

One Step Forward, Two Steps Back: Legal Arguments on the Visa-Free Travel of Turkish Citizens to the EU

A. Aslı BİLGİN

Assoc. Prof. Dr., Department of Public Law, Faculty of Law, Çukurova University

Pierluigi SIMONE

Assist. Prof. Dr., Department of Public Law, Faculty of Law, University of Rome (Tor Vergata)

To cite this article: Bilgin, A. Aslı and Simone, Pierluigi, “One Step Forward, Two Steps Back: Legal Arguments on the Visa-Free Travel of Turkish Citizens to the EU”, *Uluslararası İlişkiler*, Vol. 16, No. 61, 2019, pp. 75-95, DOI: [10.33458/uidergisi.541538](https://doi.org/10.33458/uidergisi.541538)

To link to this article: <https://dx.doi.org/10.33458/uidergisi.541538>

Uluslararası İlişkiler Konseyi Derneği | International Relations Council of Turkey
Uluslararası İlişkiler – Journal of International Relations
E-mail : bilgi@uidergisi.com.tr

All rights of this paper are reserved by the *International Relations Council of Turkey*. With the exception of academic quotations, no part of this publication may be reproduced, redistributed, sold or transmitted in any form and by any means for public usage without a prior permission from the copyright holder. Any opinions and views expressed in this publication are the author(s)'s and do not reflect those of the *Council*, editors of the journal, and other authors.

One Step Forward, Two Steps Back: Legal Arguments on the Visa-Free Travel of Turkish Citizens to the EU

A. Aşlı BİLGİN

*Assoc. Prof. Dr., Department of Public Law, Faculty of Law, Çukurova University, Adana.
E-mail: aabilgin@cu.edu.tr*

Pierluigi SIMONE

*Assist. Prof. Dr., Department of Public Law, Faculty of Law, University of Rome (Tor Vergata), Italy.
E-mail: pierluigi.simone@uniroma2.it*

ABSTRACT

Within the scope of the Readmission Agreement signed in 2013 between the European Union (EU) and Turkey, the EU will grant visa-free travel for Turkish citizens in exchange for Turkey readmitting the illegally resident of third-country nationals transited through the territory of Turkey to Europe. However, in accordance with the EU-Turkey Association Law and the case-law of the Court of Justice of the European Union (CJEU), visa-free travel could be valid for Turkish citizens who would conduct or plan to conduct economic activity in the EU since the entry into force of the Additional Protocol (AP) of 1970 and Association Council Decision (ACD) No.1/80. This paper examines whether visa-free travel for Turkish citizens is an already-acquired right stemming from the EU-Turkey Association Law or would be a favor given by the EU in exchange for signing the Readmission Agreement, via the interpretation of Article 41 (1) of the AP and Article 13 of ACD 1/80, in light of the case-law of the CJEU.

Keywords: EU-Turkey Readmission Agreement, EU-Turkey Association Law, Standstill Clause, Visa-Free Travel for Turkish Citizens

AB-Türkiye Geri Kabul Anlaşması v. Ortaklık Hukuku?

ÖZET

Türkiye ve Avrupa Birliği arasında 2013 yılında imzalanan 'Geri Kabul Anlaşması' kapsamında Türkiye'nin, ülkesi üzerinden AB ülkelerine yasadışı yollarla geçen üçüncü ülke vatandaşlarını geri kabul etmesi karşılığında Avrupa Birliği Türk vatandaşlarına vizesiz seyahat imkanı sağlayacaktır. Oysa, Ortaklık Hukuku ve Birlik içtihat hukuku uyarınca Katma Protokol ve 1/80 sayılı Ortaklık Konseyi Kararının yürürlük tarihinden itibaren Avrupa Birliğinde ekonomik faaliyette bulunacak veya bulunmayı planlayan Türk vatandaşları için vizesiz seyahat geçerli olabilir. Bu çalışmada, Türk vatandaşlarına tanınacak olan vizesiz seyahatin Ortaklık Hukukundan kaynaklanan kazanılmış bir hak mı yoksa geri kabul anlaşması karşılığında Türkiye'ye yapılan bir iyilik mi olduğu Birlik içtihat hukuku kapsamında Katma Protokol m. 41 (1) ve 1/80 sayılı Ortaklık Konseyi Kararı m.13 yorumlanmak suretiyle incelenmektedir.

Anahtar Kelimeler: AB-Türkiye Geri Kabul Anlaşması, AB-Türkiye Ortaklık Hukuku, Standstill, Vizesiz Seyahat

Introduction

The new Title V of the Treaty on the Functioning of the European Union (TFEU) concerning the Area of Freedom, Security and Justice grants to the European Union (EU) competence to regulate the conditions of entry, residence and movement of third-country nationals in the territory of the Member States. This competence, acquired through the Amsterdam Treaty, is outlined by Article 67 (2) TFEU, which opens the “General Provisions” of Title V and says that the EU “[...] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.” This provision shows a clear link between external relations, immigration and asylum policies.¹

An extremely significant aspect of the external relations in the field of immigration is nowadays represented by the readmission agreements. They aim to counteract illegal immigration by providing obligations for mutual cooperation between the EU and third countries for the return of unlawful residents.² These agreements often include technical and financial assistance to carry out border controls in third countries. They are also often associated with the provisions for obtaining visas, seen as a kind of reward for those States that actively cooperate in the containment of migratory flows to the EU.

The purpose of this paper, in particular, after a general overview of the readmission agreements and the facilitations of the issuance of visas linked to them, is to examine the treatment of Turkish citizens regarding visas, in order to demonstrate whether the right of visa-free travel in EU Member States would be a favour due to the signing, in 2013, of the EU-Turkey Readmission Agreement, or is an acquired right already stemming from the EU-Turkey Association Law (Ankara Agreement of 1963, Additional Protocol of 1970 and Association Council Decision No. 1/80) by virtue of the standstill clauses enshrined in these acts as to the freedom of establishment, the freedom to provide services and the exercise of access to employment.

Readmission Law and Visa Requirements

Readmission Agreements in General and the Facilitation of Visa Procedures

The readmission agreements are international agreements with which a third country undertakes to readmit people (mainly its own citizens but also, under certain conditions, nationals of other countries and stateless persons who are passing through its territory) who are unlawful residents in an EU Member State.

The conclusion of readmission agreements, previously conferred by Article 63 (3) (b) of the Treaty establishing the European Community (TEC),³ finds now an explicit legal basis in Article

1 Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law*, 4th ed., Oxford University Press, 2016, p. 171.

2 Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights*, Martinus Nijhoff Publishers, 2009, p. 173. See Communication from the Commission to the European Parliament and the Council on ‘Evaluation of EU Readmission Agreements’, COM (2011) 76 final, 23 February 2011; Communication from the Commission to the Council and the European Parliament on ‘EU Return Policy’, COM (2014) 199 final, 28 March 2014.

3 See Kay Hailbronner, *Immigration and Asylum Law and Policy of the European Union*, Springer, 2000; Daphné Bouteillet-Paquet, *L’Europe et le droit d’asile*, L’Harmattan, 2003; Steve Peers and Nicola Rogers, *EU Immigration and Asylum Law: Text and Commentary*, Martinus Nijhoff Publishers, 2006; Coleman, *European Readmission Policy*, p.22.

79 (3) TFEU. It is about a shared competence, as is also apparent from Protocol 23 annexed to the Treaty on the European Union (TEU) and the TFEU on external relations of the Member States with regard to the crossing of external borders, according to which “the provisions on the measures on the crossing of external borders included in Article 77(2)(b) of the Treaty on the Functioning of the European Union shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements.”

It is thus to be ruled out that there is an exclusive competence of the EU to conclude international agreements on this subject.⁴ To date, 17 readmission agreements have been concluded: 11 of them before, and 6 after, the entry into force of the Lisbon Treaty. In addition, readmission clauses are usually included in agreements with third countries that have a broader scope. So far, the EU has entered into readmission agreements with many States and autonomous territories.⁵ Some of the readmission agreements⁶ have been also combined with the conclusion, between 2006 and 2013, of agreements on the facilitation of the issuance of visas.⁷ Thus, in the cases concerned, both types of instruments are specular and constitute a unitary regulatory framework.

The purpose of these agreements, currently adopted under Article 77 (2) (a) TFEU, in conjunction with Article 218 (6) (a) TFEU, is to send back the unlawful residents to the country of transit in accordance with the readmission agreement in exchange for first facilitating then if the conditions are fulfilled abolishing the visa procedures set forth the citizens of the signatory of the agreement. The facilitation consists, *inter alia*, in the reduction of the period of time for taking a decision on visa applications;⁸ in a reduced fee for processing both single–entry and multiple–entry visas applications for third–country nationals; and for the waiver of such fees for some categories of persons.⁹ The documents to be presented to show the purpose of the journey are simplified.¹⁰ The agreements also provide for simplified criteria for issuing multiple–entry visas with a term of validity of 5 years or one year.¹¹

In the years following the signing of their respective agreements on the facilitation of visa procedures, Albania, Bosnia and Herzegovina, Georgia, the former Yugoslav Republic of Macedonia,

4 Opinion 1/03 Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ECLI: EU: C: 2006: 81.

5 These States and autonomous territories are Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, Georgia, Hong Kong, Macao, the former Yugoslav Republic of Macedonia, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey and Ukraine.

6 Such as the ones signed with Albania, Russia, Ukraine, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, Moldova, Georgia, Cape Verde, Armenia and Azerbaijan.

7 Steve Peers, “Visa Facilitation”, Steve Peers, Elspeth Guild and Jonathan Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume I: Visas and Border Controls*, Martinus Nijhoff Publishers, 2012, p.315–324.

8 See Article 7 common to all the agreements on the facilitation of the issuance of visas currently in force, with the exception of the EU–Cape Verde Agreement, in which no specific terms are established. Peers, “Visa Facilitation”, p.317–322.

9 See Article 6 common to all the agreements on the facilitation of the issuance of visas currently in force, with the exception of the EU–Cape Verde Agreement, in which this provision is referred to in Article 5.

10 See Article 4 common to all the agreements on the facilitation of the issuance of visas currently in force, with the exception of the EU–Cape Verde Agreement, in which a similar provision is not envisaged.

11 See Article 5 common to all the agreements on the facilitation of the issuance of visas currently in force, with the exception of the EU–Cape Verde Agreement, in which this provision is referred to in Article 4.

Moldova, Montenegro, Serbia and Ukraine have been included in Annex II of Council Regulation (EC) 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.¹² Actually, as will be seen below, these States are therefore among the countries whose nationals do not need to have a visa when crossing the external borders of EU Member States for stays of no more than 90 days in any 180-day period.¹³

The EU–Turkey Readmission Agreement of 2013

The Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization, signed at Ankara on 16 December 2013, approved on behalf of the EU by Council Decision 2014/252/EU of 14 April 2014 and entered into force on 1 October 2014,¹⁴ has concluded a long negotiating process lasting more than seven years and represents a significant step forward.¹⁵

The EU–Turkey Readmission Agreement is relevant in many ways and seems to be the most important tool for cooperation between EU and Turkey in order to cope with the migrant flow.¹⁶ Turkey is in fact considered to be a key country in the fight against irregular migration, since a large number of people entering the EU illegally come from Turkey. The EU, therefore, held for a long time that the conclusion of this Agreement was a priority. Turkey, in spite of its growing geopolitical importance, obviously put its demands on the negotiating table. In particular, its requests focused on the issue of visas for the entry of Turkish citizens into the Schengen area.

The main objective of the EU–Turkey Readmission Agreement is to establish, on the basis of reciprocity, procedures for the rapid and orderly readmission, by each side, of the persons having entered, or are residing on, the territory of the other side in an irregular manner. The Agreement includes provisions related both to the readmission of the nationals of the EU Member States and Turkey, and to the readmission of any other person (including third-country nationals and stateless persons) that entered into, or stayed on, the territory of either side, directly arriving from the territory of the other side. The provisions of the Agreement related to the readmission of nationals of the two sides, and those related to the readmission of stateless persons and nationals from third countries with which Turkey has concluded bilateral treaties or arrangements on readmission, entered directly

12 Regulation (EC) 539/2001 [2001] OJ L81/1. See Steve Peers, “EU Visa Lists”, Steve Peers, Elspeth Guild and Jonathan Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume I: Visas and Border Controls*, Martinus Nijhoff Publishers, 2012, p.227.

13 On the contents of Regulation (EC) 539/2001 see the analysis carried out below. See also Peers, *EU Justice and Home Affairs Law*, p.186.

14 Council Decision 2014/252/EU [2014] OJ L134/1. See also European Commission, Statement of Commissioner Malmström on the entry into force of the Readmission Agreement between Turkey and the EU, Brussels, 1 October 2014.

15 Sarah Wolff, “The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey”, *European Journal of Migration and Law*, Vol.16, 2014, p.85. For a detailed study on the EU–Turkey Readmission Agreement see İlke Göçmen, “Türkiye ile Avrupa Birliği Arasındaki Geri Kabul Antlaşmasının Hukuki Yönden Analizi”, *Ankara Avrupa Çalışmaları Dergisi*, Vol.13, 2014, p.21–86; Nuray Ekşi, *Türkiye Avrupa Birliği Geri Kabul Antlaşması*, Beta Yayıncılık, 2016.

16 İlke Göçmen, “EU–Turkey Readmission Agreement in the Wake of the Migrant Crisis: What might go wrong with it?”, *UACES 46th Annual Conference* (London, 5–7 September 2016), www.uaces.org (Accessed on 14 May 2018).

into force on 1 October 2014;¹⁷ the provisions related to the readmission of any other third-country national or stateless person, instead, are applicable from 1 June 2016,¹⁸ in accordance with the provisions of the EU–Turkey Statements approved by the Meetings of Heads of State or Government with Turkey, held in Brussels on 29 November 2015 and on 18 March 2016.¹⁹

Besides Articles 3 and 5 of the Agreement which provide, symmetrically, for both Turkey and EU Member States obligations regarding the readmission of their own nationals, Articles 4 and 6, guarantee the counterpart's commitment to readmit, in some cases, third-country nationals or stateless persons who hold, at the time of submission of the readmission application, a valid visa issued by Turkey entering the territory of a EU Member State directly from the territory of Turkey, and vice versa; or a residence permit issued by Turkey, illegally and directly entered the territory of the EU Member State after having stayed on, or transited through, the territory of Turkey, and *vice versa*.²⁰

It should be pointed out that there might be difficulties with the full and effective implementation of the EU–Turkey Readmission Agreement for political and legal reasons. As to the political dimension, the connections between the Readmission Agreement and the ‘visa-free regime’ for Turkish citizens, between the readmission obligation of third-country nationals and stateless persons ‘in law’ and ‘in fact’, and between expenses and financial assistance related to the Agreement itself should be taken into account. As to the legal dimension, the correlation between the Readmission Agreement and removal process, and the correlation between the ordinary readmission procedure and the accelerated readmission procedure, because of their relationship with the human rights and asylum law obligations, should be taken into account.²¹ In this respect, the connection between the EU–Turkey Readmission Agreement and the attainment of a visa-free regime for Turkish citizens (being the EU prepared to ‘concede’ the visa exemption to Turkey in order to get what it wants regarding the migration crisis) seems to be the most sensitive spot of the matter, since the failure of the negotiations between the EU and Turkey on this point may specifically undermine any possibility for the Agreement to be continued.

In accordance with its Article 18 (1), the EU–Turkey Readmission Agreement is without prejudice to the rights, obligations and responsibilities of the EU, its Member States and Turkey arising from international law, including from international conventions to which they are Party. In addition, as to Article 18 (2), the Agreement fully respects the rights and obligations of people, including those who are or have been legally residing and working in the territory of one of the Parties, provided by the provisions of the Agreement of 12 September 1963 establishing an association between the European Economic Community (‘EEC’) and Turkey (Ankara Agreement), its Additional Protocols,

17 Article 24(2) of the EU–Turkey Readmission Agreement, 14; See also Göçmen, “Türkiye ile Avrupa Birliği Arasındaki”, p.75.

18 Decision 2/2016 of the Joint Readmission Committee set up by the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization on the implementing arrangements for the application of Articles 4 and 6 of the Agreement from 1 June 2016; Council Decision (EU) 2016/551 of 23 March 2016 [2016] OJ L95/9.

19 European Council, Meeting of Heads of State or Government with Turkey, EU–Turkey Statement, 29 November 2015; European Council, EU–Turkey Statement, 18 March 2016.

20 See Article 4(1) and Article 6(1) of the EU–Turkey Readmission Agreement, Council Decision 2014/252/EU [2014] OJ L134/1. See Göçmen, “Türkiye ile Avrupa Birliği Arasındaki”, p.30–38. The readmission obligations do not apply if the third-country national or stateless person has only been in airborne transit via an international airport of Turkey or of the requested EU Member State.

21 Göçmen, “EU–Turkey Readmission Agreement”, p.6–16.

the relevant Association Council decisions as well as the relevant case law of the Court of Justice of the European Union (CJEU).²² Given the pragmatic and ‘politically oriented’ interpretation of the EU–Turkey Readmission Agreement (readmission of irregular migrants v. visa facilitations for Turkish citizens), in the following pages it will be seen how true or not that latter statement is.

Finally, it should be stressed that, although it has been established for an unlimited period, Article 24 (5) of the EU–Turkey Readmission Agreement gives each Contracting Party the right to renounce the Agreement itself by officially notifying the other Contracting Party. In this case, the Agreement shall cease to apply six months after the date of such notification.²³ It is therefore important to emphasize that if Turkey wants to terminate the EU–Turkey Readmission Agreement at some point and for some reason, it will be possible through Article 24 (5).

The EU–Turkey ‘Visa Liberalization Dialogue’

As already mentioned above, the signing of the EU–Turkey Readmission Agreement is closely linked to the obtaining of visa facilitations for Turkish citizens who want to travel to the EU Member States, especially to visas for the Schengen area. It is no coincidence, in this regard, that a Joint Declaration on the Cooperation in the Area of Visa Policy has been enclosed to such instrument. Under this Declaration,

The Contracting Parties reinforce their cooperation in the area of visa policy and related areas, with a view to further promoting people to people contacts, starting with ensuring the efficient application of the judgment of the Court of Justice of the European Union issued on 19 February 2009 in case no C–228/06 Mehmet Soysal, Ibrahim Savatlı v Germany and other relevant judgements on Turkish Service providers’ rights based on the Additional Protocol of 23 November 1970 annexed to the Agreement establishing an Association between the European Economic Community and Turkey.²⁴

Unlike what happened with the third countries to which reference was made earlier, the EU–Turkey Readmission Agreement has not been combined with an agreement to facilitate visa procedures for Turkish citizens, nor have Turkish citizens have been fully exempted from the visa requirement. All that has been done so far consists of the mere opening of a bilateral ‘visa liberalization dialogue’.

Actually, the aim of the EU–Turkey ‘visa liberalization dialogue’ is to progress towards the elimination of the visa obligation currently imposed on Turkish citizens travelling to the Schengen area for a short–term visit.²⁵ The dialogue essentially consists of a screening of the Turkish legislation and administrative practices, which will be carried out by the European Commission on the basis of a document, detailed on 16 December 2013, called ‘Roadmap towards the Visa–free Regime with Turkey’.²⁶ This document, launched by the European Commissioner for Home Affairs Cecilia

22 Göçmen, “Türkiye ile Avrupa Birliği Arasındaki”, p.62–63. On the Ankara Agreement and the Additional Protocol of 23 November 1970, see Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963) [1973] OJ C113/2; and The Additional Protocol and the Financial Protocol signed at Brussels, 23 November 1970 [1973] OJ C113/17.

23 Göçmen, “Türkiye ile Avrupa Birliği Arasındaki”, p.76.

24 EU–Turkey Readmission Agreement; Case C–228/06, *Mehmet Soysal and Ibrahim Savatlı v. Bundesrepublik Deutschland* ECLI:EU:C:2009:101.

25 Wolff, “The Politics of Negotiating EU Readmission Agreements”, p.86.

26 European Commission, Roadmap towards the Visa–free Regime with Turkey, 16 December 2013.

Malmström, shows the requirements which should be fulfilled by Turkey in order to allow the European Commission to present a solid proposal to the Council and the European Parliament to amend Regulation (EC) 539/2001,²⁷ so as to move Turkey from the negative list (Annex I) to the positive list (Annex II).

The Roadmap has 72 requirements (benchmarks). A first group is related to the readmission of illegal migrants; a second group is split into four “blocks”.²⁸ Once the European Commission considers that all the requirements set out in the Roadmap are fulfilled and has presented its proposal to amend Regulation (EC) 539/2001, this proposal will be voted on in the Council and the European Parliament by qualified majority. The Roadmap does not set a specific timetable by when the dialogue should be completed or this proposal should be presented, thus the speed of the process towards visa liberalization will depend essentially on the progress made by Turkey in addressing the requirements. Within the framework of the support provided through the Instrument of Pre-Accession Assistance (IPA II),²⁹ the European Commission will also support the legal reforms and the development of administrative capacities which will be deemed useful to enable the Turkish authorities to better address the requirements themselves.

The implementation of the Roadmap is still in progress. According to the last report published by the European Commission on 6 September 2017, there are still seven benchmarks out of 72 that remain to be met by Turkey:

- issuing biometric travel documents fully compatible with EU standards;
- adopting the measure to prevent corruption foreseen by the Roadmap;
- concluding an operational cooperation agreement with Europol;
- revising legislation and practices on terrorism in line with EU standards;
- aligning legislation on personal data protection with EU standards;
- offering effective judicial cooperation in criminal matters to all EU Member States; and, finally,
- implementing the EU-Turkey Readmission Agreement in all its provisions.³⁰

Nevertheless, with the understanding that the Turkish authorities will fulfill, as a matter of urgency and as they committed to do so on 18 March 2016, the outstanding benchmarks of the Roadmap, the European Commission has anyhow decided to present the proposal to amend Regulation (EC) 539/2001 to lift the visa requirement for Turkish citizens who are holders of a biometric passport in line with EU standards.³¹ The proposal, forwarded to the European Parliament and the Council, appears to have no longer been discussed by the Council after 19 October 2016, and has not yet reached any result. Consequently, the European Commission is continuing to encourage Turkey’s efforts to complete the delivery of all the outstanding benchmarks as soon as possible. Both

27 Regulation (EC) 539/2001 [2001] OJ L81/1.

28 Point I and point II, blocks 1–4, of the Roadmap towards the Visa-free Regime with Turkey.

29 See Regulation (EU) 231/2014 of the European Parliament and of the Council of 11 March 2014 [2014] OJ L77/11.

30 See point 6 of the Report from the Commission to the European Parliament, the European Council and the Council ‘Seventh Report on the Progress made in the Implementation of the EU-Turkey Statement’, COM (2017) 470 final, 6 September 2017.

31 European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 539/2001 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 (Turkey), COM (2016) 279 final, 4 May 2016.

Parties are engaged in finding solutions, including any legislative and procedural changes needed. It has recently emerged that during the last bilateral talks between Turkey and an EU delegation on 29–31 May 2018, the European Commission positively assessed the Roadmap for the issue, with the Parties agreeing to proceed with further talks on technical details for the fulfilment of the remaining criteria.³² In the meanwhile, an amendment to Regulation (EC) 539/2001, which strengthens the existing suspension mechanism for visa-free travel for citizens of any country enjoying visa liberalization, has been adopted through Regulation (EU) 2017/371 of the European Parliament and of the Council of 1 March 2017.³³ It has been 4 years since the entry into force of the EU–Turkey Readmission Agreement, but nothing has changed in Turkey’s situation, and the country is still listed in Annex I.

Council Regulation (EC) 539/2001 and Turkey’s Disadvantage

The unusual treatment of Turkey, as a signatory state of a readmission agreement with the EU, that has not yet obtained for its citizens neither facilitations in the issuance of visas, nor exemptions from the visa requirement, is even more evident if only a comparison is made with respect to what has been done for other third countries mentioned above.³⁴ After these countries signed readmission agreements with the EU, they have obtained, unlike Turkey, visa facilitations at a first stage, and particularly significant visa exemptions at a later (but not too far) stage.³⁵

In particular, with five Western Balkan countries (Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia) visa facilitation agreements entered into force on 1 January 2008, as a first concrete step forward along the path set out by the ‘Thessaloniki Agenda’ of 20 June 2003,³⁶ towards a visa-free travel regime for the citizens of Western Balkan countries. With each of these countries, a visa liberalization dialogue was opened in 2008 and roadmaps for visa liberalization were established. In the roadmaps, drafted between 7 May and 5 June 2008 (thus, immediately after the entry into force of the respective visa facilitation agreements), the European Commission formulated nearly 50 requirements it wanted the countries to meet in order to qualify for visa-free travel. The roadmaps were almost identical, but they took into account the specific situation in each country in terms of existing legislation and practice. The conditions ranged from purely technical matters to the adoption and implementation of a set of laws and international conventions, or the making progress in the fight against organised crime, corruption and illegal migration. Most of the requirements were part of the Justice and Home Affairs *acquis*, which candidate countries have to implement before they can accede to the EU; there were also a few additional conditions, mainly concerning human rights issues and readmission agreements.³⁷

32 See <https://sputniknews.com/europe/201806011065017458-eu-turkey-visa-liberalization> (Accessed on 2 June 2018).

33 Regulation (EU) 2017/371 [2017] OJ L61/1.

34 Countries such as Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia.

35 Peers, *EU Justice and Home Affairs Law*, p.188–189; Peers, “Visa Facilitation”, p.317–322; Peers, “EU Visa Lists”, p.228.

36 European Council, Thessaloniki Agenda for the Western Balkans: Moving towards European Integration (Accessed on 20 June 2003).

37 European Commission, Visa Liberalisation with Serbia, Roadmap, 7 May 2008; Visa Liberalisation with the former Yugoslav Republic of Macedonia, Roadmap, 8 May 2008; Visa Liberalisation with Montenegro, Roadmap, 8 May 2008; Visa Liberalisation with Albania, Roadmap, 3 June 2008; Visa Liberalisation with Bosnia and Herzegovina, Roadmap, 5 June 2008.

Although the key sectors taken into account are substantially the same (document security; illegal migration, including readmission; preventing and fighting organised crime, terrorism and corruption; external relations and fundamental rights), the 'Roadmap towards the Visa-free Regime with Turkey' compared with the roadmaps drawn up for the Western Balkan countries makes it easy to become aware of some clear differences between the conditions that these states, on the one hand, and Turkey, on the other hand, have been requested to fulfil. The difference is not only quantitative (nearly 50 benchmarks v. 72) but also qualitative, and relates to the content of the blocks, prepared for Turkey in an extremely more meticulous and detailed way than what was done for the Western Balkan countries. It can be even said that, in the case of Turkey, the European Commission has gone much further, making requests of which there is no evidence in the roadmaps of 2008. A few significant examples can be mentioned here:

- a request to adopt and implement measures ensuring the integrity and security of the civil status and civil registration process, paying particular attention to the amendment of individuals' basic personal data;
- a request to carry out adequate border checks and border surveillance along all the borders of Turkey, especially along the borders with EU Member States, in such a manner that it will cause a significant and sustained reduction of the number of persons managing to illegally cross the Turkish borders either for entering or for exiting Turkey;
- a request to effectively cooperate with the European Anti-Fraud Office (OLAF) and Europol in protecting the euro against counterfeiting;
- a request to adopt and implement legislation on the protection of personal data in line with the EU standards, in particular as regards the independence of the authority in charge of ensuring the protection of personal data;
- a request to provide information about the conditions and circumstances for the acquisition of Turkish citizenship, the conditions for changing personal data and the registration requirements to foreigners wishing to reside in Turkey.³⁸

Thus, the disadvantageous position of Turkey *vis-à-vis* the Western Balkan countries, who are signatories of readmission agreements with the EU, is self-evident.

With the European Commission having decided that all the benchmarks set out in the roadmaps of 2008 had been met, and in accordance with the political commitment made by the EU on the liberalization of the short-term visa requirements, the above-mentioned Western Balkan countries (as well as Georgia, Moldova and Ukraine) have been hence deleted from Annex I, and inserted in Annex II, of Regulation (EC) 539/2001.³⁹ The purpose of Regulation (EC) 539/2001 is;

38 To all this must be added, just to do some other examples: to ensure that border management is carried out in accordance with the international refugee law, in full respect of the principle of non-refoulement and effectively allowing the persons in need of international protection to have access to asylum procedures; to adopt and implement legislation providing for an effective migration management and including rules aligned with the EU and the Council of Europe standards, on the entry, exit, short and long-term stay of foreigners and the members of their family, as well as on the reception, return and rights of the foreigners having been found entering or residing in Turkey illegally; to revise the legal framework as regards organized crime and terrorism, as well as its interpretation by the courts and by the security forces and the law enforcement agencies, so as to ensure the right to liberty and security, the right to a fair trial and freedom of expression, of assembly and association in practice.

39 Confer Council Regulation (EC) 1244/2009 [2009] OJ L336/1 (former Yugoslav Republic of Macedonia, Montenegro and Serbia); Regulation (EU) 1091/2010 of the European Parliament and of the Council [2010] OJ L329/1 (Albania)

to determine the third countries whose nationals are subject to, or exempt from, the visa requirement, on the basis of a case-by-case assessment of a variety of criteria relating, inter alia, to illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union's external relations with the relevant third countries, including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.⁴⁰

In this respect, nationals of third countries on the list in Annex II are exempt from the visa requirement for stays of no more than 90 days in any 180-day period.⁴¹ This short stay must of course be assessed in the light of the entry conditions for third-country nationals set forth by Article 6 of Regulation (EU) 2016/399 concerning the Schengen Borders Code.⁴² Consequently, visa-free travel does not mean 'automatic entry' of third-country nationals (including Turkish citizens, should Turkey be inserted in Annex II) into the Schengen area. On the contrary, some other criteria are relevant, such as: the possession of valid documents necessary to cross the border; the justification of the purpose and conditions of the stay, and the possession of sufficient means of subsistence; the absence from the list of persons banned from entry within the Schengen Information System; and the absence of a threat to public policy, national security or the international relations of any of the Member States, in particular where there is no alert in the Member States national databases refusing entry on such grounds.⁴³

It is also appropriate to specify in advance that pursuant to Article 1 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the TEU and the TFEU, the provisions of Regulation (EC) 539/2001 apply neither to Ireland nor to the United Kingdom (UK).⁴⁴ As the Agreement on the European Economic Area exempts nationals of Iceland, Liechtenstein and Norway from the visa requirement, these Countries are not included in the list in Annex II;⁴⁵ on the other hand, Regulation (EC) 539/2001 constitutes the further development of those provisions in respect of which closer cooperation has been authorised under Protocol 19 integrating the Schengen *acquis* into the framework of the EU and falls within the area referred to in the Agreements concerning the association of these three States with the implementation, application and development of the Schengen *acquis* itself.⁴⁶ Switzerland also applies Regulation (EC) 539/2001 as part of the Agreement on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*.⁴⁷

and Bosnia and Herzegovina); Regulation (EU) 259/2014 of the European Parliament and of the Council [2014] OJ L105/9 (Moldova); Regulation (EU) 2017/372 of the European Parliament and of the Council [2017] OJ L61/7 (Georgia); Regulation (EU) 2017/850 of the European Parliament and of the Council [2017] OJ L133/1 (Ukraine).

40 See Article -1 of Regulation (EC) 539/2001 [2001] OJ L81/1; Peers, *EU Justice and Home Affairs Law*, p.187-188.

41 Article 1(2) of Regulation (EC) 539/2001 [2001] OJ L81/1.

42 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 [2016] OJ L77/1. Confer Elspeth Guild, "The Schengen Borders Code" in Steve Peers, Elspeth Guild and Jonathan Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume I: Visas and Border Controls*, Martinus Nijhoff Publishers, 2012, p.33-65.

43 Guild, "The Schengen Borders Code", p.44-45.

44 Recital 4 of Regulation (EC) 539/2001 [2001] OJ L81/1.

45 Recital 6 of Regulation (EC) 539/2001 [2001] OJ L81/1; Peers, "EU Visa Lists", p.227-228.

46 See recital 3 of Regulation (EC) 539/2001 [2001] OJ L81/1; Council Decision 1999/439/EC of 17 May 1999 [1999] OJ L176/35; Council Decision 2011/350/EU of 7 March 2011 [2011] OJ L160/19.

47 Council Decision 2008/149/JHA of 28 January 2008 [2008] OJ L53/50. Peers, "EU Visa Lists", p.228.

A mechanism for the temporary suspension of the exemption from the visa requirement enjoyed by the third countries listed in Annex II has been strengthened with Regulation (EU) 2017/371,⁴⁸ by making it easier for Member States to notify circumstances leading to a possible suspension and by enabling the European Commission to trigger the suspension mechanism on its own initiative.⁴⁹ Faced with this privileged situation between the EU and the Western Balkan countries, against which the suspension mechanism is entirely exceptional, Turkish citizens (being Turkey in Annex I) are required to be in possession of a visa when crossing the external borders of EU Member States.⁵⁰ Exceptions to this fundamental rule are narrowly construed; as well as being directly provided for by Regulation (EC) 539/2001, they may be adopted by the Member States also.⁵¹

Finally, it cannot be overlooked that both visa facilitations and visa exemptions have been granted to all the Western Balkan countries concerned after they entered into association agreements with the EU currently in force. All of them (except for the former Yugoslav Republic of Macedonia) had obtained visa exemptions before being recognized as candidate countries to join the EU (Bosnia and Herzegovina when it had not even submitted its application), and before the European Commission had recommended the official starting of accession negotiations. In this respect, there is also a glaring disparity with Turkey, being it an associated country for decades whose candidacy was accepted just under twenty years ago.

EU-Turkey Association Law and Visa-Free Travel

The Ankara Agreement of 1963, the Additional Protocol of 1970 and the Association Council Decision No. 1/80

The relationship between Turkey and the EU goes back to 1959. In addition to being a country associated with the EU since 1963 and a recognized candidate country since 1999, whose accession negotiations to the EU were opened in 2005, Turkey has a special situation in regard of EU–Turkey Association Law. The EU–Turkey Association Law is based on the aforementioned EEC–Turkey Association Agreement, or Ankara Agreement, of 1963 (AA);⁵² its additional Protocols, among them the Additional Protocol of 23 November 1970 (AP);⁵³ and the decisions of the EEC–Turkey (now EU–Turkey) Association Council. In accordance with Article 28 AA, the ultimate aim of the Parties is Turkey’s full membership in the EU.

The AA is a framework agreement, which envisages three phases, termed the preparatory phase, the transitional phase and the final phase, for Turkey’s involvement with European integration. It also provides general rules for Turkey on the way to the full membership.⁵⁴ In this regard, it ensures the gradual removal of restrictions on free movement of goods, services, workers and the right of

48 Regulation (EU) 2017/371 [2017] OJ L61/1.

49 Confer., in particular, Article 1a of Regulation (EC) 539/2001 [2001] OJ L81/1.

50 Article 1(1) of Regulation (EC) 539/2001 [2001] OJ L81/1.

51 See Articles 1(1) and 4(1) of Regulation (EC) 539/2001 [2001] OJ L81/1. Peers, *EU Justice and Home Affairs Law*, p.191–192; Peers, “EU Visa Lists”, p.232–233.

52 Agreement establishing an Association between the European Economic Community and Turkey.

53 The Additional Protocol and the Financial Protocol signed at Brussels.

54 Tuğrul Arat, “Avrupa Birliği ile Türkiye Arasındaki İlişkiler Gümrük Birliğinin Yeri”, *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol.44, 1995, p.589–590.

establishment. While the rule regarding the free movement of workers is Article 12 AA, the right of establishment and the freedom to provide services have been set out under Articles 13 and 14 AA. In accordance with these provisions, the Parties are obliged to abolish the restrictions on freedom of movement for workers, freedom of establishment and freedom to provide services between them with regard to the relevant precepts of the founding treaties.⁵⁵ Even though the ultimate aim of these provisions is to abolish the restrictions, they do not include precise and unconditional rules to be implemented by the Parties for the purposes of attaining abolishment of restrictions.

At the end of the preparatory phase, the AP determining the provisions of the transitional phase and the responsibilities of the Parties was signed in 1970 and entered into force in 1973. This AP includes a standstill clause under Article 41 (1), which serves to prevent the Parties from adopting new stricter restrictions on freedom of establishment and freedom to provide services between them from the date of entry into force of the AP.⁵⁶ Both Turkey and the EU Member States are obliged to preserve the *status quo* at least at the time when the AP entered into force for them.

Under Article 41 (2) AP, the main decision-making institution of the EU-Turkey Association, the Association Council, has been empowered to determine the rules for the elimination of restrictions on freedom of establishment and freedom to provide services between the Parties.⁵⁷ Even though it has not adopted any measures regarding Articles 13 and 14 AA up until today, the Parties are still bound to refrain from introducing new restrictions due to the standstill clause.

On the other hand, in respect of workers and members of their families legally resident and employed in an EU Member State, a standstill clause prohibiting the introduction of new restrictions regarding conditions of access to employment has been adopted under Article 13 of Association Council Decision (ACD) No. 1/80.⁵⁸

To sum up, neither the AA, nor the AP and ACD No. 1/80 envisaged a provision that provides a visa-free travel for all Turkish citizens explicitly, but in accordance with the case law of the CJEU, both of them and also ACD No. 1/80 include standstill clauses prohibiting the introduction of any new restrictions on the conditions of first admission of Turkish citizens in a Member State for the exercise of access to employment, the right of establishment and freedom to provide services.

Therefore, the scope *ratione personae* of Turkey-EU Association Law⁵⁹ and this study consist of Turkish citizens who would exercise or plan to exercise an economic activity as a worker, self-employed, service provider or workforce of a service provider.⁶⁰

While the Parties are still under the obligation of Article 41(1) and Article 13 of ACD 1/80, since 1980 some of the EU Member States have begun to apply stricter visa procedures for Turkish

55 Actually, Articles 45-48, 49-55, and 56-62 TFEU.

56 Nicola Rogers, *A Practitioner's Guide to the EC-Turkey Association Agreement*, Kluwer Law International, 2000, p.30; Friedl Weiss and Clemens Kaupa, *European Union Internal Market Law*, Cambridge University Press, 2014, p.28-29.

57 Case C-37/98, *The Queen v Secretary of State for the Home Department*, ex parte *Abdulnasır Savaş* ECLI:EU:C:2000:224, para. 43.

58 Anja Wiesbrock, "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons: The Court as the Motor of EU-Turkey Relations?", *European Law Journal*, Vol.19, No.3, 2013, p.426.

59 For a detailed analysis of the *Demirkan* Case see below.

60 For further information on the scope *ratione personae* of free movement of services and the right of establishment see İlke Göçmen, "Starting to Shine but How Brightly? Standstill Provisions in Association Law between Turkey and the Community", *Croatian Yearbook of Law and Policy*, Vol.5, 2009, p.181-182.

citizens rather than preserving the existing procedures.⁶¹ This issue has been raised before the CJEU several times by Turkish citizens and the CJEU has interpreted Article 41(1) with regard to the admission of Turkish citizens to a Member State. With respect to the free movement of workers, the acceptance of analogous interpretations of standstill clauses was in the *Şahin* Case,⁶² whereas the approval of the implementation of Article 13 ACD No. 1/80 to conditions concerning first admission was in the *Commission v. The Netherlands* Case.⁶³

As mentioned above, both Turkey and the EU are under the obligation not to prejudice any rights stemming from the Association Law and the case law of the CJEU while implementing the Readmission Agreement of 2013. Therefore, the case law of the CJEU for Turkish citizens is still valid and binding even though the Visa Liberalisation Dialogue brings new stricter conditions for visa-free travel. Indeed, the provisions that are in conflict with the relevant case law must be inapplicable.

The Case Law of the CJEU on the Interpretation of Standstill Clauses regarding Visa Requirements for Turkish Citizens

The CJEU followed a step-by-step approach on the interpretation of standstill clauses with regard to visa requirements for Turkish citizens under the scope of Article 41 (1) AP. The first step was the right to appeal to the Court which would be possible by direct effect. The first case in which the CJEU interpreted the direct effect of the rules related to the free movement in the AA was the *Demirel* decision.⁶⁴ The CJEU has created a direct effect test which is composed of two stages. Firstly, it examines the wording, purpose and nature of the agreement to see whether it is capable of being directly effective or not. Then it checks the rules of the agreement to see if they are precise, clear and unconditional.⁶⁵ The CJEU applied this test on the AA and denied the direct effect of Article 12 AA, since it serves to establish a program in general terms but does not set out precise, clear and unconditional rules. Similarly, it reiterated this justification whenever it is asked to decide whether Articles 13 and 14 AA have direct effect.⁶⁶ In accordance with the case law of the CJEU, those articles are general provisions which need appropriate measures adopted by the EU-Turkey Association Council to attain the relevant aim set out under Articles 13 and 14 AA. On the other hand, in regards to Article 41 (1) AP, the CJEU decided on the contrary, due to the clearness, precision and unconditionality of that provision.⁶⁷ By accepting a direct effect of Article 41 (1) AP, the CJEU paved the way for Turkish citizens to appeal to the national courts.

The second step was the prohibition on adopting stricter rules on the freedom of establishment and right of residence for Turkish citizens as from the date on when the AP entered into force in the relevant Member States: in other words, the determination of the scope of the standstill clause. In the *Savaş* Case, the CJEU held that the conditions for the entry into the territory of a Member State are determined exclusively by that State's own domestic law. However, in accordance with the standstill

61 Burak Erdenir, "Vize", Belgin Akçay and Sinem Akgül Açıkmeşe (eds.), *Yarım Asrın Ardından Türkiye-Avrupa Birliği İlişkileri*, Seçkin Kitabevi, 2017, p.546-547.

62 Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v. T. Şahin* ECLI:EU:C:2009:554, para. 65.

63 Case C-92/07, *Commission v. The Netherlands*, ECLI:EU:C:2010:228, para. 49.

64 Case C-12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:40.

65 A. Aslı Bilgin, "Avrupa Birliği Hukuk Sisteminde İki taraflı Karma Anlaşmalar ve Avrupa Birliği Adalet Divanı'nın Yargılama Yetkisi", *Marmara Avrupa Araştırmaları Dergisi*, Vol.25/1, 2017, p.173-178.

66 Case C-37/98, *Abdulnasir Savaş*, paras. 41-42.

67 *Ibid.*; Joined Cases C-317/01 and C-369/01, *Eran Abatay and Nadi Sahin v. Bundesanstalt für Arbeit* ECLI:EU:C:2003:572, para. 58.

clause, Member States are under an obligation to not introduce stricter conditions than those which applied at the time when the AP entered into force for the relevant Member State.⁶⁸

The third step was taken with the acceptance of the interrelation between visa requirements of the Member States and the standstill clause. In the *Tum and Dari* Case,⁶⁹ the CJEU implied that in order to attain the freedom of establishment, it entails a permanent installation, which is directly linked to the entry into the territory of a Member State and cannot be considered separately from the right of entry into a Member State. It is clear that Article 41 (1) AP does not confer upon Turkish citizens the right of entry into a Member State derived from EU law, but the prohibition set out under Article 41 (1) AP includes any amendment that stipulates stricter rules to the legislation on freedom of establishment, including entry requirements.⁷⁰ Otherwise, it would be contradictory to the purpose of Article 41 and of the AP as a whole. As a result, the CJEU admitted that Article 41 (1) AP precludes Member States from adopting new stricter rules regarding the first admission to the territory of a Member State, such as visas, after the AP entered into force for that Member State for the first time in the context of the freedom of establishment.⁷¹

In the *Soysal and Savatlı* Case, the CJEU has clarified that visa requirements which are adopted after the entry into force of the AP are accepted as restrictions and are contrary to the standstill clause due to the stricter entry conditions for Turkish citizens who wish to provide services in a Member State.⁷² With this decision, the CJEU has clarified its approach on the interpretation of the standstill clauses with regard to visa requirements for Turkish citizens.

The CJEU has extended its interpretation and stated that since both Article 41 (1) AP and Article 13 ACD No. 1/80 are standstill clauses, “that the objective pursued by those two clauses is identical, the interpretation set out under AP must be equally valid as regards the standstill obligation which is the basis of Article 13 in relation to freedom of movement for workers.”⁷³

Later, in the *Commission v. The Netherlands* Case,⁷⁴ the CJEU explicitly ruled that Article 13 ACD No. 1/80 prevents Member States from introducing new restrictions on the admission of Turkish workers and their family members after the entry into force of ACD No. 1/80.⁷⁵

Therefore, the amendments which made visa requirements of Member States stricter after the entry into force of ACD No. 1/80 for them would also be accepted as a breach of Article 13 – the standstill article – of ACD No. 1/80 regarding free movement of workers. Even though ACD No. 1/80

68 Case C-37/98, *Abdulnasır Savaş*, paras. 66–70; Alex Cooke, “A New Dawn for the Crescent Moon: Is the Fear of an Influx of Turkish Nationals Driving European Law?”, *MPRA Papers*, 2013, <https://mpra.ub.uni-muenchen.de/63193/6>, p. 26, (Accessed on 13 May 2017); Edgar Lenski, “Turkey and The EU: On the Road to Nowhere?”, Max-Planck Institute, 2003, http://www.zaoerv.de/63_2003/63_2003_1_a_77_102.pdf, p.85 (Accessed on 13 May 2017).

69 Case C-16/05, *The Queen*, on the application of *Veli Tum, Mehmet Dari v. Secretary of State for the Home Department* ECLI:EU:C:2007:530.

70 *Ibid.*, paras. 52–53.

71 *Ibid.* para. 63; Mustafa Karayığıt, “Vive la Clause de Standstill: The Issue of First Admission of Turkish Nationals into the Territory of a Member State within the Context of Economic Freedoms”, *European Journal of Migration and Law*, Vol.13, 2011, p.411; Narin Tezcan İdriz, “Free Movement of Persons between Turkey and the EU: To Move or Not To Move? The Response of the Judiciary”, *Common Market Law Review*, Vol.46, 2009, p.1627–1628.

72 Case C-228/06, *Mehmet Soysal and Ibrahim Savatlı v. Bundesrepublik Deutschland* ECLI:EU:C:2009:101, paras. 57, 62.

73 Case C-242/06, *Şahin*, para. 65.

74 Case C-92/07, *Commission v. The Netherlands*, para. 49.

75 Wiesbrock, *supra* note 58, p.436.

is about settled Turkish workers in a Member State, the CJEU has accepted that Article 13 governs the first admission to the territory of that Member State of Turkish workers intending to make use of the rights based on free movement of workers.⁷⁶

The concept of the standstill clauses and the CJEU's approach regarding the obligation of the Contracting Parties to refrain from adopting new restrictions on the admission of Turkish citizens in the context of establishment, services and employment after the entry into force of AP and ACD No. 1/80⁷⁷ was preserved, with the exception of one condition. This condition was introduced by the CJEU for the first time in the *Demir Case*,⁷⁸ which is about Article 13 ACD No. 1/80. In accordance with that condition, the new procedures/restrictions replacing visa requirements can only be applied if they are justified by three conditions which might be called the 'standstill test'.⁷⁹ Since the *Doğan Case*,⁸⁰ it is applied for all standstill clauses in Association Law.⁸¹ In accordance with this test, a new restriction envisaged by a Member State under standstill clauses could be justified if it has an overriding justification in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain the legitimate objective. This test should also be applicable to decide whether any new restrictions adopted in the context of establishment/services and employment after the entry into force of AP and ACD No. 1/80 are in breach of standstill clauses.⁸² On the other hand, due to the fact that by virtue of Article 59 AP, if a new restriction is applied in the same way to both Turkish and the EU citizens, it might be acceptable.

In this regard, it would not be right to generalize that the every new and stricter restriction regarding first admission of Turkish citizens in a Member State for the exercise of access to employment, the right of establishment and freedom to provide services adopted after the AP and ACD No. 1/80 become legally binding on the *parties* is in breach of Article 41 (1) AP and Article 13 ACD No. 1/80 due to the standstill test, which should be applied on a case by case basis.

Therefore, even today where there are acquisitions for Turkish citizens' first admission in a Member State based on standstill clauses, these are not constant due to the standstill test.

The *Demirkan Case*⁸³ can be interpreted as a deviation from previous CJEU case law. It dealt with the rejection of a visa application made by a Turkish citizen, Leyla Ecem Demirkan, by the German authorities. Miss Demirkan applied to the German Embassy for a tourist visa in order to visit her relatives who were resident in Germany. Her application was rejected and she brought the case before the Administrative Court of Berlin claiming that, according to the standstill clause, she had the right to enter the German territory without a visa as a tourist regarding the German legislation which was valid at the time the AP entered into force for Germany. At that time, Turkish citizens had the right to enter German territory without a residence permit if they did not intend to stay there for more than three months. The Administrative Court dismissed the application on the basis that Article 41(1)

76 Case C-92/07, *Commission v. The Netherlands*, para. 49.

77 Wiesbrock, "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons", p.436.

78 Case C-225/12, *C. Demir v. Staatssecretaris van Justitie* ECLI:EU:C:2013:725.

79 İlke Göçmen and Narin Tezcan, "Avrupa Birliğindeki Türk Vatandaşları ve Aile Birleşimi", *Ankara Barosu Dergisi*, Vol.4, 2014, p.617.

80 Case C-138/13, *Naime Doğan v. Bundesrepublik Deutschland* ECLI:EU:C:2014:2066.

81 Göçmen and Tezcan, "Avrupa Birliğindeki Türk Vatandaşları", p.618.

82 Göçmen, "Starting to Shine but How Brightly", p.187-188.

83 Case C-221/11, *Leyla Ecem Demirkan v. Bundesrepublik Deutschland* ECLI:EU:C:2013:583.

AP is not applicable to a residence permit for the purposes of a family visit. Miss Demirkan appealed to the Higher Administrative Court of Berlin–Brandenburg and this Court indicated that at the time the AP entered into force for Germany there were no requirements for Turkish citizens to enter the German territory for the purposes of family visit.⁸⁴ The German Higher Administrative Court asked the CJEU, via a preliminary ruling, whether a passive freedom to provide services falls within the scope of the concept of freedom to provide services within the meaning of Article 41 (1) AP.

The CJEU replied to the question negatively, despite the decisions confirming that the freedom to provide services includes also the passive freedom to provide services given by itself since 1984.⁸⁵ According to the CJEU, even though it is defined under Article 14 AA that “the Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them,” the scope and the purpose of the AA and the TFEU are different from each other. The CJEU mentions that while the main aim of the TFEU is to establish an internal market without internal frontiers in which persons, goods, services and capitals can move freely, the main aim of the AA is to promote the continuous and balanced strengthening of trade and economic relations between Turkey and the EU as set out under Article 2 AA.⁸⁶ In this context, under EU law the acceptance of a passive freedom to provide services is a requirement to abolish all restrictions on free movement to persons in order to establish an internal market. On the other hand, the standstill clause does not confer on Turkish citizens a general right to freedom of movement independent of any economic activity pursued, including a passive freedom to provide services, since the main aim of the AA is not to establish a single market. Secondly, the acceptance of passive freedom to provide services goes back to 1984, which means that at the time when the AP was signed, there was no notion of passive freedom to provide services.⁸⁷ Thus, it is clearly not right to extend the concept of a standstill provision disregarding the differences of both purpose and context among the TFEU, the AA and its AP. Consequently, the CJEU refused to interpret the passive freedom to provide services within the scope of the concept of freedom to provide services within the meaning of Article 41 (1) AP.

Until the *Demirkan* Case, the CJEU’s approach on the abovementioned case law is termed as ‘so far as possible’, which enables analogous interpretation between TFEU provisions and EU–Turkey Association Law.⁸⁸ Thus, in the *Abatay and Sahin* Case, the CJEU accepted that the principles enshrined at that time in the TEC (and now in the TFEU) relating to the freedom to provide services must be extended to Turkish citizens by taking into account the wording of the provision and the objective of the AA.⁸⁹ Furthermore, as Ott indicates, the CJEU has confirmed in a number of cases an identical reading of an international agreement’s provision to primary EU law without taking into consideration the aim and the purpose of the agreement.⁹⁰ The CJEU has left its broad interpretation

84 Case C–221/11, *Demirkan*, para. 17.

85 Joined Cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro* ECLI:EU:C:1984:35; Case C–186/87, *Ian William Cowan v. Trésor public* ECLI:EU:C:1989:47; Case C–274/96, *Horst Otto Bickel and Ulrich Franz* ECLI:EU:C:1998:563.

86 Case C–221/11, *Demirkan*, paras. 51–52.

87 Case C–221/11, *Demirkan*, paras. 59–60.

88 Cooke, “A New Dawn for the Crescent Moon”, p.34; Marc Maresceau, “The Court of Justice and Bilateral Agreements” in Alan Rosas, Egils Levits and Yves Bot (eds.), *The Court Of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case–Law*, Asser Press 2013, p.713–714.

89 Joined Cases C–317/01 and C–369/01, *Abatay and Sahin*, para. 112.

90 Andrea Ott, “The EU Turkey Association and Other EU Parallel Legal Orders in the European Legal Space”, *Legal Issues of Economic Integration*, Vol.42, 2015, p.9.

for ‘so far as possible approach’ and adopted a narrow one for the first time in the *Ziebell* decision.⁹¹ In the *Demirkan* Case, the CJEU reiterated the rejection of analogou interpretation.⁹²

The *Demirkan* decision should be criticized in many respects. First of all, the context of freedom to provide services does not differ according to the purpose and the dates of the agreements signed by the EU. On the other hand, the main aim of Article 14 AA is to abolish the restrictions on freedom to provide services between Turkey and the EU having regard to the articles related to the freedom to provide services now envisaged in the TFEU. It is obvious that the provisions on freedom to provide services that are provided for by the TFEU are directly related to Article 14 AA. This relation also contains the scope *ratione personae* of the freedom to provide services. Hence, if the service recipients were construed under the provisions of freedom to provide services in the TFEU, the standstill provision should also include Turkish service recipients like service providers because the verb ‘to be guided by’, used in Article 14 AA, indicates that while construing the context of the provisions on freedom to provide services under Association Law, the relevant articles under the TFEU should be considered.

In a nutshell, even though since *Demirkan* Case Turkish ‘service receivers’ are not accepted as falling within the scope *ratione personae* of Article 41(1) AP, contrary to the decision given by the CJEU, Miss Demirkan, as a tourist, should have been accepted as a service recipient in accordance to the EU–Turkey Association Law and under the standstill provision. Unfortunately, the justifications listed in the *Demirkan* decision seem political rather than juridical.

The Reflection of the Case Law of the CJEU on Member States’ Visa Procedures

After the *Soysal and Savatlı* Case, the European Commission made an announcement to the Member States, leaving the establishment and workers out of the scope, to detail the visa procedures on the freedom to provide services valid for Turkish citizens at the time the AP entered into force for them, in order to make amendments to Regulation (EC) 539/2001.⁹³

In accordance with the feedback that came from the Member States, there are only three Member States (Germany, Denmark and the Netherlands) in the Schengen area where Turkish service providers were exempted from visa requirement on the date on which the AP entered into force for them. The European Commission has prepared a guideline on the movement of Turkish service providers crossing the external borders of the EU Member States in order to provide services within the EU and inserted it into the Practical Handbook for Border Guards.⁹⁴ After the initiative of the European Commission, Germany, providing only the specific category with some limitations on the scope *ratione personae*, and the Netherlands, have made amendments on their visa requirements for Turkish citizens who want to enter their territory for the purposes of being a service provider or in the workforce of a service provider,⁹⁵ Denmark has changed its visa procedure not only for service providers or the workforce of a

91 Case C–371/08, *Nural Ziebell v. Land Baden–Württemberg* ECLI:EU:C:2011:809; Cooke, “A New Dawn for the Crescent Moon”, p.46.

92 Case C–221/11, *Demirkan*, paras. 48, 62.

93 Regulation (EC) 539/2001 [2001] OJ L81/1.

94 See Commission Recommendation establishing a common ‘Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States’ competent authorities when carrying out the border control of persons [2012] C 9330 final, 14 December 2012.

95 For the Netherlands, <https://ind.nl/en/Pages/turkish-citizens-and-their-family-members.aspx>; <https://ind.nl/Formulieren/3010.pdf>; <https://ind.nl/en/Forms/7531.pdf> (Accessed on 10 May 2018).

service provider but also for workers even if it is limited to members of the clergy.⁹⁶ It must however be underlined that there are two discrepancies between the visa procedures of these three Member States. The Netherlands and Denmark apply the amendments for the visits that do not exceed 3 months and without bringing any limitation to the scope of service providers, whereas Germany applies them for a stay up to two months and just a specific category of service providers.

The United Kingdom (UK) also has amended its visa procedures for Turkish citizens who want to enter its territory for the purposes of establishing a business of their own, after the *Tum and Dari* decision.⁹⁷ They are required to submit an entry certificate which can be obtained from the UK embassies and consulates after the application is scrutinized to ensure that the conditions are met.⁹⁸ The only difference between a visa and an entry certificate may be their names.

Member States	Article 13 ACD No. 1/80	Article 41 (1) AP	
		Establishment	Services
Germany	No amendment	No amendment	where a Turkish national residing and exercising his/her activities in Turkey enters the territory of Germany for a stay of up to two months for the purpose of lawfully providing services there as employee of an employer established in Turkey, either as a mobile worker (driver) employed in the cross border transport of passengers or goods Or to perform assembly or maintenance work or repair on delivered plants and machinery Or consisting of paid lectures, performances of special artistic, scientific value, consisting of paid sports performances.
Denmark	covers members of the clergy: an individual assessment will determine whether you will be carrying out paid work of a scope that qualifies you as a worker and are thereby covered by the stand-still clause.	No amendment	Denmark for one or several visits, the duration of which does not exceed three months, for the purpose of lawfully providing services there on a temporary basis, either on his own behalf or on behalf of an undertaking established in Turkey. require documentation for the following: the legal existence and trade relations of the company in Turkey and (unless the applicant is self-employed) documentation that the person in question is employed by the legally established company in Turkey as well as documentation that the person in question is to provide a service for a company in Denmark
The Netherlands	No amendment	No amendment	The same as Denmark

96 See <https://www.nyidanmark.dk/en-GB/Words-and-concepts/F%C3%A6lles/The-Association-Agreement-with-Turkey> (Accessed on 10 May 2018).

97 Case C-16/05, *Tum and Dari*.

98 See http://www.gov.im/media/751744/immigration_rules_procedure_guidelines.pdf (Access Date 13 May 2017).

Today, as it is seen from the Table above, the name of the visa might be abolished from the procedures set out for some Turkish service providers, but they are still required to submit documents to enter the borders. Yet, even if a Turkish service provider has all the needed documents, he or she may be denied entry by the border authorities.

On the other hand, Turkey and the EU have accepted to enhance their cooperation in the area of visa policy in accordance with the Joint Declaration set out under the Readmission Agreement of 2013. In this context, providing the application of the case law of the CJEU above in the *strict sense* has been approved as the first step that should be taken. However, the procedures envisaged for Turkish citizens, instead of a visa, can be accepted neither as a simplification of the visa procedures nor as a more efficient implementation of the case law. Although the case law of the CJEU has declared that under standstill clauses Member States are required to implement the entry conditions valid on the date the AP and ACD No. 1/80 entered into force for their country, there is still no visa-free travel ensured for Turkish citizens intending to exercise the right of establishment and the freedom to provide services.

The Outcome Comparison between the ‘Visa Liberalization Dialogue’ and the Case Law on Visa-Free Travel under Association Law

In the light of the precedent CJEU rulings on the interpretation of Article 41 (1) AP, it is justified that the new (unjustified) restrictions adopted regarding the visa requirement for Turkish citizens who are under the scope *ratione personae* of the free movement of services and the right of establishment are in breach of Association Law. This means that, even if it is limited to the self-employed, service provider or workforce of a service provider, Turkish citizens have an acquired right of a visa-free travel to the Member States that did not have a visa requirement when the AP entered into force for them unless the ‘new restrictions’ are justified. Although contrary to its ruling on the freedom for EU nationals who are the recipients of services, the CJEU rejected to title Turkish citizens as service recipients in the *Demirkan* Case on the basis of the economic purpose of the AA.⁹⁹ However, under Article 28 AA the ultimate aim of the Agreement itself is not only economic but also to prepare Turkey for EU membership.¹⁰⁰ Besides, the AA includes provisions on the right of establishment and the free movement of services which should be interpreted according to the relevant articles set out under the TFEU. Therefore, in the *Demirkan* Case, the anticipated decision of the CJEU was the acceptance of Turkish citizens as service recipients under the free movement of services like the ruling given in the *Bickel and Franz* Case due to the wording of Article 14 AA.¹⁰¹ In spite of the decisions given by the CJEU on the interpretation of the standstill clauses with regard to visa requirements for Turkish citizens, the main problem is the reluctance of the relevant Member States to implement these decisions. Even though the preparation of the guideline on the movement of Turkish citizens crossing the external borders of EU Member States after the *Soysal and Savath* decision,¹⁰² Turkish citizens are still liable to the same visa procedure under another name which is actually an obstacle to the implementation of an acquired right of them.

⁹⁹ Case C-221/11, *Demirkan*, paras. 60–62.

¹⁰⁰ Cooke, “A New Dawn for the Crescent Moon”, p. 46.

¹⁰¹ See Case C-221/11, *Demirkan*, paras. 35, 36; Case C-274/96, *Bickel and Franz*, para. 15: “[...] Article 59 therefore covers all nationals of Member States who, independently of other freedoms guaranteed by the Treaty, visit another Member State where they intend or are likely to receive services [...]”.

¹⁰² Case C-228/06, *Soysal and Savath*.

On the other hand, the readmission agreements signed with third countries protect the EU from illegal migrants by sending them back and preventing illegal entries into the Union. It is one of the effective tools used in the EU foreign policy in exchange for liberalizing visa procedures for all citizens of a signatory country. The visa liberalization procedure especially takes place in two steps. Firstly, EU facilitates the visa process and then grants visa exemptions. The facilitation of visa process is usually being implemented at the same time the readmission agreement enters into force, whereas the citizens of the signatory Countries are entitled to visa exemption after a while following the entry into force of the agreement. As it is obvious from the way of granting visa liberalization, EU offers it as a carrot to countries in exchange for readmitting the unlawful residents in Europe and preventing illegal entries to the EU itself. In regards of the EU–Turkey Readmission Agreement of 2013, there is no facilitation of the visa process but a visa exemption that will be valid three years after the entry into force of the Agreement only if, as previously said, Turkey fulfills 72 conditions envisaged under the ‘Roadmap towards the Visa-free Regime with Turkey’. In other words, the visa exemption decision would be taken into account after Turkey begins to readmit illegal migrants and the evaluation of the Turkey’s fulfillment of the conditions set by the European Commission, which means that EU has a discretionary power on visa exemption decision. In that regard, the Readmission Agreement signed with Turkey in 2013 is distinctive from any other readmission agreement on three points. Firstly, unlike other readmission agreements signed by the EU, the EU–Turkey Readmission Agreement does not involve facilitation of the visa process as a first step on the way to discretionary visa exemption decision. Secondly, while the conditions that Turkey needs to fulfill impose new concrete burdens on Turkey, EU’s responsibilities are vague and ambiguous. For instance, the EU, which wants Turkey to readmit illegal immigrants, reserves for itself the visa exemption decision at least without even foreseeing visa facilitation. Lastly, apart from the special situation between Turkey and the EU, Turkey is the only candidate State whose nationals do not have visa-free entry conditions. These discrepancies put Turkey, an associated Country, into a disadvantageous position *vis-à-vis* third and candidate countries.¹⁰³ Moreover, Western Balkan countries had the right to visa-free travel stemmed from the Readmission Agreement before becoming a candidate State. Therefore, after the entry into force of the Readmission Agreement, the number of migrants sent back to Turkey had exceeded 1000,¹⁰⁴ while there is still no visa exemption for Turkish citizens on ground of the lack of fulfillment of the ‘Roadmap towards the Visa-free Regime with Turkey’.

Conclusion

Visa liberalization attached to the EU–Turkey Readmission Agreement can be criticized from two aspects:

1. Even if it is true that the visa liberalization includes all Turkish citizens, setting visa liberalization as a reward for implementing the Readmission Agreement and 72 conditions is a diversion, as if there is no visa-free travel right stemming from the case law of the CJEU, at least to some extent, for Turkish citizens under the scope *ratione personae* of free movement of services, workers and the right of establishment today.

103 Seçil Paçacı Elitok, “A Step Backward for Turkey?: The Readmission Agreement and the Hope of Visa-Free Europe”, *IPC Mercator Policy Brief*, <http://ipc.sabanciuniv.edu/wp-content/uploads/2015/12/A-Step-Backward-for-Turkey-The-Readmission-Agreement-and-the-Hope-of-Visa-Free-Europe.pdf> (Accessed on 1 May 2018).

104 Migration News Sheet, <http://www.migrationnewsheet.eu/news/number-of-migrants-sent-back-to-turkey-on-the-basis-of-eu-turkey-statement-had-exceeded-1000> (Accessed on 13 August 2017).

2. On the other hand, while visa liberalization has been granted to all candidate countries without exception, promising to give the same right to Turkey in exchange for the Readmission Agreement shows that the EU is not treating Turkey on an equal footing with other candidate countries.

Consequently, it is obvious that Turkish citizens under the scope *ratione personae* of the free movement of services/workers and the right of establishment have some legal rights related to the first admission in a Member State, based on the “standstill” case law of the CJEU, unless it is proven otherwise. Instead of facilitating the implementation of the legal rights of Turkish citizens stemming from the case law of the CJEU, bringing new harder conditions on Turkey *vis-à-vis* other candidate countries and signatories of readmission agreements to have visa liberalization seems unfair, not a favor.