

EFFECTS OF ANKARA AGREEMENT WITHIN THE COMMUNITY LEGAL ORDER

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Özet

Avrupa Birliğinde Türk vatandaşları için işçilerin serbest dolaşımı ve sosyal güvenlik alanlarında elde edilen haklar, sürekli gelişen bir yasal arka plana sahip olup topluluğun yasal düzeninde önemli bir yer teşkil etmektedir. Bu yazı, Türk vatandaşlarının sosyal güvenlik hakları ile işçilerin serbest dolaşımı hakkındaki temel yasal düzenlemeleri Ankara Anlaşması, Katma Protokol ile Ortaklık Konseyinin 1/80 ve 3/80 sayılı kararları çerçevesinde ele alacaktır. Bu çalışma, Türk işçilerinin Ortaklık Konseyi kararları ve Avrupa Adalet Divanının içtihat hukukundan ileri gelen Avrupa Birliği içindeki göreceli iyi konumunu ve bu sayede diğer üçüncü ülke vatandaşlarından farklı durumuna da değinmektedir. Son olarak çalışma, Türk işçilerinin imtiyazlı olmalarına rağmen hâlâ eşit muamele ilkesiyle ilgili çözülmesi gereken birçok sorunun olduğunu öne sürmektedir.

Anahtar Sözcükler: Ankara Anlaşması, Ortaklık Konseyi, işçilerin serbest dolaşımı, Türkiye-Avrupa Birliği İlişkileri

Abstract

The achieved rights regarding free movement -of workers- and social security for Turkish citizens in the European Union have a progressive legal background and constitute a major role within the Community legal order. This paper presents the main legal steps related to free movement of workers and social security rights of Turkish citizens in the context of Association Agreements, Ankara Agreement, Additional Protocol and Decisions 1/80 and 3/80 of Association Council. Study also presents the distinctive situation of Turkish workers as per the other third country nationals by illustrating the relatively better position of Turkish workers in European Union is mostly derives from the decisions of Association Council and case laws of the European Court of Justice. Finally study suggests that although Turkish workers are privileged, there are still many issues regarding the principle of equal treatment which have to be solved.

Keywords: Ankara Agreement, Association Council, free movement of workers, Turkey-European Union Relations

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A. Association Agreements

In order to understand the Ankara Agreement and related arrangements better it is necessary to reflect briefly upon the association agreements' status and impact within the European Union (EU) legal order. Having regarded the ambit of Article 300 (ex-228) European Community (EC) about the binding nature of the agreements upon the institutions of the Community and the Member States, the Community agreements form an integral part of EC legal order and their provisions acquire a Community nature and character.² (The binding nature of the agreements are now settled in the article 216 (2) of the "Treaty on the Functioning of the European Union(TFEU).") This feature inevitably grounds the expansion of European Court of Justice (ECJ)'s jurisprudence on those agreements. The Court exercises its jurisprudence both through examining the validity of Union agreements due to the EU Treaty and interpreting the legal meanings of their provisions in accordance to the EU law.

The ECJ "generally adopts the same interpretative definition developed in the internal Community context to determine the effects of a mixed agreement within the Community and the Member States."³ The Court has an essential function to clarify the boundaries of the Union and Member States 'competences', especially in terms of 'mixed agreements' in which the EU and Member States share competences. This clarification and the jurisdiction of the Court are also crucial to ensure the uniform application and interpretation of those agreements within the Community.⁴ "The notion of shared competence in the ECJ's case law clearly applies to all stages in the life of mixed agreements."⁵

1. Legal Basis and Procedures

Article 217 (ex-310) of TFEU Treaty authorizes the Union to conclude "agreements establishing an association involving reciprocal rights and obligations, common action and special procedure". The association agreements are generally all "mixed agreements". If an agreement covers a field that partly belongs to the competence of the EU and partly to that of its Member State, then the agreement is defined as mixed one. Mixed agreements may raise many difficult legal questions about the role of the EU and its Member State. The line of competence between the EC and its Member States is put off until a conflict arises.⁶ It is argued that mixed agreements "distort the concept of the EC acting as a single international actor."⁷

2 Dominic McGoldrick, *International Relations Law of the European Union*, Longman, 1997, p. 119.

3 A. Filippo Gagliardi, "The Right of Individuals to Invoke the Provisions of Mixed Agreements Before the National Courts: a New Message from Luxembourg", 24 *EL.Rev.* (1999), p.291.

4 I. Cheyne, "International Agreements and the European Community Legal System", 19(6) *E.L. Rev.*, (1994), p. 586.

5 N. A. Neuwahl, "Shared Powers or Combined Incompetence? More on Mixity", 33 *CML Rev.* 1996, p.676.

6 H. G. Schermers, "The Internal Effect of Community Treaty-Making", in *Essays in European Law and Integration*, D.O'Keeffe and H. Schermers (Eds.), Kluwer, 1982, p. 176.

7 D. McGoldrick, *supra* note 58, p. 80.

While the distinction between the powers of the Union and of the Member State is hard to make, the ECJ discouraged allocating powers between the EU and its Member States. Instead, the Court stressed the need for close cooperation on the implementation of mixed agreements by the Union and the Member States. According to the Court, this legal duty “results from the requirement of unity in the international representation of the Community”⁸. This requirement is an emanation of the duty to loyal cooperation of Article 10 EC Treaty.⁹

Article 218 of TFEU only set out the procedural steps to be followed in the conclusion of agreements with third states and international organizations. The substantive power of the EC to enter into agreements must be conferred on the EC either expressly by other Treaty provisions or by implication from other provisions of the Treaty and the practice of the Community.¹⁰

The Union’s implied powers to conclude international agreements had been based on the so-called *ERTA* doctrine. In this case the ECJ said, “... The Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system”.¹¹

As far as association agreements are concerned, Article 217 of TFEU provides such an express provision. As the Commission initiates Association agreements, it is for the Commission to consider whether it would be appropriate for the Union to enter into agreements with third states. Although the Commission conducts the negotiations the Council may issue appropriate directives, which means an instruction to the Commission on any aspect of the negotiations, usually after coordination meetings between the Member States and the Commission. The Council approves a mixed agreement only after each Member State has ratified it in accordance with its own constitutional procedures. This means a mixed agreement becomes not only part of the Union’s legal order but also of the national legal order of each Member State.

The Council acting unanimously after the assent of the European Parliament (EP) has been obtained concludes the association agreements. As there are certain similarities between a decision of Association Council and an international agreement,¹² the EP needs to be involved in these decisions, as was the case over the Customs Union with Turkey in 1995. The requirement of unanimous voting in the Council in case of association agreements is a specified exception to otherwise qualified majority voting.

8 Ruling 1/78 (*Protection of Nuclear Materials*) [1978] ECR 2151.

9 I. Macleod, I. D. Henry and S. Hyett, “*The External Relations of the European Communities*”, Oxford University Press, 1996, p.145.

10 Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279.

11 Case 45/86, *Commission v Council*, [1987] ECR 1493.

12 N. Neuwahl, “The European Parliament and Association Council Decisions: The Example of Decision 1/95 of the EC/Turkey Association Council”, 33 *CML Rev.*, (1996), p. 54.

2. Binding Force

Regarding the relevance of international agreements in the Community system Article 216(2) of TFEU only provides for that the agreements are “binding upon the institutions of the Union and on its Member States”. Since the institutions of the Union have no legal personality, this provision must be understood as a rule of Union law. This provision, however, does not offer much guidance as to the proper law, which should govern the legal status of an international agreement and its possible direct effect in the national legal order of the Member State.

According to rulings of the ECJ association agreements are “integral part of Community law” after they had entered into force according to international law.¹³ The ECJ has always regarded the entry into force as a precondition for becoming part of the Union legal order. In *Demirel*,¹⁴ the Court referred to *Haegeman Case*, in which the Court held that Association Agreement with Greece formed an integral part of the Community legal system. The Court thus found that it does have jurisdiction to interpret the provisions on freedom of movement for workers contained in the Ankara Agreement and the Additional Protocol.

Decisions of association councils may also be seen as agreements since such decisions, like association agreements themselves, are both acts agreed between the Union and its Member States and third states with implications for the EU legal order. They are directly connected with the agreement to which they give effect the ECJ considers the decisions, in the same way as the Agreement itself, an integral part of the EC legal system.¹⁵

3. Direct Effect

The EU Law does not define the concept of “direct effect”. It has been created and developed by the ECJ. Prechal suggested an ideal definition of direct effect, as “direct effect is the obligation of a court or another authority to apply the relevant provision of Community law, either as a norm which governs the case or as a standard for legal review.”¹⁶

In accordance with the case law, a provision of EU law must have some requirements in order to meet the precondition for direct effect. The provision must be a clear and unambiguous. In addition, it must be unconditional. Finally, it must be taken effect without further action by the EU or Member States or international bodies such as Association Council.

As agreements are part of EU law and have to be applied and implemented in line with the rules valid for EU law, the principles of supremacy and the direct effect are of gre-

13 Case 181/73 *Haegeman* [1974] ECR 449 para 5; Joined cases 267 to 269/81 *Petrolifera* [1983] ECR 801.

14 Case C-12/86, *Demirel*, [1987] ECR 3719.

15 Case C-192/89, *Sevince* [1990] ECR I-3461, para 9.

16 Sacha Prechal, *Directives in EC Law*, Oxford, 1995, p. 276.

at importance for association agreements as well. The ECJ reasoned these two imperative principles as follows: “The EEC Treaty has established its own system of law, integrated into the legal systems of the Member States, and which must be applied by their courts. It would be contrary to such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty. The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril.”¹⁷

The direct effect is important for ensuring “respect in every Member State for the commitments of the EC arising from agreements concluded with non-member states”.¹⁸ If a provision of an international agreement is said to be direct effect, it means that it confer on natural and legal persons rights which must be protected by the national courts of the Member States.¹⁹ “The possibility for individuals to invoke EC law directly in their domestic courts is one of the great forces of the EC legal order.”²⁰

The ECJ has been asked to examine to what extent the provisions of association agreements binding the EU have direct effect several times. The Court in *Bresciani* case established the doctrine of direct effect of association agreement.²¹ In later cases, it ruled that the question of whether a provision was unconditional and sufficiently precise to have direct effect had to be examined “in the light of both the object and purpose of the Agreement and have its wording”.²²

The test for direct effect of international agreements is “twofold”.²³ A provision in such an agreement or in an act adopted for its implementation may have direct effect, depending on the wording, purpose and nature of the agreement, if it contains a clear, precise and unconditional obligation.²⁴ When the Court is satisfied that the nature and purpose of the agreement do not preclude direct application of its provisions, it examines their wording. Thus the Court’s approach to direct effect of international agreements is based “primarily on the intention of the parties to the agreement and of the Community itself.”²⁵ But it is argued that the ECJ should abandon the “purpose and nature” rule and use instead its standard test for direct effect.²⁶

17 Case 14/68 *Wilhelm* [1969] ECR 1, para 6.

18 P. Craig and G. de Burca, “*EU Law: Text, Cases, and Materials*”, Oxford, 3rd edn, 2002, p.202.

19 D. McGoldrick, *supra* note 58, p. 124.

20 H. Schermers, Commentary on case *Sevince*, 28 *CML Rev.*, (1991), p.186.

21 Case 87/75 [1976] ECR 129.

22 Case 270/80 *Polydor* [1982] ECR 329, para 8; Case 104/81 *Kupferberg* [1982] ECR 3641, para 23.

23 S. Peers, “An Ever Closer Waiting Room?” (1995), 32 *CML Rev.*, p.207.

24 Case 17/81 *Pabst & Richarz* [1982] ECR 1331, para. 27; *Sevince*, *supra* note 71, para. 15.

25 I. Cheyne, *supra* note 60, p.598.

26 M.Hedemann-Robinson, “An Overview of Recent Legal Developments at Community Level in relation to Third Country Nationals Resident within the EU”, 38 *CML Rev.*, (2001), p.536.

B. Ankara Agreement

With some third countries, the EU has concluded economic cooperation or association agreements including a social section that focuses on social security. The sources of rights and obligations laid down in respect of Turkish workers under the association arrangements are contained in the Ankara Agreement, the Additional Protocol of the Agreement establishing an Association between the EEC and Turkey (thereafter Protocol)²⁷ and the Association Council's Decisions 1/80 and 3/80.

In general, the freedom of movement of workers is not provided for non-EU nationals. Therefore, it depends on the agreements concluded by the EU and the Member States on the one hand and third countries; on the other hand, to what extent the right to freedom of movement for workers is granted. The Ankara Agreement as well as the Protocol, which is integral part of it, is so-called "mixed agreements"; not only Turkey and the Union, but also all Member States are parties to these agreements. According to the definition given by the ECJ an "association" creates "special, privileged links with a non-member country that must, at least to a certain extent, take part in the Community system."²⁸ The Ankara Agreement has organized the partnership relations of both sides. According to the third recital to the Preamble and Article 28 of the Ankara Agreement, it has been envisaged the progressive, gradual establishments of ever-closer cooperation between the parties with the intention of facilitating eventual accession of Turkey to the EC.

The Ankara Agreement commits the Contracting Parties to take all appropriate measures to ensure that the obligations arising from the Agreement are fulfilled and to refrain from any measures likely to jeopardize the attainment of those objectives. To realise these objectives, under the Articles 12-14 Ankara Agreement, the parties are to be guided by the EC Treaty provisions on free movement of workers. In pursuance of this aim, Article 6 sets up Council of Association to ensure the implementation and progressive development of the Association.

Although the scope of the EC Treaty and of the Ankara Agreement are different, the area of Agreement is not "totally outside of Community law for the purpose of review by the Court"²⁹ and the "legal picture has developed through judicial interpretation by the ECJ."³⁰ The issue of direct applicability of Ankara Agreement was commented on by the ECJ for the first time in its decision in the *Demirel* case. In that judgment, the Court had ruled that a provision of an agreement concluded by the EC with a third state must be considered as having direct effect when, "regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation

27 O.J. 1973, C 113/18.

28 *Demirel*, supra note 70.

29 J. Weiler, "Thou Shall Not Oppress a Stranger: on the Judicial Protection of the Human Rights of Non-EC Nationals", in *Free Movement of Persons in Europe*, H. Schermers... [et al.] (eds.), Martinius Nijhoff, 1991, p.264.

30 M. Hedemann-Robinson, supra note 82, p. 542.

which is not subject in its implementation or effects to the adoption of any subsequent measure".³¹ This ruling was confirmed in later cases. In *Yousfi*³² on the Cooperation Agreement with Morocco, and in *Krid*³³ on the Cooperation Agreement with Algeria the relevant articles were held as conferring direct effect.

C. Additional Protocol

The Protocol provided for freedom of movement for workers between the Member States and Turkey to be secured by progressive stages in accordance with the principles laid out in Article 12 of the Ankara Agreement between the end of the twelfth and the twenty second year after that Agreement's entry into force.

While the Ankara Agreement makes no provision for social security for Turkish workers, the Protocol set out in detail the social security objectives that the Association Council is to attain. Article 39 of Additional Protocol states that before the end of the first year after entry into force of the Additional Protocol, the Council of Association shall adopt social security measures for workers of Turkish nationality moving within the EC and their families residing in the Community. These measures must enable workers to aggregate periods of employment, or insurance spent in different Member States for retirement, invalidity and death benefits and medical care; enable retirement, death, and industrial injuries benefits to be exported to Turkey at the rate payable in the exporting country; and family benefits to be paid to members of the workers family who are resident in the EU. However, these measures shall create no obligation on Member States to take into account periods completed in Turkey.

Comparing to the Regulation 1408/71, the Article 39 of the Additional Protocol ensures less rights for the Turkish workers than the other migrant workers. There are no rights for the family members of the workers who stay in Turkey. Some insurance branches such as occupational accidents and diseases and unemployment were not taken into consideration. Likewise it is arguable that self-employed Turks have rights deriving from the Ankara Agreement or Protocol.³⁴

For the solution of these problems Turkey has established bilateral social security conventions with some EU countries. Under the Article of 39 (5) of the Protocol, if a bilateral agreement concluded between a Member State and Turkey offers a higher standard of protection to Turkish workers, such agreement will automatically replace the Ankara Agreement. Turkish workers must always benefit from the more favourable arrangements. The Ankara Agreement therefore deviate from the principle contained in Article 6 of Regulation 1408/71 which provides that the Regulation automatically replaces the con-

31 *Demirel*, supra note 70, para 14..

32 Case C-58/93 [1994] ECR I- 1353.

33 Case C-103/94 [1995] ECR I-719.

34 S. Peers, Case Commentary on *Akman*, 36 *CML Rev.*, (1999), p.1030.

ventions previously concluded by the Member States, even if the provisions of these conventions would grant the claimant higher benefits than the application of the Regulation.³⁵ However, still, the scope of the matters covered by Decision 3/80 is often much wider than the bilateral agreements.

D. Decisions of Association Council

Through Articles 22-23 of Ankara Agreement, the Association Council was empowered to take decisions in order to reach the objectives laid down in the Association Agreement. The Decisions 1/80 and 3/80 are “the most extensive” the EU agreements on migrant workers and social security.³⁶

As the Union Agreements give the nationals of some countries rights that the third country citizens in general do not possess, there are some nationalities that are considerably better off relating to their social security. For Burrows, “there are three categories of right holders in respect of employment.” Turkish workers form an “intermediate category” between the nationals of EU and EEA and the nationals of third countries. “They do not have the full range of rights of Community and EEA nationals, but neither can they be treated in the same way as other nationals of third states.”³⁷ For example, the Turkish workers still lack the right to move freely between Member States.³⁸

The ECJ had played a key role by following a purposive approach in its interpretation and ensured an efficient application of the rights arising from the Decision 1/80 and 3/80 for the Turkish workers. The freedom of movement of workers is characterised by two prerequisites of the principle of equal treatment. First, the granting of free access to the labour market of another state, the right to employment under the same legal conditions governing the employment of the nationals and, in principle, the right to remain in the territory of that state after the cessation of employment. Second, the granting of social protection against any disadvantages possibly resulting from employment in various countries. The following parts will deal separately with these two prerequisites, i.e. with aspects of the labour market and the coordination of social security schemes, though, of course, both are closely connected.

1. Decision 1/80: Free Movement of Turkish Workers?

Decision 1/80 brings forth a number of detailed provisions within the context of objectives related to the freedom of movement for workers. By its entry into force on 1 December 1980, it replaced the Decision 2/76, which was taken as a first step decision by the Association Council.

35 Case 82/72 *Walder* [1973] ECR 599, para 8.

36 S. Peers, “Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union” 33 *CML Rev.*, (1996), p.8.

37 N. Burrows, “The Rights of Turkish Workers in the Member States”, 19 *E.L. Rev.*, 1994, p. 307.

38 Case C-355/93, *Eroglu*, [1994] ECR I-5113.

Apart from the significance of its provisions concerning the rights of Turkish workers, the jurisdiction of the ECJ on Decision 1/80 is drastically salient to comprehend the legal status of the Association Council Decisions in the EU legal order. The ECJ has constantly ruled that “Decision 1/80 is a step toward free movement of workers; therefore, all Turkish nationals admitted to a Member State are potential workers.”³⁹

Turkish workers have some fundamental rights such as access to employment and related residence rights flowing from the Decision 1/80. For Peers, Turkish workers’ rights in the Member States are “sandwiched”.⁴⁰ The Decision 1/80 does not affect the Member States’ competence to make both the entry into their territories of Turkish nationals⁴¹ and the conditions under which they may take up their first employment subject to authorization. Once they have worked for a sufficient period, they have some rights under EU law, but upon ceasing work permanently, they are again covered by the Member State’s competence. In contrast to Article 45 (3) (d) TFEU, Ankara Agreement and Decision 1/80 do not provide for a right to remain in a Member State after having been employed.

A general remark can be derived from the jurisdiction of the ECJ; once lawfully settled; Turkish workers are to be treated in all respects like other Community nationals on equal basis in all social respects.⁴² To date, therefore, this Decision has been the subject to the many cases in which the position of Turkish workers is becoming clarified and tested. Thus, the basic principles on the interpretation of the Decision “have in the meantime become a part of the *acquis communautaire*.”⁴³

(i) Right to Access to Employment

Article 6 of the Decision 1/80 is the main provision covering the rights of the Turkish workers. There are also provisions relating to the rights of their family members under the Decision. In accordance with Article 6 of Decision 1/80, Turkish workers who are already duly registered as belonging to the labour force of a Member State are entitled to continue to be employed there and, after at least four years of legal employment, enjoy free access there to any paid employment of their choice. According to the ECJ, Article 6(1) “is set out as a series of progressive stages...The purpose of that progressive arrangement is to allow a Turkish worker to acquire more rights the longer he is employed in a Member State and, accordingly, the greater his degree of integration in that Member State.”⁴⁴

Article 6 of Decision 1/80 sets out the conditions that a Turkish worker must fulfil in order to enjoy a worker’s rights. Namely, a Turkish national must be regarded as a worker; he must be “duly registered as belonging to the labour force” and he must be in a

39 S. Peers, *supra* note 90, p.1037.

40 S. Peers, Case Commentary on *Bozkurt*, 33 *CML Rev.*, (1996), p.111.

41 Case C-36/96, *Gunaydin*, [1997] ECR I-5143, para 23.

42 N. Burrows, *supra* note 93, p. 308.

43 K. Hålibronner, *Immigration and Asylum Law and Policy of the EU*, Kluwer, 2000, p. 229.

44 Case C-386/95, *Eker* [1997] ECR I-2697, para 19.

“legal employment”. Furthermore, it necessitates a time “of prior residence, employment, or completed vocational training before Turkish workers have full access to the labour force.”⁴⁵ The main concepts such as “worker”, “to be duly registered as belonging to the labour force of the Member State” and “legal employment” have been made from a Union law perspective by the ECJ.

(ii) Right of Residence

Indeed, Decision 1/80 makes provision in respect of Turkish nationals only as regards employment, and not as regards a right of residence. The Court, however, has consistently held that the rights, which Article 6 Decision 1/80 confers on a Turkish worker in regard to employment necessarily, imply the existence of a right of residence for the person concerned.⁴⁶

The ECJ in *Kus*⁴⁷ case examined the nature of the right to residence. This judgment developed and clarified the status of Turkish workers within the Member States. The Court stated that a Turkish worker who has the right to work in one of the Member States of the Union under the terms of Decision 1/80 have the right to obtain a residence permit if the conditions of Article 6(1) have been fulfilled.

(iii) Status of spouses and children

Family members, spouses and children up to 21 years of age are granted a derived movement right pursuant to Article 10 (1) of Regulation No 1612/68 irrespective of their nationality. Upon application of that provision there may not be any discrimination between national workers and workers from a third country.

In *Diatta*, the ECJ made it clear that the derived right of taking up one's abode with the worker did not mean that family members had to live there permanently.⁴⁸ The ECJ held that family member includes a spouse⁴⁹ and child⁵⁰; it can include an unmarried partner, at least where a married couple divorced, stayed together then remarried.⁵¹

Derived rights are based on the relationship with a beneficiary of direct rights and “intended to extend social protection to people who do not exercise an occupational activity.”⁵² The Court has ruled in many cases on the legal status of family members of Turkish workers. Article 7 of Decision 1/80 provides for “certain conditional rights con-

45 S. Peers, “Social Security Equality for Turkish Nationals”, 24 *EL Rev.*, (1999), p.635.

46 *Gunaydin*, supra note 97, para. 26; Case C-1/97, *Birden*, [1998] ECR I-7747, para. 20.

47 Case C-237/91 [1992] ECR I-6781.

48 Case 287/83 [1985] ECR 567.

49 Case 351/95, *Kadiman* [1997] ECR I-2133.

50 Case C-210/97, *Akman* [1998] ECR I-7519.

51 Case C-65/98, *Eyup* [2000] ECR I- 4747.

52 M. Jepsen and D. Meulders, “The Individualizations of Rights in Social Protection Systems”, in *Labour Market and Social Protection Reforms in International Perspective*, H. Sarfati and G. Bonoli (ed.), Ashgate, 2002, p.100.

cerning access to employment market for such persons.”⁵³ Article 7(1) only gives rights if a family member stays with the person he/she was “authorised to join” during the first three years, unless there is an objective reason such as work or education to live apart; after that the family member has independent rights.⁵⁴

(iv) Equality of Treatment

According to the well-established case law of the ECJ, in the sphere of the freedom of movement for workers, both EC nationals, pursuant to Article 45(2) of the TFEU and Turkish nationals, under Article 37 of the Additional Protocol, are entitled to receive the same treatment as the Member States confer on their own nationals. Similarly, Article 9 of the Ankara Agreement, Article 37 of the Protocol, and Article 10(1) of Decision 1/80 all prohibit discrimination on grounds of nationality.

The Member States are only obliged to grant equal treatment to Turkish workers, when and for as long as they are actually employed. Furthermore, those workers must be “legally” employed. The Court would require Member States to grant Turkish workers the same time in order to find a work as granted to EU citizens because they are entitled to non-discrimination according to Article 10(1) of Decision 1/80.⁵⁵ Although this Article established non-discrimination as regards remuneration and other conditions of work for Turkish workers, they still “face discrimination and reduced benefits because of their citizenship.”⁵⁶

2. Decision 3/80: Coordination of Social Security

(i) Purpose

The coordinating rules in the Protocol have been developed further into a Decision No 3/80 of the Association Council of 19 September 1980 (hereafter Decision 3/80).⁵⁷ As Regulation 1408/71 has been transposed into Decision 3/80 almost verbatim, Turkish workers residing in the Member States and the members of their families enjoy more or less identical rights to those accorded to nationals of the Member States.

In pursuance of the aim of Article 39 Additional Protocol, Decision 3/80 sets out to coordinate Member States’ social security schemes to allow Turkish workers and members of their families to qualify for benefits. It aims to coordinate the Member States’ social security schemes with a view to enabling Turkish workers employed or formerly employed in the EU, members of their family and their survivors to qualify for benefits in the traditional branches of social security. It provides for equal treatment and coordination

53 Gavin Barrett, “Family Matters: EC Law and Third-Country Family Members”, 40 *CML Rev.*, 2003, p. 416.

54 Case 329-97, *Ergat* [2000] ECR I-1487.

55 K. Hälibronner, *supra* note 99, p. 228.

56 S. Peers, *supra* note 92, p.7.

57 OJ 1983 C 110, p.60.

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of benefits for the nationals of Contracting Parties moving within the Union and Turkey. This Decision only provides for the coordination of social security systems for workers and does not apply to the self-employed.

The provisions of this Decision refer, for the most part, to a number of provisions of Regulation 1408/71 and, less frequently, to Regulation 574/72. The aim of Article 39 of Protocol is similar to the aim of Article 48 of the TFEU. However, there are some different points: the aggregation of periods is only possible for workers moving within the EU. But the coordination is not purely “internal” because according to Articles 39(4) of the Protocol and Article 6(1) of the Decision 3/80, the export of benefits must be possible not only to Member States, but also to Turkey. Furthermore, Article 39 is not intended to secure the freedom of movement within the EU, it governs the questions arising after movement within the Union has taken place. This is a similar situation as before the entry into force of the right to freedom of movement for workers in 1968, and then the first coordinating Regulation 3 and 4 had already been adopted in 1959.

(ii) Persons Covered

Decision 3/80 applies to workers who are, or have been, subject to the legislation of one or more Member States and who are Turkish nationals: to family members resident in the Union and survivors. A “worker” for the purposes of social protection is defined in Article 1 (b) of Decision 3/80. Broadly, it means any person who is insured, compulsorily or on optional continued basis, against one or more of the contingencies covered by the branches of a social security scheme for employed persons in the host Member State.

Members of the family are those defined as such by the national legislation of the Member State concerned. According to Articles 2 and 19 of Decision 3/80, they are subject to a basic condition of geographical residence: they must reside in the territory of one of the Member States. This may, therefore, be a different Member State to that in that the Turkish worker resides.

(iii) Binding Effect of Decision 3/80

The question, to determine the legal status of Decision 3/80 in the Union legal order, is whether the Decision has a binding effect or not. The answer to the question is fundamental in respect to the prospective legal consequences on both Union institutions and Member States and individuals as well.

Unlike Decision 1/80, Decision 3/80 does not contain any provision on its entry into force. In 1983 the Commission submitted a proposal⁵⁸ for a Council Regulation implementing Decision No 3/80. The provisions providing detailed supplementary rules are based on Regulation 574/72, which implements Regulation No 1408/71. The preamble of

58 O.J. 1983, C 110/1.

this Proposal states “it is necessary to give Decision 3/80 force of law in the Community and to that end establish additional implementing measures”. However, as there was no unanimous vote the Council has so far not adopted this proposal. Some Member States argued that as the Council has not yet adopted a decision, Decision 3/80 still has not become effective and therefore does not have a binding effect. This argument was tested in the *Taflan-Met*⁵⁹ case.

Taflan-Met case “is of distinct nature, because it brought the Decision 3/80 into the Court’s scrutiny for the first time.”⁶⁰ This case was specifically concerned with rights to social security of Turkish workers. With a brief illustration, the main problem is the refusal by the Netherlands social security authorities to pay the widow’s pensions to the plaintiffs who were the surviving spouses of Turkish workers. The workers in question had worked in various EU member states. The reason behind the refusal was the materialization of the insured risk that has come about at time the workers were not covering by the Dutch legislation. The other plaintiff was a Turkish worker had been employed in both Germany and Netherlands. And he had been denied an invalidity pension in Germany.

Before the ECJ could answer the question as to whether or not the provisions of Decision 3/80 had direct effect, it first had to answer whether Decision 3/80 had entered into effect. While Advocate General (AG) La Pergola had argued that Decision 3/80 had never entered into force since this Decision did not mention a date of entry into force and thus could not become binding before further action by the EC. Pergola concluded that as the Commission proposal to implement Decision 3/80 has not been adopted by the Council, this Decision has not entered into force.

The Court, however, found that the decision had entered into force on the day it was adopted. The Court reasoned that the binding effect of decisions of Association Council couldn’t depend on whether implementing measures have in fact been adopted by the Contracting Parties.⁶¹ The Court added that Decision 3/80 has ‘binding effect’ by virtue of the Association Agreement to which it legally depends upon. Article 22(1) of the Agreement includes the legal basis for the binding effect through providing that ‘each party shall take necessary measures for the implementation of the Decisions.’ The Decisions of the Association Council are the measures taken by a body, which was empowered by the contracting parties. Therefore, from the outset, the parties agreed to be bound by the Association Council Decisions.

According to the ECJ, Decision 3/80 has effect in the EC’s legal order because the contracting parties agreed to be bound by such decisions and if those parties were to

59 Case C-277/94, [1996] ECR I-4085.

60 M. Mamak, “*Legal Aspects of the Customs Union between the EC and Turkey*, Dissertation of LLM in EC Law”, University of Essex, 1998, p.40.

61 *Taflan-Met*, supra note 115, paras, 17-18.

withdraw from that commitment, it would constitute a breach of the Agreement itself.⁶² Moreover, if the Court had ruled in an opposite way and decided to attach the binding effect to the adoption of implementing measures, the international character of Decision 3/80 could have been bruised by the ruling of the ECJ through connecting binding effect with a unilateral action of one party.⁶³

The ECJ concluded that in the absence of any provision on its entry into force it follows from the binding character that the Agreement attaches to decisions of the Association Council that Decision 3/80 entered into force on the date on which it was adopted. The ECJ pointed out that “although non-publication of those decisions may prevent their being applied to a private individual, a private individual is not thereby deprived of the power to invoke, in dealing with a public authority, the rights which those decisions confer on him”.⁶⁴ Therefore, on the date of adoption, i.e. 19 September 1980, Decision 3/80 became operative in the EC.

After this judgment there is no doubt regarding the fact that the EU is bound by international law to implement Decision 3/80. Because the Ankara Agreement commits the Contracting Parties to take all appropriate measures to ensure that the obligations arising from the Agreement are fulfilled and to refrain from any measures likely to jeopardize the attainment of those objectives.

(iv) Direct Effect of Decision 3/80

As is known the fact that a decision has become operational does not necessarily imply that it has direct effect. The wording of Article 39 of the Additional Protocol on social security is not sufficiently clear or precise to have direct effect. It was left to the Council of Association to establish the provisions necessary to implement the principles contained in this Article. But, the ECJ recognized that decisions by organs set up under international agreements could be directly effective even if the provision of the agreement to which the decisions refer was not direct effect.⁶⁵ The ECJ confirmed that international agreements concluded between the EU and third countries may have direct effect in certain situations.⁶⁶ The consistent case law of the stated that in order to have direct effect, the provisions of a Decision of the Association Council must satisfy the same criteria as those required of the Agreement itself: that is that the provision contains a clear and precise obligation which is not subject to the adoption of any subsequent measures.

62 Ibid, at para 21.

63 M. Bulterman, Case commentary on *Taşlan-Met*, 34 *CML Rev.*, 1997, p. 1504.

64 *Taşlan-Met*, supra note 115, para 24.

65 *Sevince*, supra note 71, para. 21.

66 Case C-416/96, *El-Yassini* [1999] ECR I-1209.

In considering whether the provisions contain a clear and precise obligation, which is not subject in its interpretation of effects to the adoption of any subsequent measure, the Court drew a parallel with Regulation 1408/71 to point out that the practical application of the latter necessitated the adoption of implementing measures set out in Regulation 574/72. For example, particularly, in relation to the principle of aggregation of the periods subject to social security under the different systems of Member States, Article 15 of Regulation 574/72 has significant practical effect on the implementation of Regulation 1408/71.⁶⁷ The Court establishes this analogy through examining the similarities between two legal texts in terms of their purpose and scope.⁶⁸

With a comparison of Decision 3/80 with those Regulations, the Court considered that Decision 3/80 is required to be supplemented and implemented in the EU by a subsequent act of the Council. The Court held that so long as the Council has not adopted the supplementary measures essential for implementing Decision No 3/80, Articles 12 and 13 of that Decision do not have direct effect in the territory of the Member States and therefore individuals cannot rely on them before national courts.⁶⁹ The Court used the Commission's proposal for a Council Regulation submitted in 1983 as support for the view that the implementation of Decision 3/80 is intended to be supplemented by a subsequent act of the Council.⁷⁰ Thus, the Court, for the first time, "excluded a decision temporarily from containing directly effective provisions."⁷¹ But it is not clear if this judgment concerns the whole Decision or only the provisions relevant in the case that are Articles 12 and 13.

The rationale of the Court's judgment seems to be stemming from a technical implementation problem in social security field or an "operability problem" as alleged by some commentators⁷² rather than a legal concern. Moreover it is argued that by this ruling, the Court "deviates from the path of gradual improvement of the legal position of Turkish workers as set out in its previous case law."⁷³

In *Surul*,⁷⁴ the ECJ did not follow the interpretation of *Taşlan-Met* case.⁷⁵ The ECJ held that its reasoning in *Taşlan-Met* cannot be transposed to the principle of equal treatment in the field of social security. *Surul* judgment has ensured that rules on access social security benefits are paid to host nationals and Turkish workers and their families on an

67 J. M. Steiner, "Social Security for EC Migrants", (1992) 1, *Journal of Social Welfare & Family Law*, p. 39.

68 M. Moore, "Freedom of Movement and Migrant Workers' Social Security: An Overview of the Court's Jurisprudence 1992-1997", 35 *CML Rev.*, (1998), p.454.

69 *Taşlan-Met* supra 115, paras. 37-38.

70 *Ibid*, at paras. 33-36.

71 M. Bulterman, supra note 119, p. 1505.

72 H. Verschueren, "EC Social Security Coordination Excluding Third Country Nationals: Still in Line with Fundamental Rights After *Gaygusuz* Judgment?" (1997) 34(4) *C.M.L.Rev.*, p. 1012.

73 M. Bulterman, supra note 119, p. 1503.

74 Case C-262/96, *Surul*, [1999] ECR-I 2685.

75 F. Pennings, *Introduction to European Social Security Law*, 3rd Ed., Kluwer Law, 2001, p. 220.

equivalent basis. The Court confirmed that the prohibition of discrimination contained in Article 3(1) of Decision 3/80 is directly effective, as it requires no further implementation at national level in order to be enforced. However, the system underpinning Article 3 (1) of Decision 3/80 is “limited in its effects as it does not, for instance, require recognition of acquired social security rights or status in other Member States or Turkey.”⁷⁶ The ECJ, in *Kocak and Ors*, rejected submissions by the plaintiffs’ and Commission’s argument that German social security rules were indirectly discriminatory, in refusing to take account of foreign court judgments, which had rectified dates of birth, entered on the plaintiffs’ original birth certificates.

(v) Principle of Non-discrimination

Non-discrimination on the grounds of nationality is one of the main principles of EU law. This principle forbids any form of discrimination based on nationality in the field of social security. The development of the principle of equality in the field of social security was also influenced by the notion of proportionality.⁷⁷ The prohibition of discriminatory treatment in social security on grounds of nationality is “one of the first devices used in international agreement to regulate social security provision” for free movement of workers.⁷⁸

Although this principle was not adopted in the Additional Protocol, it is included in Decision 3/80. Article 3(1) of Decision 3/80 constitutes the implementation, in the field of social security, of the general principle of non-discrimination on grounds of nationality laid down in Article 9 of the Ankara Agreement. Under Article 3, the persons covered by the Decision 3/80 enjoy equal treatment with nationals. Subject to the special provisions of the Decision, they are subject to the same obligations and enjoy the same benefits under the legislation of the host Member State on the same conditions as the nationals of that State. The ECJ held that Article 3 of Decision 3/80 is suitable for direct application, as this provision lays down in clear, precise and unconditional terms a prohibition of discrimination based on nationality.⁷⁹

Similarly, as AG Ruiz-Jarabo Colomer rightly pointed out that in the field of social security, “Article 3(1) of Council Regulation (EEC) No 1408/71 which is applicable to EU nationals, and Article 3(1) of Decision No 3/80, which applies to Turkish nationals, are drafted in identical terms and impose on the Member States the obligation to confer on residents of a Member State who rank among the persons covered by the provision the same treatment as they confer on their own nationals. The direct effect of the principle of equality of treatment in the field of social security has been recognised by the Court in relation to both Article 3(1) of Regulation No 1408/71 and Article 3(1) of Decision No

76 M. Hedemann-Robinson, *supra* note 82, p. 554.

77 Case C-57/96, *Meints*, [1997] ECR I-6689.

78 Ogus, Barendt & Wikeley, *the Law of Social Security*, Butterworths, 4th ed., 1995, p.709.

79 Surul, *supra* note 130, para 60.

3/80. Consequently, a Member State may not assign a different scope to the principle depending on whether the person to whom the provision applies is a worker who is a national of another Member State or a worker who is a Turkish national.”⁸⁰

The ECJ has ruled that the concept of social security in the Cooperation Agreements has to be interpreted by analogy with the same concept in Regulation 1408/71.⁸¹ In the framework of Regulation 1408/71, the Court ruled this equal treatment had to be interpreted in the broadest sense possible. Similarly, the ECJ referred to the *Graf*⁸² in the *Kocak and Ors*⁸³ and held that “as regards the scope of the principle of non-discrimination on grounds of nationality embodied in Article 3(1) of Decision No 3/80... the rule of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result.”

E. Conclusion

On the other hand, the Third-Country-Nationals (TCNs) are obliged by law to contribute to the social security system of the Member States in which they reside but they are unable to maintain their social security rights when they move from one Member State to another. Some recent cases have reaffirmed the applicability to TCNs of the right to non-discrimination and have extended a number of rights from migrant workers to members of their families. For example, *Surul*⁸⁴ case confirmed the principle of non-discrimination with respect to social security for migrant workers and their families but it also has temporal effects.

It can be argued that Turkish workers are a privileged group of TCNs, but there are still many problems regarding the principle of equal treatment. In the words of Vink: “None of the association agreements gives individuals a right to equal treatment equivalent to the categorical prohibition of discrimination on grounds of nationality for Union citizens under Article 12 EC Treaty.”⁸⁵ (now, Article 18 of the TFEU) Although some articles of Regulation 1408/71 are still valid, Regulations 883/2004 and 987/2009, are applicable since 1st of May 2010. However, extension of 883/2004 to third country nationals and developments with regard to the Association Agreements are still pending issues.

80 Joined Cases C-102/98 and C-211/98, *Kocak and Ors* [2000] ECR I-1287, Opinion of Advocate General, para 43.

81 Case C-18/90, *Kziber* [1991] ECR I-199, para 25; *Yousfi*, supra note 88, para 24; *Krid*, supra note 89, para 32.

82 Case C-190/98, [2000] ECR I-493.

83 *Kocak and Ors*, supra note 136, para. 39.

84 *Surul*, supra note 130.

85 Maarten P.Vink, “Limits of European Citizenship: European Integration and Domestic Immigration Policies”, p.10, available internet at: <http://ideas.repec.org/p/erp/conweb/p0018.html>, (10.06.2010).

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