

Joint Commentary of the EuroMaster Directors of Akdeniz and Hamburg Universities

Prof. Dr. Harun GÜMRÜKÇÜ
Director of the joint Master's Programme
European Studies, Antalya

Prof. Dr. Wolfgang VOEGELI
Director of the joint Master's Programme
European Studies, Hamburg

Akdeniz University, Antalya
Faculty of Economic and Administrative Sciences
International Relations Department

School of Business, Economics and Social
Sciences
Center of International Studies, Hamburg

- The visa requirement for Turkish nationals is illegal in most cases.
- Regulation № 539/2001 EC and the correspondent German 'Aufenthaltsgesetz' conflict with international obligations of the EU resulting from the Association Agreement. Hence, Turkey must be shifted to the Positive list (the list of countries, whose nationals are not required to apply for visa when entering any Member State of the European Union).

Effects of the decisions made by the European Court of Justice (ECJ) on the legal status of Turkish nationals in the Member States of the EU

Turkey is bound to the Member States of the European Union through the Accession Agreement (Ankara Agreement), signed in 1963. The Additional Protocol, which entered into force on 1 January 1973, elaborated the Accession Agreement and determined conditions of its implementation. According to Article 41 para. 1 of the above mentioned Protocol, the Contracting Parties agree to "refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services". The ECJ has made 4 decisions since 2000 and hitherto in order to interpret the above mentioned provision. The matter concerns:

Case	Date	Parts
1 C-228/06	Judgment 2009-02-19	Soysal and Savatli
2 C-16/05	Judgment 10.11.2007	Tum and Dari
7 C-317/01	Judgment 2003-10-21	Abatay u. a.
9 C-37/98	Judgment 2000-05-11	Savas

The ECJ interpreted the law of Agreement as directly applicable. In conformity with it, the above mentioned provision has a direct effect according to numerous ECJ judgements. Article 41 para. 1 of the Additional Protocol contains a Standstill Clause, which is a clear precise and unconditional legal obligation to refrain from certain actions (see Urteile Savas, paras. 46 to 54 and 71 second indent, Abatay and others., paras. 58, 59 and 117 first indent, and of 20. September 2007, Tum und Dari, C-16/05, Slg. 2007, I-7415, para. 46). Consequently, Turkish nationals, whom this provision applies to, have the right to rely on it

before the national courts of Member States (see *Urteile Savas*, para. 54, and *Tum und Dari*, para. 46). Certainly, the Standstill Clause itself does not itself contain a legal right which might be directly invoked. Such a right arises only in connection with national laws, which were valid at the moment the Standstill Clause came into effect. The content of these laws has thereby become inalienable and can be amended only with the objective of effective achievement of the goals set in the Accession Agreement.

The requirement of entrance visa for Turkish citizens when coming to Germany arose from the eleventh amendment of the Foreigners' Law of July 1, 1980 (Source: BGBl. I, p 782). But this change became effective only on 5 October 1980, after cancellation of the German-Turkish Visa Agreement of 1953. This law was promulgated long after the decisive date of 1 January 1973. The visa requirement for Turkish nationals, which has been declared unlawful by the ECJ, presently arises out of Article 4, para. 1 and Article 6 of the Residence Act (*Aufenthaltsgesetz*) of 30 July 2004 (BGBl. I, p 1950), which came into force on 1 January 2005. However, this law is just an implementation of the EC-Regulation № 539/2001, according to which Turkey was entered into the list of third countries, whose nationals are required to obtain a visa in order to cross the external borders of the European Union.

In the above mentioned judgment (C-228/06, *Soysal*), the ECJ has once again declared such changes to national law as violating the principle of supremacy of European law, because these changes are to the detriment of Turkish nationals, which has been forbidden since 1 January 1973. Although the German Residence Act (*Aufenthaltsgesetz*) is nothing else but an implementation in national legislation of Art. 1 (1) of Council Regulation № 539/2001 EC of 15 March 2001 (ABL. L 81, p 1), still it must be considered as a breach of Art. 41 (1) of the Additional Protocol, because secondary EC law is to be interpreted in such a way that it does not collide with international obligations of the EU (Commission/Deutschland, C-61/94, para. 52). Regulation № 539/2001 collides with the Standstill Clause of the Additional Protocol, which takes priority over the Regulation. Thus, the visa requirement set in this Regulation, does not take effect in those Member States, whose national legislation did not contain any visa requirement at the time the Additional Protocol came into force. The date of the Additional Protocol coming into effect is 1 January 1973 for the original Member States of the European Community and, accordingly, for other Member States it is the date of accession to the EU.

Based on the above mentioned judgments, the following conclusions can be drawn:

- 1) According to the above mentioned decisions of the ECJ, the immigration laws of the Member States of the EU which were valid on 1 January 1973 and whose validity has been extended by the Standstill Clause, must be immediately applied to Turkish nationals. Accordingly, the Regulation on Implementation of the Foreigners' Law (*Durchführungsverordnung zum Ausländergesetz*), as valid on 1 January 1973, must be applied henceforth. Under this law, under certain conditions there was no visa required for Turkish nationals intending to provide or receive services. Before 1 January 1973, according to section 1 para. 2 № 1 of the Regulation on Implementation of the Foreigners' Law (*Durchführungsverordnung zum Ausländergesetz*) in the edition of 12 March 1969 (BGBl. I p 207) Turkish nationals entered Germany without visa as tourists for a period no longer than three months and according to section 1 para. 2 № 2 as service providers for a period no longer than 2 months. Service provider is a person who provides services in Germany on behalf of the company, which has its head office in Turkey. But since under European Law the freedom to provide services also encompasses the freedom to receive services, everyone comes under this rule who just wants to make use of the transportation services of local transport.

- 2) Free movement of services within the EU is regulated by Art. 49 of the EC Treaty. In case of Turkey this provision has been elaborated by the ECJ in its judgment Abatay/Sahin in 2003. Free movement of services covers not only employers and self-employed persons, but also those, who travel with educational purposes (e.g. language courses), take medical care or visit their family of friends, as well as those, who travels with tourist purpose (Source: ECJ judgment “Luisi and Carbone” of 31 January 1984, C-286/82, 2.021989, Cowan, C-186/87). Furthermore, this freedom is also valid for employees since no company can provide services without them.
- 3) A Visa requirement is still valid for Turkish nationals in case of family reunification and for the purpose of taking up employment.
- 4) On grounds of the legal provisions mentioned above, Turkish nationals must:
 - a) have a valid passport,
 - b) not have been convicted of grave offences or have been expelled from Germany (Threat to public health and security).
- 5) All persons can come to Germany for tourist purposes without any visa, and are allowed to stay there during three months (section 1 para. 2 № 1 of the Regulation on Implementation of the Foreigners' Law (Durchführungsverordnung zum Ausländergesetz)).
- 6) Persons intending to provide services can come to Germany and stay there without visa for maximum two months (section 1 para. 2 № 2 of the Regulation on Implementation of the Foreigners' Law (Durchführungsverordnung zum Ausländergesetz)).
- 7) With the expiration of that period a fine will be imposed and an expulsion from the country applied.
- 8) Turkish nationals are not allowed to be employed by German companies during the sojourn in Germany. Employment will be considered illegal and will be prosecuted.
- 9) As a political consequence of the preceding observations, Turkey must be entered to the list of countries, which nationals are not required to receive visa for entering the Member States of the EU.

In spite of the fact, that this legal situation has been clarified in the above mentioned decisions, it must be remembered that public officers, who work on the borders of any Member State of the EU, will observe internal administrative rules issued by the authorities of that particular state, rather than the law of the European Union, even if these rules are based on an inapplicable national law. In this respect, the suggestion to Turkish nationals is to apply to official representatives of the Federal Republic of Germany and to request a confirmation that no visa is required for entry into Germany. If this request is rejected or a respective document has not been issued in the proper period, the Federal Republic can be sued before German administrative courts. Alternatively, one can claim compensation for damages suffered, namely the costs related to visa application.

The claim for compensation of damages arises out of the case law of the ECJ concerning the legal effects of the violation of rights conferred by primary or secondary EU law. This case law is based on the ECJ judgement Francovich (C-6/90). The conditions are that primary or secondary law confers a right on individuals, the content of this right is clear and precise and that the infringement of this right caused damages. It is also necessary to prove that the infringement of this right is a manifest disregard of discretion by institutions of a particular Member State. This condition is always met when the ECJ has already held a particular national provision to be a breach of EC law. In the cases where entry into the country without a visa is rejected all these conditions are met. In the legal proceedings an individual can invoke the Standstill Clause which, together with the relevant national norms, establishes the right of entry with no visa required. An infringement of this right by German institutions leads to expenses, which otherwise would not have arisen. These expenses can be considered as damages.

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It is necessary, though, to bear in mind that entry into Germany through another Member State requires that the regulations of that state also provide for a right of entry without a visa, because German law cannot provide a right of entry into the EU in general.