 70% of the costs of processing files is not capable of justifying their application and that Member State’s assertion that those charges are not disproportionate must be rejected”.¹⁹⁵

As to the Netherlands’ submission that the charges were non-discriminatory because of fundamental differences between Turkish and EU citizens, the Court replied that the AA seeks to bring the situation of Turkish nationals and the citizens of the Union closer through the progressive securing of free movement for workers and the abolition of restrictions between them.¹⁹⁶ Furthermore, Article 9 AA and Article 10 of Decision 1/80 contribute to the progressive integration of Turkish migrants. Within that context, the Court found that the Netherlands could not justify the difference in fees, and concluded that “the Commission correctly relied on the non-discrimination rules as well as on Article 59 of the Additional Protocol for the purpose of verifying whether the contested charges did not make the situation of those nationals worse in comparison with that of citizens of the Union, in a manner which was contrary to the standstill rules”.¹⁹⁷

Returning to the concept of proportionality, the Court stated that not all higher charges are necessarily disproportionate. For instance, it did not rule out that charges which are “slightly higher” for Turkish nationals than for

¹⁹³ Ibid, Para. 63.

¹⁹⁴ Similarly: Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*, [2009] ECR I-0000, Para. 73.

¹⁹⁵ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 65.

¹⁹⁶ See Article 2(1) AA.

¹⁹⁷ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 69.

EU citizens may, “in certain specific instances”, be considered proportionate.¹⁹⁸ In the circumstances of *Commission v. the Netherlands* this was clearly not the case, as the Court pointed out that the lowest fee to be paid by Turkish nationals was more than two-thirds higher than that to be paid by EU citizens. Such a difference could, according to the Court, not be regarded as being “minimal”.

As to the non-discrimination rights of Articles 9 AA and 10 of Decision 1/80, the Court could simply conclude that, having applied charges of a disproportionate amount to Turkish citizens, the Netherlands had thereby imposed charges of a discriminatory nature. This constituted a violation of Article 10 of Decision 1/80 in so far as it affected Turkish workers or members of their family. Where the charges impacted Turkish nationals seeking to avail themselves of the freedom of establishment or the freedom to provide services pursuant to the AA, they were considered to contravene Article 9 AA.

The Court’s overall conclusion could be fitted into a single sentence:

76 “It follows that, by introducing and maintaining a system for the issue of residence permits providing for charges which are disproportionate in relation to those imposed on nationals of Member States for the issue of similar documents, and by applying that system to Turkish nationals who have a right of residence in the Netherlands on the basis of the Association Agreement, the Additional Protocol or Decision No 1/80, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 9 of the Association Agreement, Article 41(1) of the Additional Protocol and Articles 10(1) and 13 of Decision No 1/80.”

¹⁹⁸ Ibid, Para. 74.

3 Conclusions

It can be seen that the Judgments in *Sahin* and *Commission v. the Netherlands* present a further development from the decision in *Soysal*. As stated, that judgment made explicit that Article 59 AP necessitates an interpretation of the standstill clause whereby new restrictions on Turkish nationals do not violate that clause so long as they apply equally to EU citizens. In *Sahin*, the referring court asked the Court how this ruling should be applied to a system in which administrative charges for residence permits were levied on Turkish migrants that were significantly higher than the charges imposed in similar situations on EU citizens. Given that the charges levied on Turkish citizens arguably did not apply equally to nationals of EU Member States, a possible logical application of *Soysal* would have been to establish that the fees violated the standstill clause in so far as they exceeded the charges imposed on the EU citizens.

As stated, the Court did not adopt this approach but instead established that, since some form of charges applied to both EU and Turkish citizens, the standstill clause did not preclude them as such. These charges, however, could according to the Court not create a restriction within the meaning of Article 13 of Decision 1/80. This would be the case if the fees subjected Turkish nationals to new obligations that were disproportionate as compared with those established for Community nationals. The difference between the two sets of fees was considered to be significant and unjustified and for that reason contravened Article 13 of Decision 1/80.

Thus, the Court appears to have added a new level to the standstill clauses, whereby after establishing whether or not they have been violated, it must be determined whether the contested measure creates a restriction consisting of the disproportionate treatment of Turkish nationals. As in *Soysal*, Article 59 AP is instrumental in justifying this interpretation, which leads to the odd conclusion that a provision designed to prevent the more

favourable treatment of Turkish citizens as opposed to EU citizens is used to prevent those Turkish citizens from being treated disproportionately less favourably than the citizens of EU Member States.

The Court's more recent judgment *Commission v. the Netherlands* provides an interesting basis on which to further examine this reasoning. It was published half a year after its predecessor *Sahin* and concerned the same administrative fees, save that they had been increased in the meanwhile and the Court was now asked to comment also on its impact on Turkish service providers and those making use of their freedom of establishment. For this purpose, the Commission invoked all principles at a stroke – that is to say: Article 13 of Decision 1/80, Article 41(1) AP, Article 10 of Decision 1/80 and Article 9 AA. It did not as such invoke Article 59 AP but during the oral proceedings did acknowledge its importance as recognised in *Soysal* and *Sahin*.

The Commission's arguments were met by responses from both the Netherlands and Germany. These responses shared two common factors. First, interestingly, both Member States reasoned that the difference between the fees should be justifiable. The Netherlands, drawing inspiration from a judgment that was concerned with non-discrimination clauses in the Europe Agreements with Bulgaria, Poland and the Slovak Republic, proposed a set of criteria that should be met in order for its measures to be justified and argued that it satisfied those criteria. Among others, it advocated that it had not undermined the substance of the right of access to the labour market and that the situation of Turkish and EU citizens were fundamentally different because the Association Acquis did not seek to create an Internal Market. This leads to the second common factor. Both the Netherlands and Germany expressed the fear that, if the Court were to rule that the standstill clause had been violated, this would wrongly extend such far-reaching rights to Turkish nationals as are actually exclusive to the

European Internal Market.

It is apparent from the Court's judgment that it follows its reasoning in *Sahin* very closely. Given that the administrative fees in *Sahin* had been considered disproportionate and they had even increased since that time, it was a small step to determine that the Dutch laws under scrutiny were similarly disproportionate and thus in contravention of the standstill clause. In response to the Dutch arguments, the Court found that the difference between the charges was so disproportionate that it could not accept the Dutch justification that the higher fees reflected the higher costs of processing the residence permits for Turkish citizens, even where part of those costs was still covered by the State. It similarly did not accept that there were fundamental differences between the situation of Turkish and EU citizens.

A new aspect to the judgment in *Commission v. the Netherlands* is that it expanded further on the interpretation of the concept of proportionality. While the Commission found that the terms 'higher charge' and 'disproportionate charge' could be used nearly interchangeably, the Netherlands volunteered that 'slightly higher charges' might not be disproportionate. The Court did not agree with the Commission and replied to the Netherlands that "it cannot be ruled out that the charges applicable to Turkish nationals, slightly higher than those claimed from citizens of the Union for the issue of similar documents, may, in certain specific instances, be considered proportionate".¹⁹⁹ Applied to the circumstances of the case, it established that a difference of more than two-thirds between charges applied to Turkish and EU citizens "cannot be regarded as being minimal" and is therefore disproportionate.²⁰⁰

¹⁹⁹ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 74.

²⁰⁰ *Ibid.*

CHAPTER 6: TURKISH DELIGHT?

1 A whole lot less than the sum of its parts

It has been seen that the application of the principle of reverse discrimination means that only discriminatory restrictions violate the standstill clause. This interpretation of the standstill clause as presented in the *Soysal* Judgment has been upheld in the Court's most recent case law, *Sahin* and *Commission v. the Netherlands*, and has even been taken a step further.

After *Sahin* and *Commission v. the Netherlands*, only disproportionately discriminatory measures constitute such a violation. The concept of proportionality seems to have been newly introduced into the Association Acquis. None of the provisions that have been discussed in this research make any mention of such a concept. Thus, however permissively that notion may be interpreted by the Court, it entails an entirely new test that follows directly from neither the prohibition of discrimination, nor the principle of reverse discrimination, nor the standstill clause.

Nevertheless, all three principles are invoked to validate the introduction of proportionality concept. It is very interesting to note the manner in which these principles are intertwined and blended in *Commission v. the Netherlands*. In the Court's words:

“the Commission correctly relied on the non-discrimination rules as well as on Article 59 of the Additional Protocol for the purpose of verifying whether the contested charges did not make the situation of those nationals worse in comparison with that of citizens of the

*Union, in a manner which was contrary to the standstill rules”.*²⁰¹

The suggestion is that both the principle of non-discrimination and the prohibition of reverse discrimination play an essential part in interpreting the standstill clause. This is an odd development for a clause that has been interpreted and applied numerous times without any mention of the discrimination principles.²⁰² The effect is that the test of proportionality, apparently based on all three principles at a stroke, seems to be far less than the sum of their parts, and that the independent value of the relevant provisions has become much more uncertain.

2 Re-interpreting the principle of non-discrimination

The discussion of the *Soysal* Judgment in Chapter 4 ended with the question what would be the independent value of the non-discrimination provision now that its ‘task’ can in many cases just as easily be carried out by the standstill clause, as long as the restriction has occurred after the entering into force of the Ankara Acquis. After all, since *Soysal*, the standstill clause prohibits new discriminatory restrictions which amount to the less favourable treatment of Turkish citizens as opposed to EU citizens, while the non-discrimination right prohibits the less favourable treatment of Turkish citizens as opposed to EU citizens. This question must now be reconsidered.

Since the Judgments in *Sahin* and *Commission v. the Netherlands*, the standstill clauses are interpreted as prohibiting restrictions which amount to

²⁰¹ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 69.

²⁰² Consider Case C-37/98, *Savas*, [2000] ECR I-2927; Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301; and Case C-16/05, *Tum and Dari*, [2007] ECR I-7415.

the disproportionately less favourable treatment of Turkish citizens as opposed to EU citizens. The issue is now whether such an interpretation should also apply to the principle of non-discrimination. Two reasons can be presented for extending this interpretation to the non-discrimination right. First, as stated, the Court invokes both the prohibition of reverse discrimination and the non-discrimination right when it interprets the standstill clause as prohibiting disproportionately discriminatory treatment. Having apparently been instrumental in introducing the concept of proportionality into the standstill clause, it would be logical if the non-discrimination right was interpreted in the light of that same concept.

A second reason for the possible reinterpretation of the prohibition of discrimination is a more subjective one. If the national courts were to look for less favourable treatment when applying the non-discrimination right while verifying if there is any disproportionately less favourable treatment in case of the standstill clause, this would create a strange asymmetry. The more rigid test would be provided by the standstill clauses, whose wording in no way refers to discrimination or proportionality but has instead been interpreted broadly as precluding *any* restriction.

This asymmetry would mean in practice that a Turkish citizen should be very careful as to which provision he or she invokes in the face of, for instance, a system of administrative fees such as that existed in the Netherlands. An unaltered application of the non-discrimination right would lead a court to forbid treatment whereby the plaintiff was received less favourable treatment than EU citizens. Applying the standstill clause, however, could lead a court to decide that the less favourable treatment of a Turkish national is allowed so long as it is not disproportionately less favourable. This seems to be an illogical construction. It is thus compelling to conclude that the judgments in *Sahin* and *Commission v. The Netherlands* impact not only on the standstill clause, but also by necessity influence the

interpretation of the principle of non-discrimination. Whereas this line of reasoning may be defensible legally, whether it is desirable from the point of view of the rights of Turkish citizens is another question entirely and cannot be answered in the context of this research.

3 The plea for justification grounds reconsidered

As stated, the German and Dutch governments have both advocated the possibility to justify any violation under the standstill clause. The Court has not, in its previous case law on the standstill clause, explicitly discussed the option of invoking justification grounds, but its judgments in *Soysal*, *Sahin* and *Commission v. the Netherlands* may help to open this discussion.

First and perhaps most obviously, in the latter two judgments the Court stated that the difference between the administrative fees was significant and could not be justified. In *Sahin*, the Dutch government had argued that the fees for Turkish citizens were higher because the costs involved in processing their residence permits were also higher. In *Commission v. the Netherlands* it had added that the State covered 30% of those charges itself. Although the Court rejected these proposed justification grounds, it clearly did not rule out the possibility of submitting a justification as such. It is interesting to see that the Court in its ruling on *Commission v. the Netherlands* discussed (and dismissed) each of the criteria with which, according to the Dutch government in its rejoinder, justification grounds should comply. This may, however, not be conclusive for the validity of these criteria but merely a discussion of the substantive arguments submitted by the Netherlands in this context.

It may be recalled that the German government has made a strong case for the introduction of justification grounds in the context of the Ankara Acquis. It drew an analogy with non-discriminatory restrictions to the free movement of persons within the European Internal Market. Whereas

directly discriminatory restrictions in that context can be justified only on grounds that are explicitly mentioned in the TFEU, indirectly discriminatory and non-discriminatory restrictions can be justified on such grounds as well as on unwritten justification grounds.²⁰³ Thus, a range of justification grounds is available where a Member State hinders the access to its market by an EU citizen, whether or not discrimination is involved.

Germany reasoned that, if the standstill clause should be interpreted as a prohibition to introduce any new restriction, Member States should too be able to justify a violation of it. After all, it has been recognised that Member States in the context of the Ankara Acquis are guided by the fundamental freedoms.²⁰⁴ Any principles recognised concerning the free movement within the Internal Market must be applied as much as possible also to Turkish citizens making use of their free movement rights.²⁰⁵ If a non-discriminatory hindrance to market access in the context of the Internal Market can be justified by unwritten justification grounds, then, the same should apply to the introduction of non-discriminatory restrictions in the context of the standstill clauses.

Since the *Soysal* judgment, this line of argument is no longer quite as compelling. In order to violate the standstill clause, restrictions must be discriminatory, making the analogy to hindrance of market access significantly less compelling.

4 Minimal restrictions v. *de minimis*

National measures must in fact not only be discriminatory, but since *Sahin* they must also be disproportionate before they constitute a restriction in the

²⁰³ Barnard (2007), p.262 and Chapter 2, point 4 above.

²⁰⁴ Articles 12-3 AA and Case C-434/93, *Ahmet Bozkurt v. Staatssecretaris van Justitie*, [1995] ECR I-1475, Para. 19.

²⁰⁵ Case C-434/93, *Ahmet Bozkurt v. Staatssecretaris van Justitie*, [1995] ECR I-1475, Para. 20.

sense of the standstill clause. As stated, the Court has shed some light as to its interpretation of the concept of proportionality, which it is well worth giving some attention to. In response to the arguments of the Dutch government, the Court found that the difference between the charges applied to Turkish and EU citizens was disproportionate, given that they “cannot be regarded as being minimal”.²⁰⁶ It can be inferred from this that the difference between the situations of Turkish nationals and EU citizens must be minimal in order to be considered proportionate. It has already been noted that, apparently, the Court condones the introduction of discriminatory restrictions so long as they are not disproportionate. To allow such restrictions unless they can be regarded as minimal could be described as a *de minimis* approach to the standstill clause. It will be interesting to see whether the Commission, in any future cases concerning the standstill clauses, will maintain its view that these clauses provide no room for *de minimis*.

5 “Strengthening relations to facilitate accession”

It may be recalled that the purpose of the Ankara Acquis is to steadily strengthen the commercial and economic relations between Turkey and the European Economic Community and to decrease the economic differences between these two parties in order to facilitate at a later stage Turkey’s accession to the Community.²⁰⁷ These purposes are laid down explicitly in Articles 13 and 2(1) AA. An interesting question to ask is whether this purpose is still vouchsafed in the Court’s most recent case law, given its introduction of the ‘proportionality test’.

On the one hand, the Court reaffirms the existence and validity of this goal in strong terms when it rejects the Netherlands government’s submission

²⁰⁶ Case C-92/07, *Commission v. the Netherlands*, [2010] ECR I-0000, Para. 74.

²⁰⁷ *Supra* at Chapter 1 (1).

that Turkey takes no part in the internal market as one of the defining characteristics of the EU and that therefore the situations of Turkish and EU citizens must be considered to be fundamentally different. This is a natural continuation of its earlier statements on the purpose of the Association Acquis, which often served to insist on a non-restrictive interpretation thereof.²⁰⁸

On the other, it can be defended that to impose a stricter test for non-discrimination and standstill serves in effect to weaken the relations between Turkey and the EU. After all, arguably both the standstill clause and the non-discrimination clause are interpreted more restrictively than before. This can hardly be considered to steadily strengthen relations between the two parties.²⁰⁹

6 The accession debate

It is beneficial to place the case law concerning relations with Turkey within its context. It is already clear that the position of Turkish nationals in the EU is a matter of some political sensitivity. It has been proposed that it was the European Court of Justice that safeguarded the application of the Association documents and that this judicial activism has so far served to offset the Member States' more guarded outlook.²¹⁰ Although the Association Agreement is aimed definitely towards the eventual accession of Turkey to the EU, the attainment of this goal within the foreseeable future is uncertain and the desirability thereof for many parties is

²⁰⁸ See for instance Joined Cases 317/01 and 369/01, *Abatay and others*, [2003] ECR I-12301, Para. 77.

²⁰⁹ Unfortunately, there is not yet a lot of literature concerning the *Sahin* and *Commission v. the Netherlands* Judgments. The discussions of *Sahin* in Kurzidem (2010) and Ünal Zeran (2010) confine themselves to a summary of the case and some of its practical consequences but do not discuss the issues above.

²¹⁰ Shah (2009), p. 1.

questionable also.²¹¹

Doubtless, this political setting places the Court in a difficult position. One need only recall the German government's forceful statement that to adopt a broader interpretation of the Association Acquis would be tantamount to enabling Turkey's accession to the EU – a decision, Germany stresses rightly, that cannot be taken by the judiciary. This leaves the Court in the uncomfortable situation of enforcing an agreement towards which many Member States are politically strongly opposed or at least reserved.

Without delving into the accession debate, on which has already been written extensively, in too much depth, it is relevant here to note that Member States' perspectives on such accession are far from clear. The Association Agreement was signed in 1963 in the light of a high demand for labour in the EEC and arguably a genuine wish to expand.²¹² It has been demonstrated in the literature that at this time, it was much more readily accepted that such an agreement should provide a stepping stone for eventual accession to the European Union.²¹³ In later years, the premise has been the deepening rather than widening of the EU. Still, although it was recognised that public opinion was largely not in favour of Turkish accession, the EU and its Member States are steadily moving towards such accession, in the view that "there is no plan B".²¹⁴ Accession negotiations between the EU and Turkey have started officially in 2005,²¹⁵ although it is

²¹¹ See, among others: Shah (2009), p. 5, Tweede Kamer, 'Spoeddebat over een uitspraak van het Europese Hof op grond waarvan Turkse dienstverleners zonder visum naar Nederland kunnen komen', 10 March 2009 (TK 61-4911); Blockmans (2007), p. 62. Viewpoints were different at the time the agreement was signed. See Feld (1965), p. 234.

²¹² Akgündüz (2008), p. 174; Phinnemore (1999), p. 16.

²¹³ Phinnemore (1999), pp. 31-32.

²¹⁴ Record of the High-Level Round Table Conference organized by the Netherlands Ministry of Foreign Affairs, 'Turkey and the EU. From Association to Accession?', 6 and 7 November 2003, Amsterdam, p. 224.

²¹⁵ Council Decision 2008/157 of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, *OJ L* 51/18, preamble.

expected that they will be drawn out over a long period of time.²¹⁶

As to the scope of the Ankara Agreement, it has been argued that the impact thereof on the migration and residence rights of Turkish citizens in the EU was widely underestimated at the time of signing. Most Member States were convinced that the rights of migrants were really determined by the large amount of bilateral recruitment agreements that also existed at the time.²¹⁷ A debate prompted by the *Soysal* judgment in the Dutch Parliament shows many members of parliament to object to the need to enforce the ‘outdated’ Agreement.²¹⁸ It can in fact be argued that the reality of EEC-Turkey relations was far less ambitious than the text of the Association Agreement might suggest.²¹⁹

Whatever the real status of the Association Agreement may be, it is clear that until the judgment in *Soysal*, the Court adopted a broad interpretation of this Agreement, as much as possible along the lines of the EC Treaty. It is in this light, and taking into account the new candidate status of Turkey, that the newer and more restrictive approach by the Court must be regarded.

7 “Other than that, Mrs. Lincoln, how did you enjoy the play?”

Although the three judgments that lie at the core of this research provoke intriguing questions on the relation between the standstill clauses and the

²¹⁶ Sociaal Economische Raad, ‘De komende uitbreiding van de EU, in het bijzonder de toetreding van Turkije’, Advies van de Commissie Internationale Sociaal-Economische Aangelegenheden, Publicatienummer 12, 8 november 2004, p. 13.

²¹⁷ Shah (2009), p. 4.

²¹⁸ Tweede Kamer, ‘Spoeddebat over een uitspraak van het Europese Hof op grond waarvan Turkse dienstverleners zonder visum naar Nederland kunnen komen’, 10 March 2009 (TK 61-4911). For those interested in Dutch politics: spokespersons of the parties CDA, VVD, PVV and Lijst Verdonk all state in one form or another that the consequences of the Association Acquis are not what had been envisaged and that, if need be, changing that Acquis could be necessary. Spokespersons of GroenLinks opposed this view and argued that the Netherlands must honour its international obligations, which it has entered knowingly. Other political parties did not submit comments.

²¹⁹ Blockmans (2007), p. 61, referring to Esen (1990), pp. 223 ff.

discrimination principles, a practical application thereof may not be immediately apparent. In so far, the literature following these decisions has focused more on the impact that the judgments are likely to have on the laws of the Member States.²²⁰ It goes without saying that an examination of the extent to which a Member State's rules comply with the Ankara Acquis and which consequences the most recent case law will have on their legislation is of great significance.

The impact of that case law on the interrelation of the discrimination principles and the standstill clauses may at some points be interesting on a more strictly academic level, but it does provide some interesting insights. It has been argued that the distinction between the standstill clauses on the one hand and the non-discrimination rights on the other hand has become ever more blurred. A possible consequence of this is that the principle of non-discrimination as laid down in Article 10 of Decision 1/80 and Article 9 AA must, similarly to the standstill clauses, be interpreted in a more restrictive manner so as to prohibit disproportionate discrimination. Furthermore, it appeared that there may from now on be more room for a *de minimis* approach to the standstill clause and for justification grounds in the case of a violation thereof.

In the light of the Court's consistent efforts to reaffirm the goal to steadily strengthen the commercial and economic relations between Turkey and the EU, this seems to be a somewhat contradictory development. However, it is far from conclusive. The developments described above amount to an opening for the Court to adopt a stricter approach towards the rights of Turkish citizens in its case law. It will then remain interesting to pay close attention to the Court's application of the standstill and discrimination provisions in the Ankara Acquis in the future.

²²⁰ Consider Ünal Zeran (2010), Welte (2009), and to a lesser extent Dienelt (2009b) and Hailbronner (2009).

CHAPTER 7: CONCLUSION

In the introduction, it was asked how the Court's Judgment in *Soysal, Sahin* and *Commission v. the Netherlands* influenced the interpretation of the standstill clauses, the non-discrimination rights and the prohibition of reverse discrimination. In particular, the question was raised how it dealt with any interrelation of those principles and what this would mean for the interpretation of the Ankara Acquis. This interrelation proved to lead to difficulties since, to an extent, the principles are in conflict with each other.

It may be recalled that the standstill clause, which has been laid down in Article 13 of Decision 1/80 and Article 41(1) AP, prohibits the introduction of new restrictions as of the date on which, respectively, Decision 1/80 and the AP entered into force. This prohibition is quite extensive and covers any measure, procedural or substantive, that has the object or intent of making the exercise of the rights of a Turkish citizen, relating to his first entry into a Member State and beyond, subject to stricter conditions than those which applied before the entering into force of the Association Acquis ('the critical date'). The standstill clauses do not produce any rights as such but dictate instead which of its rules a Member State must apply to a Turkish citizen. The clauses apply to Turkish nationals wishing to make use of the free movement of workers, services and establishment, as well as to their family members. Whether or not service recipients are included in the personal scope is still under debate.

The principles of non-discrimination are codified in Article 9 AA and Article 10 of Decision 1/80. The first provision provides a general non-discrimination right, without limitations to certain situations or beneficiaries. Article 10 of Decision 1/80, on the other hand, is limited to workers as regards remuneration and conditions of work.. Turkish nationals

who do not fall within its scope will thus have to resort to Article 9 AA. However, it is not yet clear whether they can invoke that provision before the national courts, as the question whether it has direct effect has not yet been answered with any certainty. In fact, the Court's case law has given indirect indications both for and against the existence of direct effect.

The last principle can be found in Article 59 AP and prohibits the treatment of Turkish citizens that is more favourable than the treatment awarded to EU citizens. This counterpart to the non-discrimination right, which has also been referred to as the prohibition of reverse discrimination, has been the subject of very little case law before the Judgment in *Soysal*, until which time its exact influence on the Ankara Acquis was still quite uncertain. Once the three principles are examined in relation to each other, possible problems emerge.

The combination of the three principles outlined above, in short, means the following: The rules applicable to Turkish nationals may not create restrictions that did not exist at the critical date. Neither may they amount to the more favourable treatment of Turkish citizens as opposed to EU citizens. At the same time, however, Turkish nationals may not be treated less favourably than EU citizens. This creates in effect a requirement to maintain a close link between the legal situations of Turkish and EU citizens, while securing that the legal situation of Turkish nationals does not fall below a certain standard, which differs between the Member States depending on their legislation on the critical date. For instance where the legal situation of an EU citizen becomes worse than the standard that applied to them on the critical date, these principles cannot co-exist. After all, Article 59 AP would dictate that the legal situation of Turkish citizens should likewise drop below this standard, whereas the standstill clause would prohibit the creation of a situation that is worse than that on the critical date.

In its seminal Judgment in *Soysal*, the Court demonstrated how it solved this conflict. It determined that, while the standstill clause prohibits any measure amounting to a new restriction, such a restriction does not violate that clause when it also applies to EU citizens. This followed directly from the supremacy of the prohibition of reverse discrimination. If the Court had determined that a measure that applied to both groups of persons should be deemed not to apply to Turkish nationals in line with the standstill clause, this would have as its effect that they would be put in a more favourable position than EU citizens in contravention of Article 59 AP.

It has been noted that this conclusion is logical from the perspective of the position of Article 59 in the Ankara Acquis. However, it also proved to have some far-reaching consequences for the interpretation of the standstill clause and its relation to the non-discrimination rights. Since the standstill clause requires courts to examine whether any discriminatory new restrictions have been introduced, it has come to closely resemble the prohibition of discrimination, which prohibits any discriminatory treatment.

As stated, there still exist some differences between the two clauses. If Article 9 AA lacks direct effect, only Turkish workers can invoke the non-discrimination right before the national courts and thus, in practical terms, the personal scope of the standstill clause is larger. Furthermore, the standstill provisions only apply to measures that have been introduced after the critical date, meaning that discriminatory measures in force since before that date will be subject only to scrutiny based on the prohibition of discrimination. Finally, the concepts of discriminatory treatment and discriminatory restrictions do not overlap entirely. If, for instance, an obligation binding both Turkish and EU citizens is dropped for the latter group, this will likely amount to discriminatory treatment without imposing on Turkish nationals a new restriction. Arguably, however, such differences are to a large extent cosmetic. Both sets of clauses still have the concept of

discrimination as a central element.

The development that started in the *Soysal* Judgment was explored further in the cases *Sahin* and *Commission v. the Netherlands*, which both concerned the Dutch administrative practice of levying fees for the granting or extension of residence permits. These judgments appeared to introduce a two-step test, where the first test amounted to an application of the previous case law. Therefore, it was to be determined whether a new restriction had been created, keeping in mind that this would not contravene the standstill clause if it applied to both Turkish and EU citizens. As appeared from the second step, it was necessary to determine only whether a rule applied for both groups, and not whether it applied to both groups in the same manner. According to that second step, it was to be established whether a measure applicable to both groups would create a restriction in the sense of the standstill clause. This is the case where the contested measure subjects the Turkish national to obligations that are disproportionate as compared with those established for EU citizens.

The introduction of the concept of proportionality was confirmed in *Commission v. the Netherlands*, which is interesting among others because it involved all provisions discussed in this research, which is to say, Articles 10 and 13 of Decision 1/80, Articles 41(1) and 59 AP and Article 9 AA. Additionally, it shed some light on the concept of proportionality, which had received very little discussion in the *Sahin* Judgment. In principle, a measure is disproportionate where it cannot be considered minimal.

Where *Commission v. the Netherlands* clarified to an extent the definition of proportionality, it simultaneously blurred the distinction between the separate principles. Intriguingly, it found that

“the Commission correctly relied on the non-discrimination rules as

well as on Article 59 of the Additional Protocol for the purpose of verifying whether the contested charges did not make the situation of those nationals worse in comparison with that of citizens of the Union, in a manner which was contrary to the standstill rules.”

It appears that, in order to assess the standstill provisions, it is necessary to interpret these in the light of the prohibition of discrimination as well as the prohibition of reverse discrimination. This can hardly be considered a clarifying interpretation of the interrelationship between these principles.

Similarly, where the *Soysal* Judgment had inserted elements of the non-discrimination right into the standstill clause and obscured the borders between the two sets of provisions, the Judgments in *Sahin* and *Commission v. the Netherlands* raised further questions. Specifically, if an application of the non-discrimination right leads to an interpretation whereby the standstill clause precludes disproportionately discriminatory restrictions, does this in turn have implications for that non-discrimination right? Not to do so would create a strange asymmetry whereby the standstill clause, which in its wording mentions neither discrimination nor proportionality, would in fact impose a stricter test than the prohibition of discrimination. It might thus be the case that the prohibition of discrimination must rather be interpreted as a prohibition of disproportionate discrimination.

A further development implied in *Sahin* and *Commission v. the Netherlands* is that there may be more room to invoke a justification ground for a violation of the standstill clauses. Although the Court in both judgments rejected the justification grounds proposed by the Dutch government, it did not reject the possibility of invoking such grounds generally. Additionally, the introduction of the proportionality concept, which forbids a difference in treatment that cannot be considered minimal, may indicate a *de minimis*

approach to the standstill clause. In doing so, it seems to have granted Member States more freedom, if only to an extent, in imposing measures that may impact Turkish citizens. These measures will not contravene the Ankara Acquis where they apply equally to EU citizens, or where at least the difference in treatment remains minimal. In so far as a contravention is established, it is possible at least in theory to justify such a difference.

These tendencies appear to be somewhat at odds with the affirmed goal to steadily strengthen relations between Turkey and the EU, aiming at the eventual accession of the Turkish Republic to the EU. In fact, it is even more remarkable if one considers that the two parties have officially begun accession negotiations in 2005. On the other hand, it must be noted that these tendencies are not conclusive until the Court expressly confirms them. The Turkish migrants involved in the Court's most recent cases have, after all, for all practical purposes, 'won' their cases before the Court. Whether these cases herald a new development that will prove less favourable to Turkish migrants seeking to make use of their rights under the Ankara Acquis is a question that can only be answered by examining how the Court applies the standstill and discrimination provisions in its future case law.

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