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CJEU – JUDGMENT OF 23.9.2013 (GRAND CHAMBER)
– CASE C-221/11 *LEYLA DEMIRKAN V*
BUNDESREPUBLIK DEUTSCHLAND – ASSOCIATION
AGREEMENT WITH TURKEY – ARTICLE 41 OF THE
ADDITIONAL PROTOCOL – FREEDOM TO PROVIDE
SERVICES – VISA REQUIREMENT

TURKEY ASSOCIATION AGREEMENT DOES NOT
COVER PASSIVE RECEPTION OF SERVICES
AND TURKISH NATIONALS WISHING TO ENTER
THE SCHENGEN AREA CANNOT BENEFIT
FROM THIS FREEDOM

CLAUDIO MATERA *

- I. INTRODUCTION.
- II. THE *LEYLA DEMIRKAN* CASE: FACTUAL BACKGROUND.
- III. OPINION OF THE ADVOCATE GENERAL AND DECISION BY THE COURT OF JUSTICE.
- IV. ANALYSIS.
- V. CONCLUSIONS.

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I. INTRODUCTION

On the 23 of November 1970 the then European Economic Community, its Member States and Turkey signed the Additional Protocol¹ to the EU² - Turkey Association Agreement of 1963.³ The signature of the Additional Protocol marked the passage from the ‘preparatory’ stage to the ‘transitional’ one in the association process.⁴ According to Article 2 of the Association Agreement, EU - Turkey relations were to be marked by three different stages of cooperation. While the preparatory stage was envisaged to allow Turkey to strengthen its economy by establishing favourable trade rules and by creating advantageous investment mechanisms, the transitional stage was designed to establish a customs union and align the economic policies between the Contracting Parties. Moreover, the 1970 Additional Protocol also held that the Contracting Parties would progressively abolish restrictions on the freedom of establishment, freedom to provide services and secure the freedom of movement for workers. Lastly, the Association Agreement envisaged a ‘final’ stage in which the Contracting parties would coordinate more closely their economic policies.⁵

However, since the entry into force of the Association Agreement first and the Additional Protocol second, the Association between Turkey and the EU is somehow stuck between the ‘final’ stage envisaged by Article 5 of the Association Agreement and the negotiations for acceding the EU. Indeed, while the EU and Turkey have attained a custom union, the level of integration is far from having attained the abolition of restrictions pertaining to the free movement provisions. Yet, the provisions of the Association Agreement and the 1970 Additional Protocol pertaining to the movement of persons have been the object of numerous decisions by the Court of Justice of the European Union (hereinafter CJEU). Thus, even though the association and accession processes have not been completed, the existing provisions have been

¹ Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force, OJ 1972 L 293/4.

² At the time of the conclusion of the agreement EEC, the current name European Union will be used in this text.

³ Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey, O.J. 1977 L361/1.

⁴ Article 2(2) of the Association Agreement.

⁵ Article 5.

repeatedly invoked in front of national and EU instances. In this respect, a recent strand of case law pertains the interpretation and scope of application of Article 41(1) of the Additional Protocol.

Article 41(1) of the Additional Protocol contains the so-called ‘standstill clause’ in relation to the freedom of establishment and the freedom to provide services.⁶ The inclusion of this provision meant that after the conclusion of the Protocol the Contracting Parties couldn’t introduce new restrictions on the freedom of establishment and the freedom to provide services between themselves. Thus, while the progressive *abolition* of restrictions on the freedom of establishment and the freedom to provide services was left to the works of the Association Council,⁷ Article 41(1) was introduced so as to preclude the adoption of stricter rules than those in force at the time when the Additional Protocol entered into force.

Between 2007 and 2009 the CJEU delivered two significant judgements concerning the interpretation and application of the ‘standstill clause’ of the Additional Protocol.⁸ In 2007 the CJEU held in the case of *Tum and Dari*⁹ that Article 41(1) of the Additional Protocol covered, in relation to the freedom of establishment, not only rules pertaining residence permits and other authorisations related to the establishment of economic activities, but also rules pertaining to the right of entry within the territory of a Member State.¹⁰ Later, in 2009, the CJEU was called to interpret the scope of article 41(1) of the Additional protocol in relation to the freedom to provide services in the case of *Soysal and Savatli*.¹¹ After having confirmed the interpretation according to which the Article 41(1) of the Additional protocol prohibits the introduction of *any* new measures having the object or effect of making the exercise of the economic freedoms mentioned therein subject to stricter con-

⁶ Article 41: 1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

⁷ Article 41(2) of the Additional Protocol

⁸ For a recent analysis: Tezcan/Idriz and Slot, «Free movement of persons between Turkey and the EU: hidden potential of Article 41(1) of the Additional protocol» CLEER Working Papers 2010/2, T.M.C Asser Institute, The Hague

⁹ Case C-16/05 *The Queen, Veli Tum and Mehmet Dari v Secretary of State for the Home Department*, [2007] I-07415

¹⁰ C-16/05 *Tum and Dari*, *supranote*, paragraphs 47, 52, 55, 61 and 63 of the judgement.

¹¹ Case C-228/06 *Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland*, [2009] ECR I-1031

ditions than those which applied at the time when the Additional Protocol entered into force,¹² the CJEU finally held that services providers could not be asked to obtain a visa to perform their service if such condition was not in force at the time in which the Additional Protocol was concluded.¹³

As it has been observed by academics¹⁴, the cases of *Tum and Dari* and *Soysal and Savatli* are significant because they have clarified the scope of the standstill clause. Indeed, following the two judgements in question, it is clear that article 41(1) of the Additional Protocol on freedom of establishment and freedom to provide services not only applies to residence permits and other types of authorisations, but also to procedural matters pertaining to the crossing of borders such as visas. As a consequence of these developments the last question on article 41(1) left to be answered by the CJEU was whether the decision on *Soysal and Savatli* was applicable, *mutatis mutandis*, also for services recipients.

II. THE *LEYLA DEMIRKAN CASE*: FACTUAL BACKGROUND

The opportunity to clarify whether the decision of the CJEU in the *Soysal and Savatli* case was applicable also to services recipients came with the case C-221/11 *Leyla Demirkan v Bundesrepublik Deutschland* decided by the CJEU on the 23rd of September 2013.¹⁵ Ms Leyla Demirkan, a Turkish national, had requested a short-term tourist visa to German authorities to go and visit her stepfather, a German national. However, German authorities rejected her request and Ms Demirkan attacked the decision arguing, *inter alia*, that on the basis of Article 41(1) of the Additional Protocol to the EU–Turkey Association Agreement she was entitled to enter Germany without a visa because at the time of the conclusion of the Additional Protocol —1970— Turkish nationals did not need a visa to enter Germany as tourists. Indeed, as pointed out in the case of *Soysal and Savatli* at the time of concluding the Additional protocol, Germany did not impose the possession of a visa for services providers and tourists coming from Turkey: the introduction for a generalised visa requirement to enter Germany for Turkish nationals was introduced in 1980. With the introduction of a generalised visa system for

¹² *Ibid.*, paragraph 47

¹³ *Ibid.*, paragraphs 55-57

¹⁴ Tezcan/Idriz and Slot, *supra* note n. 8

¹⁵ Case C-221/11 *Leyla Demirkan v Bundesrepublik Deutschland*, NYR

Turkish nationals this law clearly contravened Article 41(1) of the Additional protocol in so far as this law did not exempt services providers and individuals moving to establish themselves in Germany. Moreover, the imposition of a visa to enter any Schengen State was later confirmed at EU level with the adoption of Regulation 539/2001 on the list of the third countries whose nationals must be in possession of visas when crossing the external borders of the EU.¹⁶

On the basis of Ms Demirkan's claim, the referring court in Berlin addressed two questions to the CJEU. First, it asked whether article 41(1) of the Additional protocol containing the 'standstill clause' on restrictions related to the freedom of establishment and the freedom to provide services included the passive reception of services. Secondly, but only in case the first question was answered positively, the referring court asked the CJEU whether a tourist traveling to visit family could be considered as a passive recipient of services when the purpose of traveling is personal and not economical. Other than the issues directly linked with the interpretation and application of Article 41(1), the case also implied an evaluation circa the compatibility of laws and regulations adopted by the EU and its Member States after the entry into force of the Additional Protocol such as Regulation 539/2001.

III. OPINION OF THE ADVOCATE GENERAL AND DECISION BY THE COURT OF JUSTICE

Advocate General Villalón delivered his Opinion in April 2013 and argued that the answer to the two questions should be negative. The first, main, question asked to the CJEU sought to obtain a clarification whether passive recipients of services were also covered by Article 41(1) of the Additional protocol. To answer the question the AG considered that the Additional Protocol should be interpreted on the basis of international rules pertaining to the interpretation of treaties and, namely, the Vienna Convention on the Law of Treaty of 1963.¹⁷ Using this method, the AG argued that Article 41(1) of the Additional Protocol should be interpreted in the light of the circumstances and objectives enshrined in the Additional Protocol at the time of its conclu-

¹⁶ Regulation 539/2001 on the 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, O.J. 2001 L 81/1.

¹⁷ Paragraph 53 of the Opinion.

sion; a time in which, also internally, the EU legal system recognised the *active* freedom to provide services and only '*indicia*' spoke in favour of the passive form.¹⁸ Moreover, according to the AG also the context of the EU-Turkey Association Agreement did not argue in favour of an extensive interpretation of Article 41(1) so as to include the passive reception of services.¹⁹ This is because, according to him, the EU - Turkey Association Agreement does not have the same objectives of the EU treaties and, therefore, the notions contained in the latter instruments cannot be automatically extended to the former; rather, the AG emphasised that the provisions on the economic freedoms contained in the EU-Turkey Association Agreement and Additional Protocol merely refer to the EU treaties for *guidance*²⁰ and do not seek to mirror the structures, rules and objectives of the EU internal market.

On the 23rd of September 2013 the CJEU reached the same conclusion of the AG and held that the notion of freedom to provide services contained in Article 41(1) of the Additional Protocol must be interpreted as not encompassing freedom for Turkish nationals to visit a Member State in order to obtain services. Indeed also the CJEU considered that the objectives and context of the EU - Turkey Association Agreement and Additional Protocol spoke against the transposition of the notion of passive recipient of services stemming from the law of the internal market.²¹ In particular, the CJEU emphasised that while the EU treaties developed a generalised system of economic and non-economic freedoms with special consideration for the rights of movement attributed to citizens of the Member States,²² this is not the case in relation to the EU-Turkey association process which has only economic purposes.²³ As a consequence of this, the CJEU held that Article 41(1) is applicable only in relation to the *actual* exercise of economic activities falling within the scope of the Association Agreement and passive activities such as the one at stake in the case are not.²⁴ Lastly, the CJEU took in consideration the context in which the Additional Protocol and the Association Agreement were concluded. First, like the AG had done, the CJEU considered that at the time of the conclusion of the agreements also internally the notion of

¹⁸ Paragraphs 54-57 of the Opinion.

¹⁹ Paragraphs 58-63.

²⁰ Article 14 of the Association Agreement.

²¹ Paragraphs 40-47.

²² Paragraph 53 and 56.

²³ Paragraphs 49-53.

²⁴ Paragraphs 54-55.

passive recipient of services and not yet clearly emerged.²⁵ Secondly, the CJEU held that looking at the praxis among the parties the introduction of visa requirements for tourist introduced by Germany and Turkey alike ran against the argument of Ms Demirkan.²⁶

IV. ANALYSIS

It is well established in EU law that the freedom to provide services codified in Article 56 TFEU comprises the passive freedom to receive services. While the first occasion in which the Court of Justice made use of this concept was the *Luisi and Carbone*²⁷ case, the concept of ‘passive recipient of services’ can be traced to two legislative instruments. Indeed, the concept in question was firstly mentioned in Directive 64/221/EC²⁸ on the co-ordination of special measures concerning the movement and residence of persons and in in Article 1 (b) of Directive 73/148²⁹ on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. However, it is true that at the time the Additional Protocol was concluded only Directive 64/221/EC was in force. Therefore, while a strict temporal parameter favours the decision reached by the CJEU, the same decision introduces for the first time a distinction that opens a number of other questions.

With the decision in the case of *Luisi and Carbone* the CJEU held that the passive freedom to receive services is the *necessary corollary* of the freedom to provide services. Since then, the CJEU has applied Article 56 TFEU and developed the notion of passive freedom to provide services for a number of

²⁵ Paragraphs 57-59.

²⁶ Paragraph 61.

²⁷ Joined Cases 286/82 and 26/83 *Luisi and Carbone*, [1984] ECR 1984 p. 377.

²⁸ Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, *Official Journal* 056, 04/04/1964 P. 0850.

²⁹ Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. Article 1 provided that: 1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of: (b) nationals of Member States wishing to go to another Member State as recipients of services;

situations: persons travelling for business, medical treatment and education.³⁰ More interestingly, in case C-274/96 *Bickel and Franz*³¹ the CJEU went as far as affirming that article 56 TFEU also protects those who visit another Member State where ‘they intend or are likely to receive services’. As a consequence of this, the passive freedom to provide services not only covers the situation of individuals *purposively* traveling to receive a service, but also covers the situation of individuals like *Bickel and Franz* or a situation such as the one of the *Cowan*³² case where the movement within the internal market did not occur to receive a *specific* service. In *Demirkan*, however, the AG and the CJEU did not elaborate a solution that would take into account the nuances existing in the internal market case law pertaining to the active and passive freedom to receive services and opted for the introduction, *sic et simpliciter*, of the distinction between provision and reception of services.

Thus, while the *Demirkan* decision reaffirms that «the principles enshrined in the provisions of the Treaty relating to freedom to provide services must be extended, so far as possible, to Turkish nationals»³³, the CJEU took the opportunity to affirm that the standstill clause of Article 41(1) is applicable only in connection to the active exercise of an actual economic activity. However, by introducing such a strict divide between active and passive reception of services, the CJEU has also cut off from the scope of Article 41(1) of the additional protocol to the EU – Turkey Association Agreement also those individuals who may wish to travel to receive a specific service such as medical treatments; hence limiting the potential economic advantages that could have stemmed from Article 41(1) of the Additional protocol. Thus, according to this reasoning, the case of *Soysal and Savatli* would only be applicable to individuals that are providers of services and that are moving for the actual performance of their service.

How does the CJEU justify this restrictive notion of freedom to provide services? The CJEU and the AG developed their respective solutions to the case following two lines of arguments. The first and main argument is linked to the objectives of the EU - Turkey Association process. Indeed in this respect the CJEU and the AG emphasised that the EU - Turkey Association

³⁰ For an analysis, Barnard C. «The Substantive Law of the EU. The Four Freedoms», Oxford University Press, 2008, p. 357.

³¹ Case C-274/96 *Criminal Proceedings against Otto Bickel and Ulrich Franz*, [1998] ECR I-07637.

³² Case 186/87 *Ian William Cowan v Tesor Public*, [1989] ECR 00195.

³³ Case C-317/01 *Eran Abatay and Others* and Case C369/01 *Nadi Sahin v Bundesanstalt für Arbeit*, [2003] ECR I-12301, paragraph 112.

Agreement does not envisage an integration process similar to the one created by the EU treaties; rather the EU – Turkey Association merely promotes the «continuous and balanced strengthening of trade and economic relations between the EU and Turkey».³⁴ This relation—which is purely economic according to the CJEU, is not strong enough to include the passive freedom to provide services. However, the economic scope of the Association Agreement could have been protected and enhanced more advantageously by distinguishing between travelling for the actual provision and reception of services versus travelling for non-economic purposes. By doing so the CJEU would have been able to use more convincingly the argument according to which the broad notion of the freedom to provide and receive services as developed within the internal market and as emerging from the *Bickel and Franz* and *Cowan* cases are justified only within the EU context because only within the EU context economic freedoms are supplemented by the freedom to move guaranteed by the conferral of an autonomous right for EU citizens, a right that can be exercised independently from a specific economic activity on the basis of Article 21 TFEU.³⁵

The second main argument developed by the AG and the CJEU is the temporal one. According to this line of argument the Association Agreement and the Additional protocol must be interpreted on the basis of the temporal context in which the agreements were concluded. Yet, while this approach is formally correct, the way in which this approach was followed *in casu* is not fully convincing. This is because the AG and CJEU have placed a considerable emphasis on the fact that the passive reception of services was not yet fully established as a corollary of article 56 TFEU at the time of the conclusion of the agreements and on the fact that the Association Council has not yet adopted any rules on the freedom to provide services between the EU and Turkey. However, other elements of EU-Turkey legal relations could have been used to argue the opposite, or at least could have been used to affirm a less strict interpretation of Article 41(1) of the Additional protocol.

In this respect, a first element that the CJEU could have taken into account in its assessment is the evolution of the EU-Turkey relations; secondly, the CJEU could have clarified better the question concerning the manner in which the evolution of internal EU law may legitimately affect the interpre-

³⁴ Article 2(1) of the Association Agreement.

³⁵ On this point paragraphs 53-56 of the Judgement. Hence the CJEU seems to suggest that the extension of the passive reception of services for non-economic activities should be read as a corollary of citizenship's rights.

tation an Association Agreement. In relation to these issues it is striking that neither the AG nor the CJEU make reference to Article 28 of the Association Agreement where it is said that the long-term goal of the agreement is to enter accession talks. And even more striking is the fact that nowhere in the Opinion and the judgment it is mentioned that Turkey is a candidate country of the EU since 2005; the only candidate country for which there is still a visa regime applicable. Shouldn't the status of 'candidate country' have influenced the interpretation of the Additional protocol and the Association Agreement? Shouldn't this element have sufficed to interpret Article 41(1) differently? Not according to the CJEU since the judgment is deprived of any reference to the evolution of the EU-Turkey relations exception being made for the reference to the impasse concerning the works of the Association Council in relation to the liberalisation of services.³⁶

Moreover, the decision of the CJEU appears questionable also if one takes into consideration the case law pertaining to other instruments of external relations and neighbourhood policy such as Partnership and Cooperation Agreements (PCA); an instrument used in the external relations of the EU that is weaker, in its scope and content, than Association agreements. An example of this is the *Simutenkov* case.³⁷ In *Simutenkov* the CJEU was asked to interpret the scope of the rules pertaining to workers' rights under the EU - Russia Partnership and Cooperation Agreement.³⁸ In *Simutenkov* the CJEU argued that even though the PCA agreement did not have the same objectives of the EU treaties, the limited scope of a PCA did not necessarily entail a restrictive interpretation of specific provisions of such agreement whenever a provision is very similar to EU treaties ones.³⁹ At the time of the *Simutenkov* judgment, two main issues were highlighted. First, *Simutenkov* implied a re-consideration of the *Polydor*⁴⁰ rule according to which the similarities between a provision of the EU treaties with a provision of an agreement concluded between the EU and a third country is not sufficient to give to the wording of the latter the same meaning of the EU internal one. Secondly, *Simutenkov* 'watered down'⁴¹ the distinction between Association Agreements

³⁶ Paragraph 46 of the judgment.

³⁷ Case C-265/03 *Simutenkov*, [2005] ECR p. I-2579.

³⁸ O.J. 1997 L 327/3.

³⁹ Paragraphs 27, 28, 34 and 35.

⁴⁰ Case 270/80, *Polydor* and RSO Records, [1982] ECR 329.

⁴¹ Hillion C, Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, [2005] ECR I-2579, CMLRev 45: 815-833-2008.

and PCA ones since it applied for a PCA the same methods of interpretation traditionally used for Association Agreements.⁴²

Thus, while in *Demirkan* the limited objectives of the 1963 Association Agreement with Turkey prevented the CJEU to interpret the notion of freedom to provide services in the same manner as it is applied internally, the limited scope of the PCA agreement with Russia was not considered as a limiting parameter for the interpretation of that treaty. As a result of this, while *Simutenkov* symbolised the «Court's active transposition of notions of E[U] substantive and constitutional law into bilateral agreements regardless of their teleological variation»,⁴³ the *Demirkan* decision appears as a step back in this respect since the CJEU adopted stricter interpretative parameters for the EU - Turkey Association Agreement than it did for the PCA one.

Furthermore, a last aspect of the *Demirkan* decision concerned the relationship between the Additional protocol and the subsequent national and EU rules that introduced visa requirements for Turkish nationals wishing to enter Member States. While the generalised introduction of visas in 1980 by Germany and other EU Member States⁴⁴ was probably linked to the military coup that affected Turkey at that time; the CJEU had the opportunity to affirm in the *Soysal and Savatli* judgement that visa requirements affecting the exercise of economic freedoms guaranteed by the Association Agreement contravened Article 41(1) of the Additional Protocol.⁴⁵ However, since in this specific case the situation of Ms *Demirkan* was not considered to fall under the scope of Article 41(1) of the Additional Protocol, the CJEU did not have to consider the relationship between the latter provision and other subsequent instruments imposing visa requirements.

V. CONCLUSIONS

With the *Demirkan* case the CJEU was called upon to clarify the scope of Article 41(1) of the Additional protocol to the EU - Turkey Association Agreement and affirm whether the *Soysal and Savatli* ruling was also applicable to the passive reception of services and, more specifically, to tourists. The CJEU answered negatively and adopted a strict literal interpretation of

⁴² Paragraphs 35-36 of the *Simutenkov* judgement.

⁴³ Hillion C, *supra* note 42, p. 833.

⁴⁴ Paragraph 61 of the *Demirkan* judgement.

⁴⁵ Paragraphs 54-57 of the Judgement.

Article 41(1). However, while the CJEU's final decision does not raise particular doubts over the actual result, the reasoning and the argumentations used can raise some criticisms. As it was evidenced above, the CJEU could have reached the same result with a less controversial argumentation. Indeed, the CJEU could have easily upheld the notion of passive freedom to provide services also in relation to the EU - Turkey agreement with the caveat that the reception of services covered by the standstill clause of Article 41(1) only applies in relation to *actual* economic services that constitute the reason of entrance in a Member State. Moreover, with the *Demirkan* decision the CJEU has, albeit indirectly, complicated further the issue pertaining to the techniques of interpretation of bilateral agreements with third countries. Thus, as it was evidenced above, the CJEU appeared stricter in *Demirkan* than it did on the occasion of *Simutenkov*. Therefore, as a result of this ruling the only certainty pertaining to the interpretation and application of bilateral agreements is, in the wording of AG Stix-Hackl, that «the Court will sometimes interpret the provision in the same way as the provision of the [EU] Treaty and sometimes not».⁴⁶

Therefore, the CJEU decision in the *Demirkan* case, this case opens considerable questions and seems to confirm the emergence of what has been identified as 'selective associationism' by early commentators to this case.⁴⁷ Moreover, this case also fragments notions that were previously considered as unitary in EU law and introduces a questionable method to interpret agreements: a regressive method of interpretation of agreements that freezes, disproportionately, normative notions and policy contexts to the time in which an agreement was signed. Future cases will hopefully clarify the complicated jigsaw pertaining to the transposition of notions belonging to the EU legal system in the context of association and partnership and cooperation agreements with third countries.

As for the situation of Turkish nationals, shortly after the *Demirkan* decision the EU and Turkey have concluded a readmission agreement⁴⁸ that will lead to the introduction of visa liberalisation between the two parties, thus bringing an end to the immediate topic of this case note.

⁴⁶ Paragraph 30 of the AG Opinion in the *Simutenkov* case. The quotation used to refer to the EU, and has been changed to EU.

⁴⁷ Pirker, *AG Cruz Villalon in Case C-221/11 Demirkan: 'Selective Associationism'*, <http://europeanlawblog.eu/?p=1713>.

⁴⁸ On the 16th of December, official text not available yet, http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/20131216_01_en.htm.

CJEU - JUDGMENT OF 23.9.2013 (GRAND CHAMBER) – CASE C-221/11
LEYLA DEMIRKAN V BUNDESREPUBLIK DEUTSCHLAND – ASSOCIATION
AGREEMENT WITH TURKEY – ARTICLE 41 OF THE ADDITIONAL PROTOCOL -
FREEDOM TO PROVIDE SERVICES – VISA REQUIREMENT

TURKEY ASSOCIATION AGREEMENT DOES NOT COVER PASSIVE
RECEPTION OF SERVICES AND TURKISH NATIONALS WISHING TO ENTER
THE SCHENGEN AREA CANNOT BENEFIT FROM THIS FREEDOM

ABSTRACT: With the *Demirkan* case the CJEU was called upon to clarify the scope of Article 41(1) of the Additional protocol to the EU - Turkey Association Agreement and affirm whether the *Soysal and Savatli* ruling was also applicable to the passive reception of services and, more specifically, to tourists. The CJEU answered negatively and adopted a strict literal interpretation of Article 41(1). With this decision the CJEU affirmed that article 41(1) of the Additional protocol does not apply to services recipients and to reach this conclusion the CJEU emphasised that the EU -Turkey Association Agreement and protocol should be interpreted in the light of the context and objectives enshrined at the time of their conclusion. By doing so the CJEU adopted a formal method of interpretation that does not seem to take into consideration the status of candidate country of Turkey and that appears stricter than the techniques used by the CJEU in other cases. As a result of this tourists and other recipient of services from Turkey will have to keep on applying for a visa to enter the Schengen area until the visa liberalisation agreement enters in to force.

KEY WORDS: EEC-Turkey association agreement; additional protocol; article 41(1); ‘standstill’ clause; visa requirement for admission to the territory of a Member State; freedom to provide services; the right of a Turkish national to enter a Member State in order to visit a family member and, potentially, to receive services.

TJUE - SENTENCIA DEL TJUE DE 23.9.2013 (GRAN SALA) – ASUNTO C-221/11
LEYLA DEMIRKAN / BUNDESREPUBLIK DEUTSCHLAND – ACUERDO DE
ASOCIACIÓN CON TURQUÍA – ARTÍCULO 41 DEL PROTOCOLO ADICIONAL –
LIBRE PRESTACIÓN DE SERVICIOS – REQUISITO DE VISADO

EL ACUERDO DE ASOCIACIÓN CON TURQUÍA NO ABARCA
A LOS RECEPTORES PASIVOS DE SERVICIOS POR LO QUE
LOS NACIONALES TURCOS QUE DESEEN ENTRAR EN EL ESPACIO
SCHENGEN NO PUEDEN BENEFICIARSE DE ESTA LIBERTAD

RESUMEN: Con el asunto *Demirkan* el TJUE estaba llamado a clarificar el alcance del artículo 41 (1) del Protocolo adicional del Acuerdo de Asociación entre la UE y Turquía a fin de confirmar si el fallo en el asunto *Soysal y Savatli* era igualmente aplicable a la recepción pasiva de servicios y, de forma más específica, en el supuesto del turismo. Y a esta cuestión el Tribunal responde de forma negativa tras una estricta interpretación literal del artículo 41(1). De esta forma, el TJUE afirma que el artículo 41(1) del Protocolo adicional no se aplica a los beneficiarios de servicios, señalando que el Acuerdo de Asociación entre la UE y Turquía y su Protocolo deben interpretarse a la luz del contexto y de los objetivos en ellos inscritos en el momento de su conclusión. De este modo, el TJUE adopta un método formal de interpretación que no parece tomar en consideración el estatuto de país candidato de Turquía y que parece más estricto que las técnicas interpretativas utilizadas en el pasado. Como resultado de ello, los turistas y otros beneficiarios de servicios procedentes de Turquía deberán continuar solicitando un visado para entrar en el espacio Schengen hasta que entre en vigor el Acuerdo entre la UE y Turquía sobre la liberalización del régimen de visados.

PALABRAS CLAVE: acuerdo de asociación CEE-Turquía; protocolo adicional; artículo 41, párrafo 1; cláusula ‘standstill’; obligación de disponer de un visado para la admisión en el territorio de un Estado miembro; libre prestación de servicios; derecho de un nacional turco para entrar en un Estado miembro a fin de visitar a un miembro de su familia y beneficiarse potencialmente de la prestación de servicios.

CJUE- ARRÊT DU 23.9.2013 (GRANDE CHAMBRE) – *LEYLA DEMIRKAN / BUNDESREPUBLIK DEUTSCHLAND*, AFFAIRE C-221/11 – ACCORD D’ASSOCIATION AVEC LA TURQUIE – ARTICLE 41 DU PROTOCOLE ADDITIONNEL – LIBRE PRESTATION DE SERVICES – ACCORD D’ASSOCIATION CEE-TURQUIE – PROTOCOLE ADDITIONNEL – ARTICLE 41, PARAGRAPHE 1 – CLAUSE DE ‘STANDSTILL’ – OBLIGATION DE DISPOSER D’UN VISA

L’ACCORD D’ASSOCIATION AVEC LA TRQUIE N’ENGLOBE PAS LA LIBERTE POUR LES RESSORTISSANTS TURCS, DESTINATAIRES DE SERVICES, DE SE RENDRE DANS UN ÉTAT MEMBRE POUR Y BENEFCIER D’UNE PRESTATION DE SERVICE.

RÉSUMÉ: Avec l’affaire *Demirkan* la CJUE a été appelée à clarifier la portée de l’article 41 (1) du Protocole additionnel à l’accord d’association entre l’UE et la Turquie ; en outre elle avait été appelée à affirmer si la décision *Soysal et Savatli* était également applicable à la réception passive des services et, plus spécifiquement, dans le cas du tourisme. La CJUE a répondu en négative et a adopté une interprétation littérale stricte de l’article 41(1). Avec cette décision la CJUE a affirmé que l’article 41(1) du Protocole additionnel ne s’applique pas aux bénéficiaires de services et a souligné que l’accord d’association entre l’UE et la Turquie et son protocole doivent être interprétés à la lumière du contexte et des objectifs inscrit au moment de leur conclusion. Ce faisant, la CJUE a adopté une méthode formelle d’interprétation qui ne semble pas prendre en considération le statut de pays candidat de la Turquie et qui semble plus stricte que les techniques interprétatives utilisées par la CJUE dans le passé. À la suite de cette affaire les touristes et autres bénéficiaires de services en provenance de Turquie devront continuer à appliquer pour un visa pour entrer dans l’espace Schengen jusqu’à ce que l’accord UE - Turquie sur la libéralisation du régime des visas entre en vigueur.

MOTS CLÉS: accord d’association CEE-Turquie; protocole additionnel; article 41, paragraphe 1; clause de ‘standstill’; obligation de disposer d’un visa pour l’admission sur le territoire d’un État membre; libre prestation des services; droit d’un ressortissant turc d’entrer dans un État membre afin de rendre visite à un membre de sa famille et de bénéficié, potentiellement, de prestations de services.

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