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A Comment on the Inconsistency between the EU-Turkey Association Law and EU Secondary Legislation

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The Court of Justice dealt with the problem of inconsistency between the EU-Turkey association law and European Union (EU) secondary legislation in the Soysal case. The solution adopted by the Court was to accord primacy to the association law and to interpret the provisions of secondary legislation, to the extent possible, in a manner that is consistent with that law. However, this solution was not taken into consideration during the accession of Croatia to the EU and Croatia had to adopt the relevant secondary legislation which itself was adopted by the EU without observing its respective standstill obligation, which led to the tightening of its more liberal regime towards Turkey. Moving from the example of Croatia, this contribution explores the limits of the consistent interpretation approach of the Court and proposes a solution reconciling this approach with the obligations of EU membership.

1 INTRODUCTION

The termination[1] of the Agreement between Turkey and Croatia on the Abolition of Visas as from 1 April 2013 due to Croatia's accession to the European Union (EU) as from 1 July 2013 provides an opportunity for discussing the unfair situation resulting from the inconsistency between the EU-Turkey association law and EU secondary legislation.

In the following, first, the Court of Justice's (the Court) approach to eliminate the inconsistency between the international agreements to which the EU is a party and EU secondary legislation will be explained briefly. Then, it will be argued that, in the example of Croatia's visa regime towards Turkey, non-application of this approach to acceding Member States is contrary to the EU-Turkey association law.

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1 Decision No. 2013/4483 of Council of Ministers (Official Gazette of the Republic of Turkey, 29 Mar. 2013, No. 28602).

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2 THE APPROACH OF THE COURT

The Court clarified, for the first time in 1996, what should be done when there is inconsistency between the international agreements to which the EU is a party and EU secondary legislation in its judgment in case *Commission v. Germany.*[2] The third sentence of paragraph 52 thereof reads:

> *[…] the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.*

The Court referred to this sentence in its *Soysal* judgment[3] in order to deal with the inconsistency between Article 41(1) of the Additional Protocol and Regulation No. 539/2001.[4]

Thus, according to the Court, if there is inconsistency between the international agreements to which the EU is a party and EU secondary legislation, the problem can be solved by interpreting the provisions of secondary legislation, so far as possible, in a manner that is consistent with those agreements.

3 THE EFFECT OF CROATIA'S ACCESSION TO THE EU ON ITS VISA REGIME TOWARDS TURKEY

As stated above, the Agreement between Turkey and Croatia on the Abolition of Visas has been terminated as of 1 April 2013 due to Croatia's accession to the EU as from 1 July 2013. To be more specific, Croatia began to require visas from Turkish nationals –which was not the case before– in order to align with Regulation No. 539/2001 which forms part of the *acquis* Croatia needed to adopt as a member of the EU. Turkey is listed in Annex I of that Regulation among the third countries whose nationals are required to be in possession of a visa when crossing the external borders of the Member States.

4 THE OBLIGATION OF THE EU RESULTING FROM THE EU-TURKEY ASSOCIATION LAW

From the standpoint of the EU, both the Agreement establishing an Association between the European Economic Community and Turkey (Ankara Agreement)[5]

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2 Case C-61/94, *Commission v. Germany* [1996] ECR I-3989.

3 Case C-228/06, *Mehmet Soysal and İbrahim Savatlı v. Bundesrepublik Deutschland* [2009] ECR I-1031, para. 59.

4 Council Regulation (EC) No. 539/2001 of 15 Mar. 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21 Mar. 2001, p. 1.

5 Signed on 12 Sep. 1963 and entered into force on 1 Dec. 1964 (OJ C 113, 24 Dec. 1973, p. 2).

and the Additional Protocol[6] regulating the transitional phase of the association are mixed agreements to which the Community and Member States are parties. The same mixed form can also be found in the decisions of the Association Council in which both the Community and Member States are represented. Consequently, when an obligation is foreseen in one of these texts for the contracting parties, it is also binding for the Community/Union with regard to its acts, provided that that obligation concerns one of the fields within its sphere of competence.[7]

In the context of the standstill clauses, those clauses, which are set out in Article 41(1) of the Additional Protocol, and Article 7 of Decision No. 2/76 and Article 13 of Decision No. 1/80 of the Association Council, oblige the contracting parties not to introduce new restrictions for the relevant categories of persons. These categories comprise self-employed persons, service providers and workers. Among these, only service providers[8] are of concern to us in relation to visa exemption for short stays.

In my view, the then Community infringed its obligation resulting from the standstill clause by listing Turkey in the respective annexes of Regulation No. 2317/95,[9] Regulation No. 574/1999[10] and Regulation No. 539/2001 among the third countries whose nationals are subject to visa. Although a measure of this kind taken at Community/Union level does not affect, in line with the Court's interpretation in *Soysal*, the visa regimes of the present Member States with regard to service providers, it seems not to be the case for the new Member States. In view of the fact that a new Member State has to adopt the *acquis* in force, such a measure (Regulation No. 539/2001) prevents it from determining its own visa regime freely –which will be subject to the standstill clause set out in Article 41(1) of the Additional Protocol after accession– and cause the tightening –if it was more liberal before– of its existing visa regime, which is applicable also to service providers, contrary to the aim of progressive integration of the Ankara Agreement.

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6 Signed on 23 Nov. 1970 and entered into force on 1 Jan. 1973 (OJ C 113, 24 Dec. 1973, p. 17). The Additional Protocol forms an integral part of the Ankara Agreement (Art. 62 of the Additional Protocol).

7 See, Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 9 and Case 204/86, *Greece v. Council* [1988] ECR 5323, para. 13.

8 While 'provision of services' includes 'service recipients' in EU law, the Court held that *it does not* in the context of EU-Turkey association law. See Case C-221/11, *Leyla Ecem Demirkan v. Bundesrepublik Deutschland* [2013] ECR-I 00000.

9 Council Regulation (EC) No. 2317/95 of 25 Sep. 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ L 234, 3 Oct. 1995, p. 1).

10 Council Regulation (EC) No. 574/1999 of 12 Mar. 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ L 72, 18 Mar. 1999, p. 2).

I will try to clarify the matter in the examples of Denmark and Croatia.

Denmark acceded to the European Communities on 1 January 1973. This date is also the date of entry into force of the Additional Protocol. Since it was bound to adopt the *acquis* in force as from its date of accession, the starting date of the standstill obligation contained in Article 41(1) of the Additional Protocol for Denmark is also 1 January 1973. On the other hand, since there was no Community act subjecting Turkish nationals to a visa requirement among the *acquis* adopted by Denmark upon accession, Denmark's obligation was limited to not tightening its visa regime towards Turkish nationals falling under the category of service providers, which it determined according to its national visa policy.

Croatia acceded to the EU on 1 July 2013. Previous to its accession, Croatia did not require Turkish nationals to hold a visa for short stays in accordance with the bilateral agreement it concluded with Turkey. Nevertheless, since Croatia had to align with the Regulation No. 539/2001, which lists Turkey in its Annex I among the countries whose nationals must be in possession of a visa, it began to require visa for short stays from all Turkish nationals, including service providers, as from its accession to the EU. As a result, since the starting date for Croatia of the standstill obligation laid down in Article 41(1) of the Additional Protocol is 1 July 2013, its visa regime towards Turkey, which it may not tighten as from that date, has been already tightened at the outset, in order to comply with Regulation No. 539/2001, to the extent that no more tightening is possible.

Thus, the EU breaches its obligation flowing from the standstill clause laid down in Article 41(1) of the Additional Protocol by maintaining Regulation No. 539/2001 in force without introducing a clause which leaves discretion to the new Member States in respect of visas to be applied to Turkish service providers. Since there was no secondary legislation regulating the visa regime for short stays on 1 January 1973, which is the date of entry into force of the Additional Protocol for the Community, the Community/Union should observe the limits foreseen in Article 41(1) of the Additional Protocol while adopting secondary legislation on this matter after that date. If legislation adopted thereafter, like Regulation No. 539/2001, results in making the visa regimes of the new Member States more stringent, it cannot be said that the EU observes those limits.

The aim of the prohibition contained in Article 41(1) of the Additional Protocol, like other standstill clauses to be found in other agreements, is, as a first step towards integration to be attained at a later date, to ensure that contracting parties maintain the status quo in the field concerned, i.e. refrain from introducing new restrictions.

By contrast, the EU has adopted binding secondary legislation, which lists Turkey among the third countries whose nationals are subject to visa, without taking into account, in view of Article 41(1) of the Additional Protocol, the fact

that the present Member States had diverging visa regimes towards Turkey at the relevant dates.[11]

5 IDEAL SOLUTION FOR THE NEW MEMBER STATES

In respect of the present Member States, the Court addressed the problem of inconsistency between the EU-Turkey association law and EU secondary legislation in *Soysal*.[12] The Court held in that judgment that the visa applied to Turkish service providers is also within the scope of the prohibition on introducing new restrictions. After having admitted that German national legislation 'merely implements, at the level of the Member State concerned, an act of secondary Community legislation, namely Regulation No. 539/2001',[13] the Court went on to state that 'it is sufficient to recall that the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements'.[14]

As a result, the problem was solved not on the basis of Regulation No. 539/2001, but on the basis of Article 41(1) of the Additional Protocol and it was concluded that the latter provision 'precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals such as the appellants in the main proceedings must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required'.[15]

However, EU secondary legislation (Regulation No. 539/2001) took precedence over the relevant provision of the association law (Article 41(1) of the Additional Protocol) in respect of Croatia and the interpretation made by the Court in *Soysal* for the present Member States was not at issue. During its accession to the EU, Croatia took into consideration, under its obligation to adopt the *acquis*, Regulation No. 539/2001, but disregarded the Additional Protocol, which is no different from the said Regulation in terms of being part of the *acquis* and additionally, which takes priority over it, as established by the Court. Needless to say, it is not the initiative of the acceding country, but the guidance of the EU that leads to this choice.

Here we encounter an intriguing issue. While one of the two legal instruments, both of which are an integral part of the *acquis*, is taken into

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11 The date on which the Additional Protocol has entered into force with regard to each Member State.
12 Case C-228/06, *Mehmet Soysal and İbrahim Savatlı v. Bundesrepublik Deutschland* [2009] ECR I-1031.
13 *Ibid*. at para. 53.
14 *Ibid*. at para. 59.
15 *Ibid*. at para. 62.

consideration in respect of the present Member States so as to accord primacy over the other, it is disregarded in respect of a new Member State.

Consequently, Croatia, which did not require Turkish nationals to be in possession of visas in accordance with its national policy, has become a country which requires visas without exempting any category of Turkish persons upon accession to the EU.

No doubt, some of the present Member States had the chance in the past to tighten their visa regimes, which would be subject to the standstill clause laid down in Article 41(1) of the Additional Protocol, before the entry into force of that Protocol in respect of them. Nevertheless, in the absence of a binding measure at the Community/Union level, recourse to such a way would have meant nothing more than adoption of a position by the acceding country towards Turkey in its national visa policy with its own will. By contrast, in view of significant revenue obtained from Turkish tourists visiting Croatia, the change in Croatia's visa policy is not a voluntary one, but the result of the obligation to comply with Regulation No. 539/2001.

In fact, the ideal solution was to strike a balance, before Croatia's accession to the EU on 1 July 2013, between the two legal instruments, both of which would be binding for this country as from that date, in line with the Court's approach adopted in *Soysal*. To be more specific, the EU should have set Croatia free in its visa regime towards Turkey, at least in respect of service providers[16] by inserting the necessary clauses in Regulation No. 539/2001, instead of requiring this country to change its existing visa regime towards Turkey by means of that Regulation.

6 CONCLUSION

It runs counter to the spirit of the interpretation adopted by the Court in *Soysal* to force acceding countries to require visas from all Turkish nationals in compliance with Regulation No. 539/2001, while accepting the possibility of differing visa regimes towards Turkey in respect of the present Member States. That interpretation makes clear, as a general principle, what should be done in case of inconsistency between the international agreements to which the EU is a party and EU secondary legislation. It should also be taken into consideration with

[16] As of 1 Jul. 2013, it was not clear whether service recipients, including tourists, are within the scope of the concept of 'freedom to provide services' used in Art. 41(1) of the Additional Protocol or not. As known, *Demirkan* judgment was delivered on 24 Sep. 2013.

regard to acceding countries wishing to maintain their liberal visa regimes towards Turkey, and a measure taken by the EU in breach of its respective standstill obligation should not constitute a reason for these countries to tighten their visa regimes towards Turkey.