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TIPO DE ARTÍCULO DE INVESTIGACIÓN

Equal treatment in agreements concluded between European Union and third countries

Igualdad de trato para los acuerdos celebrados entre la Unión Europea y terceros países

Igualdade de tratamento para acordos celebrados entre a união europeia e países terceiros

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Abstract
The purpose of this work is to bring the legal status of third-country citizens closer to that of member states, as a different special regime according to the relative agreements concluded for certain categories of foreigners without disregarding the value of some elements of fact, such as residence, family ties, performance of specific economic activities or interests of international politics for respect of these obligations, with the not always uniform content that the union evidently had to entrust to member states a union of intent through "supervision" as well as the interpretation carried out by The Court of Justice of the European Union (CJEU) which has strongly reduced state's competences aiming at a European integration still in progress and especially after Brexit.

Keywords**:** circulation agreements; special regimes; brexit, The Court of Justice of the European Union (CJEU); legal status of foreigners; standstill; non-discrimination

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Resumen
El propósito de este trabajo es mostrar el estatus legal de los ciudadanos de los terceros países que están cerca de ser estados miembros, con un régimen especial diferente a los convenios concluidos frente a ciertas categorías de extranjeros sin que se hayan tenido en cuenta algunos elementos de hecho como: la residencia, los lazos familiares, el desempeño de actividades económicas específicas o los intereses de la política internacional para el cumplimiento de estas obligaciones, con el contenido no siempre uniforme que la Unión evidentemente tuvo que confiar a los Estados miembros, una unión de intenciones a través de la "supervisión" también como la interpretación llevada a cabo por la El Tribunal de Justicia de la Unión Europea (TJUE) que ha reducido en gran medida las competencias estatales con el objetivo de una integración europea aún en progreso y especialmente después del Brexit.

Palabras clave: acuerdos de circulación, regímenes especiales, brexit, TJUE, estatuto jurídico de los extranjeros, detención, no discriminación

Resumo
O objetivo deste trabalho é mostrar o status legal dos cidadãos de países terceiros que estão próximos de serem Estados membros, com um regime especial diferente dos acordos concluídos contra certas categorias de estrangeiros sem levar em conta alguns elementos de constituído por: residência, vínculos familiares, desempenho de atividades econômicas específicas ou interesses da política internacional para o cumprimento dessas obrigações, com o conteúdo nem sempre uniforme que a União evidentemente tinha que confiar aos Estados-Membros, uma união intenções através da "supervisão", bem como a interpretação realizada pelo Tribunal de Justiça da União Europeia (TJUE), que reduziu consideravelmente os poderes estatais com o objetivo de uma integração europeia ainda em andamento e especialmente depois do Brexit.

Palavras-chave: acordos de circulação, regimes especiais, Brexit, TJUE, situação legal de estrangeiros, detenção, não discriminação

Introduction

Special arrangements for entry, stay and circulation in EU of third country nationals, workers, are provided for in agreements concluded by the Union. Among these, the agreement signed with countries of European economic area (EEA, January 1994, OJ, L 1 of 3 p. 3-522), the one on free movement of persons concluded with Switzerland[2], Euro-Mediterranean association agreements, in

[2]Agreement between the European community and its member states, on the one hand, and the Swiss confederation, on the other, on the free movement of persons, OJ, L 114 of 30 April 2002, 6-72.

particular the agreements concluded with Algeria, Tunisia and Morocco[3] and the agreement concluded with Turkey[4].

These agreements governed by art. 217 TFEU (Hatje at. al., 2019) create an association characterized by reciprocal rights and obligations of the parties as well as common actions and special procedures. With regard to matters that can be the subject of such agreements, the Court of Justice of the European Union (CJEU) has been able to specify how the disposition to undertake commitments towards third states in all the sectors governed by the Treaty (Conant, 2018)[5], which involves CJEU competence to interpret all the provisions contained therein. In practice, the association agreements were stipulated by the then community, also in matters falling within member states competence. What distinguishes these agreements from other international agreements concluded by the community (now Union) like commercial agreements is the greater intensity of collaboration established which normally also involves the creation of common institutions[6].

Their binding value derives from being an integral part of EU legal system with prevalence over secondary law which implies, as established by CJEU, the obligation to interpret the latter as far as possible in accordance with the terms of association (Schütze et al. 2018; Mendez, 2013, pp. 152ss; Akçay et al., 2013)[7]. Another peculiarity is linked to the direct effects of such agreements, therefore the possibility that their provisions give individuals rights that can be asserted in court. This direct effect exists where the provisions of the agreement imply a clear and precise obligation for the contracting parties, based on their literal meaning for the purpose and content of the agreement and provided that the effects of the latter are not subordinated to the adoption of further proceedings (Thies, 2013. Baranard, 2016)[8].

[3]Euro-Mediterranean agreement establishing an association between the European community and its member states and the democratic and popular Algerian Republic of 22 April 2002, OJ, L 265 of 10 October 2005, 2-228. Euro-Mediterranean agreement establishing an association between the European community and its member states and the Tunisian Republic of 17 July 1995, in OJ, L 97 of 30 March 1998, 2-174. Euro-Mediterranean agreement establishing an association between the European communities and their member states and the Kingdom of Morocco of 26 February 19996, OJ, L of 18 March 2000, 2-190.

[4]Agreement establishing an association between the European economic community and Turkey of 12 September 1963, OJ 217 of 29 December 1964, 3687-3697.

[5]CJEU, C-12/86, Meryem Demirel v. Comune di Schwäbisch Gmünd of 30 September 1987, ECLI:EU:C:1987:400, I-03719.

[6]The association agreements create each constituted by representatives of the patios that have the task of ensuring their implementation among them an association council, to which the function of address is entrusted, but which can sometimes adopt decisions aimed at the execution of the agreement, a parliamentary committee composed of European and national parliamentarians of the third state, with the task of monitoring the work of the council and sometimes a jurisdictional body.

[7]CJEU, C-228/06, Mehmet Soysal Savatli v. Germany of 19 February 2009, ECLI:EU:C:2009:101, I-01031.

[8]CJEU, C-63/99, The Queen v. Secretary of State for the Home Departmnet, ex parte Wieslaw Gloszcuk and Elzbiela Gloszczuk of 27 September 2001, ECLI:EU:C:2001:488, I-06369.

The association agreements constitute a broad category of agreements which tend to establish particular relations between the Union and third countries and which in the field of free movement of persons, in particular with regard to the treatment of workers in state parties[9], have given in some cases birth to particularly advantageous statuses. Among the agreements with third states that provide privileged treatment for the benefit of citizens of the contracting parties will inevitably be the withdrawal agreement between Union and United Kingdom, as well as the possible agreement on future relations.

Agreement of European Economic Area (EEA) with switzerland on the free movement of people

The agreement on the European economic area concluded in Oporto on 2 May 1992 in force between EU and Lichtenstein, Iceland, and Norway (Lock, 2015)[10], aims to promote the strengthening of economic and commercial relations between the parties. It contains provisions relating to the free movement of goods, services, capital, and persons. In particular with reference to the free movement of workers, the agreement implies the abolition of any discrimination based on nationality, between the workers of member states of the then community and those of the states of the European Free Trade Association in matters of employment, remuneration and high working conditions, as well as the right to respond to actual job offers, to move freely, for this purpose, in the territory of states parties, or to take up residence there in order to carry out a work activity in accordance with the legislative provisions of the state governing the employment of national workers and of remaining in the territory of a state party after having occupied a position there.

The agreement recognizes in the field of social security to employed and self-employed the accumulation of all the periods taken into consideration by the various national legislations, both for the arising and preservation of the right to benefits, and for the calculation of these, as well as the payment of benefits to persons residing in the territories of the contracting parties.

In order to facilitate access to subordinate or self-employed activities and their exercise, the agreement provides that the contracting parties take the necessary measures regarding the mutual recognition of diplomas, certificates and other educational qualifications, as well as of coordination of legislative, regulatory and administrative provisions regarding access to professional activities and their exercise by employed or self-employed workers.

[9]CJEU, C-123/17, Yön of 19 April 2018, ECLI:EU:C:2018:632, published in the electronic reports of the cases.

[10]It was signed between the 12 member states and 6 states of the European free trade association (EFTA) then composed of Austria, Finland, Iceland, Liechtenstein, Sweden, Norway, and Switzerland which came into force in 1994 due to refusal by Switzerland. In 1995 Austria, Finland and Sweden enjoyed the EU

Following the adoption of Directive 2004/38/EC on the right of union citizens and their family members to move and reside freely within the territory of member states, the joint EEA committee, with the Decision 158/2007 amended the Directive agreement to apply to sectors covered by the same, as well as to enjoy the derived rights to family members of citizens of a third state.
Despite the agreement contains rules contained in the then TEC especially with reference to the free movement of workers, art. 6 states: "(...) subject to future legislative developments, the provisions of this agreement to the extent that they are identical in substance to the corresponding provisions of the treaty (...) in accordance with the relevant judgments pronounced by CJEU prior to the date of signature of the this agreement (…)" (Lock, 2015).

The opinion of CJEU of 14 December 1991 on the draft agreement between the community and countries of the European free trade association concerning the creation of the European economic space, which is précised that: "(...) both must necessarily be interpreted at the same time. An international treaty must be interpreted not only on the terms it is drafted, but also in light of its aims (…)" (Lock, 2015)[11].

CJEU underlined how the agreement has as its object the application of a free trade and competition regime in economic and commercial relations between contracting parties while ECC treaty aimed to achieve an economic integration aimed at the establishment of an internal market and an economic and monetary union. Also the context in which the agreement is inserted differs from that in which the community objectives are pursued, the European economic area having to be realized on the basis of an international treaty that creates rights and obligations between contracting parties, which do not provides for any transfer of sovereign powers to the intergovernmental bodies established by it.

It follows that the fact that the provisions of the agreement are drafted along the lines of those of TEC (now TFEU) does not necessarily result in an extension of the meaning of the Community rules.

Similar considerations can be made with reference to the agreement on free movement of persons concluded with Switzerland in 1999. Following the negative outcome of the referendum on EEA agreement, the Swiss federal council undertook new negotiations with the then community that led to the conclusion of a series of agreements, including the one on free circulation[12].

[11]CJEU, Opinion 1/9 of 14 December 1991, ECLI:EU:C:1991:490, I-01137.
[12]The other sectors in which bilateral accords were signed are air and land transport, agriculture, technical barriers to trade, supplies to the administration and scientific research.

The agreement, unlike the one concluded with countries of the European economic area, does not make the reference to European legislation but reconstructs its content by sanctioning art. 2 the general principle of non-discrimination based on nationality and providing that European and Swiss citizens enjoy reciprocal entry and residence rights, regardless of the performance of work, access to an economic activity, establishment as a worker autonomous and the right to stay at the end of their activity. Furthermore, the agreement establishes that the host country guarantees foreign citizens the same conditions of life and employment as national citizens.

Other rights then complete the picture of free movement of persons, in particular the right to personal and geographical mobility that allows citizens of the contracting parties to move freely around the territory of the host state and to exercise the chosen profession, the right of family members, whatever both their nationality, residence and exercise of an economic activity; the right to purchase real estate, in particular to establish a residence in the territory of the host state, at the end of an economic activity or a stay.

With reference to the service providers including the companies, the agreement recognizes them the possibility of making a long-term benefit on the territory of the other contracting party, under the same conditions as the citizens of that state.

In article 16 of the agreement, the parties also undertake to take all the necessary steps to ensure that in their reports equivalent rights and obligations are applied to those contained in legal acts of the European community to which reference is made. Furthermore, it is specified that insofar as the application of the agreement involves notions of EU law, the pertinent CJEU jurisprudence prior to the date of its signature must be taken into account, while the subsequent jurisprudence is periodically communicated to Switzerland. In light of the position of CJEU with reference to the EEA agreement that instead referred to Union rules, the fact that the agreement in question reformulates the European regulation leads to believe that in making operational the provision contained in art. 16, it is necessary to proceed with caution in the sense that even the provisions of the agreement identical to those of the treaty may be interpreted differently by the latter since they relate to a circulation system not identical to that of the Union.

The agreements in question risked being questioned following the positive outcome of the popular referendum held in Switzerland on 9 February 2014, which proposed the introduction of quantitative limits on immigration. EC in the aftermath of the popular consultation with a press release considering that the initiative co-ordinated with the principle of free movement of people between Union and Switzerland stated that: "(...) EU will examine the implications of this popular initiative for EU-Switzerland relations as a whole (...)". The other High Representative of EU for

Common Foreign and Security Policy following consultation with member states rejected in July of 2014 Switzerland's request to renegotiate the free trade agreement to introduce a quota system based on national preference. Informal consultations were initiated in February of 2015, between EC and Swiss authorities aimed at reaching a possible agreement. The National Council and Council of States adopted on 16 December 2016 the implementing law which did not impose restrictions on free movement concluded with EU. Ongoing are new initiatives that are likely to call into question the free regulated circulation of the agreement especially after the conclusion of 16 July 2019 of the collection of signatures proposed by the Swiss Conservative party aimed at repealing the agreement with EU on free movement of people. It is proposed to amend the federal constitution of art. 121B of the title: Immigration without free movement of persons.

Clauses of non-discrimination contained in some Euro-Mediterranean association agreements.

Following the guidelines defined by the European Council of Essen of 1994 and EC[13], the Euro-Mediterranean inter-governative Conference of Barcelona of 27-28 November 1995 gave birth to a new context of relations between EU and Mediterranean countries, establishing the so-called Euro-Mediterranean partnership which includes political, social and cultural sectors together with the economic one.

The final declaration of conference divides three main areas of cooperation: political and security partnership that aims to establish a common area of peace and stability; economic and financial partnership, whose objective is to create a free trade area; social, cultural and human partnership which aims to develop human resources to promote understanding between different cultures and exchanges between civil societies.

The multilateral framework is completed with the bilateral dimension of the Euro-Mediterranean partnership achieved through the conclusion of the Euro-Mediterranean association agreements that have replaced the cooperation agreements concluded since the 1970s.

Beyond the bilateral character and specific peculiarities of each partner state, the association agreements respect a similar scheme, referring to the three pillars of

[13]Communication of EC at the council and in European parliament of 8 March 1995, Strengthening of the European Union's Mediterranean policy: proposals for the realization of the Euro-Mediterranean partnership COM (95) 72 final Communication of EC in council and in European Parliament of 19 October 1994, A more incisive Mediterranean policy for the European Union. Establishment of a new Euro-Mediterranean partnership, COM (94) 427 final.

partnership[14]. They set themselves the objective of promoting a regular dialogue on political and security matters, the progressive liberalization of trade in goods, services, and capital[15], an in-depth dialogue in social, cultural and human sectors.

In particular, with reference to the social sector, the agreements generally provide for the establishment of a continuous dialogue on all social issues of mutual interest, through which, among other things, individuals can make further progress with regard to the movement of workers, equal treatment and social integration of citizens of states that legally reside in host states.

The same agreements also contain an equal treatment clause in social security matters which provides for a regime characterized by the absence of any discrimination based on citizenship with respect to citizens of contracting parties, residing or legally employed in the respective host countries to citizens of member states in which they are employed. The clause goes as far as to specify the expression social security, including social security sectors which concern sickness, maternity, disability, old-age, and survivors' benefits related to occupational accidents and diseases, death, unemployment and family benefits.

CJEU also intervened on the notion of social security contained in the Euro-Mediterranean association agreements, stating that it must be interpreted considering the same notion contained in Regulation n. 1308/71 (now EC Regulation no. 883/2004)[16].

It is necessary to underline how CJEU recalling its constant jurisprudence according to which an agreement concluded by the then community with third states must be considered endowed with direct effect when having regard to its content as well as to the object and nature of the agreement establishes a clear and precise obligation which is not subordinate with regard to its implementation or effects, to the intervention of any further-specific act with reference to the non-discrimination provisions of workers contained in the Euro-Mediterranean agreement concluded with Tunisia has recognized the direct applicability of said rules (Wiesbroxk, 2010)[17].

The result is advantageous treatment, reserved for workers Tunisian, Algerian and Moroccan citizens, legally resident in a member state that effectively places them, in many respects in privileged conditions compared to the category of foreigners.

[14]CJEU, C-629/16, CX of 24 August 2018, ECLI:EU:C:2018. published in the electronic reports of the cases.
[15]CJEU, C-24/12, X BV of 5 June 2014, ECLI:EU:C:2014:1385, published in the electronic reports of the cases.
[16]CJEU, C-113/97, Henia Babahenini v. Belgium of 15 January 1998, ECLI:EU:C:1998:13, I-00183
[17]CJEU, C-97/05, Mohamed Gattoussi v. StadtRüsselsheim of 14 December 2006, ECLI:EU:C:2006:780, I-11917.

The legal status of Turkish citizens in European Union

The Ankara agreement differs from other in that it is strongly linked to the role of turkey on the international scene in the era of cold war. Its main objective is: "(...) the continuous and balanced strengthening of trade and economic relations between the parties, taking full account of the need to ensure a more rapid development of the Turkish economy and the improvement of employment and standard of living of the Turkish people (art. 2) (...)"(Wiesbroxk, 2010).

To achieve this, the agreement provides for the progressive establishment of a custom union, to be implemented in three phases. The transitional phase, lasting 5 years, was intended to strengthen Turkish economy, with the help of the then community so that the turkey could assume obligations incumbent on the transitional phase lasting 12 months, during the which the contracting parties were called upon to ensure the progressive implementation of a customs union as well as the approximation of turkey economic policies to those of Europe to ensure the proper functioning of association and development of common actions necessary for this purpose. Finally, the definitive phase based on customs union implies strengthening the coordination of economic policies of the contracting parties.

Art. 9 of the agreement contains a non-discrimination clause based on nationality in the field of application of the agreement itself while articles 12, 13 and 14 recognize in the relevant provisions of TFEU, the source of inspiration to gradually realize between contracting parties the free movement of workers, as well as the elimination in their relations of restrictions on freedom of establishment and freedom to provide services.

An additional protocol was signed in 1970 in order to establish the terms and conditions of the transitional phase, which is an integral part of the agreement. It is divided into four titles. The first one concerns the free circulation of goods, the second the circulation of persons and services, the third the approximation of economic policies, and the fourth, the general and final provisions.

Regarding the issues that are relevant here, art. 37 of the Protocol, accords to workers of Turkish nationality employed in a member state a regime characterized by the absence of discrimination based on nationality as regards working conditions and remuneration. The Protocol also contains in art. 41, par. 1 a standstill clause, according to which the contracting parties refrain from introducing among themselves new restrictions on the freedom of establishment and the freedom to provide services.

The Protocol confers on the association council the task of defining the modalities for the gradual realization of free movement of workers between member states of

the then community and turkey (art. 36) on the other to establish the rhythm and methods of suppression of the restrictions on freedom of establishment and freedom to provide services (article 41, paragraph 2).

If the latter issue was not taken into consideration by the association council but at the time only dealt with by CJEU with regard to the free movement of workers, the association council adopted on 19 September 1980 the Decision n. 1/80 which contains, among other things, the provisions relating to the use and free movement of workers, and the Decision no. 3/80 concerning the application of social security schemes of member states to Turkish workers and their families.

According to Decision n. 1/80 the Turkish worker, entered in the regular labor market of a member state, is entitled after one year of regular employment to renew the work permit with the same employer if he has a job. He has the right after 3 years of regular employment and without prejudice to the priority accorded to workers who are nationals of member states to respond to another job offer, registered at the employment offices of the member state in the same profession with an employer of his liking. After 4 years of regular employment he enjoys free access in the member state in which he is employed to any paid employment of his choice (art. 6, par. 1).

Family members of the Turkish worker regularly employed in a member state admitted to reunion have the right to respond to any job offer after at least 3 years of regular residence except for community preference. After 5 years of regular residence they enjoy free access to any paid employment as well as the children of the Turkish worker who have obtained a professional training in the host country, regardless of the duration of the legal residence, provided that one of the parents has exercised in that state a working activity for at least 3 years (art. 7).
With reference to family members, art. 9 states that children of Turkish citizens legally residing in a member state with their parents, who are or have been regularly employed, have access to education, learning and training courses of the member state based on the same admission requirements as required to the children of citizens of that state; finally, they can enjoy the benefits provided for in national legislation.

Art. 10 provides for a regime characterized by the absence of any discrimination based on citizenship with respect to citizens of member states in which they are employed for Turkish workers in the field of remuneration and other working conditions.

The decision contains some safeguard clauses which for example provide for the possibility for states to adopt temporary restrictive measures after notifying the Association Council in the event of serious threats to their labor market or the

possibility of limitations to the provisions of the decision justified by reasons of public order, security and health.

Art. 13 of the decision in question which on a par of art. 41, par. 1 of the additional protocol contains a standstill clause which prohibits states from introducing new restrictions to access work conditions for workers and family members who are in their territory in a regular situation as regards residence and employment. Decision n. 3/80 it aims to achieve coordination of member states social security systems in order to allow occupied Turkish workers or those who have been employed in one or more EU member states, as well as family members of such workers and their survivors, enjoyment of social security benefits. According to art. 2 of the decision in question the ratione personae application concerns workers who are Turkish citizenship subjected or who have been in the past to the legislation of one or more member states their family members and their survivors residing in a member state (Dumas, 2013, pp. 592ss). The next article states that the expression of residing in the territory of one of member states and to which the provisions of the decision are applicable, are subject to obligations and are admitted to benefit the legislation of each member state under the same conditions as the citizens of that state. Art. 4 provides for the application of the principle of non-discrimination to all sectors of social security recognized as such by Regulation n. 1408/71 (now Regulation n. 883/2004) that is to say the classic sectors such as illness, maternity, unemployment, family, pension, and death benefits.

The agreement, protocol, as well as the decisions adopted by the council of association constitute the regulatory framework to refer to in the analysis of the statute granted to Turkish citizens in member countries, a regulatory framework which is also greatly enriched by the relevant CJEU jurisprudence.

What is good from the outset underline is that neither the agreement nor the protocol nor the decisions of the insurance council give Turkish citizens the right of entry into the EU territory remaining the first access to a subordinate job such as the authorization to carry out an autonomous activity within the competence of the host state.

CJEU has recognized the direct effectiveness of some provisions of the protocol agreement and Decision n. 1/80, however, specified that art. 6, par. 1 of the Decision n. 1/80 limits itself to regulating the position of Turkish workers already regularly included in member states labor market[18].

It is true that over the years state competence has been increasingly limited both with reference to the standstill clauses contained in the protocol, in Association

[18]CJEU, C-247/91, Kzim Kus v. Landeshauptschadt Wiesbaden of 16 December 1992, ECLI:EU:C:1992:527, not published.

Council decisions and through an extensive interpretation of the various provisions contained therein.

CJEU has recognized the direct effectiveness of art. 41, par. 1 of Protocol[19] and art. 13 of the Decision n. 1/80[20]. In both cases CJEU recalled its constant jurisprudence and considered that both the provisions in question establish in clear, precise and unconditional terms, two standstill clauses, which prohibit the contracting parties from introducing new restrictions on the freedom of establishment starting from the date of entry into force of the additional protocol. The first introduction of new restrictions on the access to work of workers ruined in a regular position about residence and employment in the territory of the contracting states. The second in CJEU opinion so formal prohibitions not accompanied by any condition or subordinate, in their execution or in their effects, to the emanation of any other provision are complete and consequently apt to produce direct effects, with reference to the same provisions. In the Abatay sentence of 2003 (Zipperle, 2017; Thym, Margarite Zoetewej-Turhan, 2015)[21], CJEU emphasized that both pursue the same purpose, namely the creation of favorable conditions for the progressive implementation of the free movement of workers, the right of establishment and freedom to provide services by prohibiting national authorities from introducing new obstacles to these freedoms in order not to make their gradual implementation between member states and the republic of Turkey more burdensome.In the present case CJEU rejected the restrictive interpretation of art. 13 of Decision 1/80, according to which this article would not affect the right of member states to adopt even after 1st December 1980 new restrictions on access to employment for Turkish citizens, but would only imply the inapplicability of restrictions to citizens who already they exercise a regular working activity and enjoy for this purpose a right of residence in the host member state when the restrictions are introduced. According to CJEU this interpretation would be contracted with the system established by Decision n. 1/80 and would deprive art. 13 of the decision of its practical effectiveness.

CJEU has observed how art. 6, par. 1 of the Decision n. 1/80 recognizes to Turkish migrant workers labor rights. These rights, which gradually extended 1 year according to the regular subordinate employment activity and are aimed at progressively consolidating the situation of the interested party in the host member state. The rights are conferred directly by the community legislation and the national authorities cannot subordinate their application under conditions or limiting their application unless the decision is deprived of all effect. It follows,

[19]CJEU, C-37/98, The Queen v. Secretary for the Home Department ex parte Abdulnair Savas of 11 May 2000, ECLI:EU:C:2000:224, I-02927

[20]CJEU, C-192/89, S.. Sevince v. Staatsecretaris van Jiustitie of 20 September 1990, ECLI:EU:C:1990:322, I-03461.

[21]CJEU, joined cases C-317/01 to C-369/01, Eran Abatay and others and Nadi Sahin v. Bundesanstalt für Arbeit of 21 October 2003, ECLI:EU:C:2003:572, I-12301.

according to CJEU, that art. 13 of the Decision n. 1/80 cannot have as object the protection of rights of Turkish citizens in the matter of exercising a working activity, since these rights are already fully governed by art. 6 of the final decision. On the other hand, as emerges, the text from art. 13 prohibits national authorities from making the conditions of access to employment of Turkish citizens more burdensome with the introduction of new restrictions. The rationale of the provision lies in the fact that member states have retained the power to authorize Turkish citizens' access to their territory and to carry out a first working activity. A restrictive interpretation or art. 13 of Decision 1/80 would appear paradoxical to the judges since a Turkish citizen who already works regularly in a member state no longer needs protection through a standstill clause concerning access to work, given that access has already occurred and the interested party enjoys for the rest of his career in the host member state rights expressly acted upon by art. 6 of the Decision itself. For the standstill clause concerning the conditions of access to work is aimed at ensuring that national authorities refrain from issuing such provisions as to jeopardize the achievement of the aims of Decision no. 1/80 consisting in the implementation of free movement of workers, although in a first phase of the process of progressively achieving freedom, the pre-existing national restrictive measures regarding access to work can be maintained. As it emerges moreover from its literal tenor, art. 13 does not apply only to Turkish workers but also to their families. As for the latter, Decision no. 1/80 does not make the exercise of a work activity access to the territory of a member state by way of family reunification with a Turkish worker already legitimately present in that state. According to the judges, it cannot be sustained that art. 13 of Decision n. 1/80 can only be applied to Turkish citizens already integrated into the labor market of a member state. As for the literal wording of the provision in question, from the fact that it concerns workers and their family members who are on their respective territories in a regular situation with regard to residence and occupation, it follows that a Turkish citizen can benefit from the clause standstill only if it has complied with the legislation of the host member state regarding entry, stay and possibly work and if therefore it is legitimately located in the territory of that state.

In subsequent judgments[22], CJEU went further and argued that art. 41, par. 1 of additional protocol must be interpreted as meaning that starting from the entry into force of this protocol against the member state concerned it prohibits the introduction of all new restrictions on the exercise of freedom of establishment including those concerning substantive conditions and/or procedural matters concerning the first admission to the territory of this state of Turkish citizens wishing to pursue a professional activity there as independent workers.

CJEU while reiterating that the provision in question does not have the effect of

[22]CJEU, C-16/05, The Queen ex parte Veli Tum and Mehmet Dari v. Secretary of State for the Home Department of 20 September 2007, ECLI:EU:C:2007:530, I-07415.

granting Turkish citizens a right of entry into the territory of a member state, while remaining this right governed by national legislation, however it acknowledged art. 41, par. 1 of the protocol the nature of a procedural rule, which ratione temporis establishes what are the provisions of the legislation of a member state that intends to make use of the freedom of establishment in a member state.

The standstill clause does not call into question member states competence to determine their national immigration policy but imposes an obligation of abstention on them without compromising the very substance of states competence concerned in the context of immigration policy.

The same position was then taken by Luxembourg judges also with reference to art. 13 of the Decision n. 1/80 considering a national regulation that provides for the payment of rights for the examination of the application for a residence permit or in the case of an application for renewal a restriction prohibited by art. 13 of the Decision n. 1/80 as for the purpose of examining a request for the issuance of a residence permit or an extension of a validity it requires the payment by Turkish citizens to apply art. 13, of rights for an amount disproportionate to that required in circumstances similar to EU citizens (Morano-Foadi et al. 2012.)[23].

CJEU jurisprudence did not stop then at the standstill clauses having recognized the Luxembourg courts also the direct effectiveness of articles 5 and 7 of Decision no. 1/80 as well as the principle of non-discrimination pursuant to art. 10 of the Decision n. 1/80 and art. 37 of the Protocol, since Turkish citizens are guaranteed the same treatment as citizens of the host member state.

CJEU then intervened in the field of social security[24] recognizing the parity clause contained in art. 3, par. 1 of the Decision n. 3/80, direct effectiveness and interpreting the notion of worker contained in it with reference to art. 1, letter a) of Regulation n. 1408/71 (now Regulation 883/2004) and therefore to be understood as the insured person, even if for a single risk pursuant to a compulsory or optional insurance with a general or special pension scheme and regardless of the current existence of an employment relationship.

CJEU acknowledged that the concept of equal treatment referred to in Decision no. 3/80 prohibits not only direct discrimination based on nationality but also indirect or disguised discrimination which by the application of other distinctive criteria is effectively resolved in the same result (Eisele, 2014)[25].

[23]CJEU, C-242/06, Minister voor Vreemdelingenzaken en Integratie v. T. Sahin of 17 September 2009, ECLI:EU:C:2009:554, I-08465.

[24]CJEU, C-262/96, Sema Sürül v. Bundesanstalt für Arbeit of 4 May 1999, ECLI:EU:C:1999.228, I-02685.

[25]CJEU, C-373/02, Sakir Öztürk v. Pensionsversicherunganstalt der Arbeiter of 28 April 2004, ECLI:EU:C:2004:232, I-03605.

The interpretative work of Luxembourg judges has greatly reduced the state competences with reference to the juridical status of the Turkish citizens it would seem to lead to an ever-greater thinning of the differences between these and European citizens. It is undeniable that the recognition of certain rights is closely linked to a specific objective as repeatedly emphasized by CJEU itself, namely the economic growth of Turkey, moreover, in view of its accession to EU. As a demonstration of the merely functional character of this status, CJEU in Demirkan case of 2013[26] seems to have deviated from the approach used until then following an interpretative method defined regressive.

Before analyzing the sentence, however, it is necessary to take a step back to Soysal and Savatli case of 2009 (Göçmen, 2010, pp. 150ss. Tezcan-idriz, 2009, pp. 1622ss)[27], which CJEU considered contrary to the standstill clause pursuant to art. 41, par. 1 of the additional protocol the German legislation with which following the entry into force of the protocol the visa requirement was introduced for the entry of third-country nationals, including Turkey. In the specific case, the question concerned two Turkish hauliers who wanted to obtain a visa to provide services in the form of international road haulage.

The Demirkan case of 2009 (Hatzopoulos, 2014, pp. 648ss) is inspired by Soysal and Savatli case but has had a different outcome. This last sentence in fact pertains to the story of a Turkish citizen, Leyla Demirkan who asked to enter Germany as a tourist without having to obtain a visa (which was also requested and denied) in light of art. 41, par. 1 of supplementary protocol pertaining to the provision of services and according to the appellant to be understood also with reference to the recipients of the services and not only to providers.

This position was inspired by CJEU jurisprudence according to which the right to free services conferred by art. 56 TFEU (Mangas-Martìn, 2018) to citizens of member states and EU citizens includes the freedom to provide "passive" services, i.e. the freedom for recipients of services to travel to another member state for using a service[28].

It is necessary to dwell on the reasoning of CJEU with regard to the first question submitted to it, namely whether in the concept of freedom to provide services pursuant to art. 14, par. 1 of the protocol also includes the freedom to provide

[26]CJEU, C-221/11, Lyela Ecem Demirkan v. Budesrepublik Deutschland of 24 September 2014, ECLI:EU:C:2014:583, published in the electronic reports of the cases.

[27]CJEU, C-228/06, Mehmet Soysal and Ibrahim Savalti v. Republic of Germany of 19 February 2009, ECLI:EU:C:2009:101. I-01031.

[28]CJEU, joined cases C-286/82 and C-26/83, Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro of 31 January 1984, ECLI:EU:C:1984:35, I-00377.

passive services. CJEU has found that according to settled jurisprudence the principles admitted under the articles of the treaty relating to freedom to provide services must be transposed, as far as possible to Turkish citizens in order to eliminate restrictions on the freedom to provide services between contracting parties. The interpretation given to the provisions and EU law relating to the internal market including those of the treaty may not be applied automatically to an agreement concluded in EU with a third state, unless the agreement itself contains express provisions to that effect. In this case, the parties to the association agreement agree to be inspired by the provisions of the then TEU to eliminate the restrictions on the freedom of establishment among them (article 13). The use of the verb "to inspire" does not oblige the contracting parties to apply as such the provisions of the treaty on the matter of free provision as such, but only to consider these provisions as a source of inspiration for the measures to be taken in order to achieve the objectives set by the aforementioned agreement. Now CJEU has recalled as previously stated that the extension of the interpretation of a treaty provision to a provision drafted in comparable or similar identical terms contained in an agreement concluded by the Union with a third state depends in particular on the purpose pursued by each of these provisions in its specific area.

As regards CEE-Turkey association, it should be noted that there are differences between the association agreement and its additional protocol and the treaty due to the particular connection between the freedom to provide services and the free movement of persons within EU. In particular, the objective of art. 41, par. 1 of the additional protocol as well as the context in which this provision is inscribed differ fundamentally from those of art. 56 TFEU in particular as regards the applicability of these provisions to the recipients of services. First, as far as the objectives are concerned, the association agreement and its additional protocol essentially aim to favor the economic development of Tureky. A general principle of free movement of persons between Turkey and Union is by no means envisaged by this agreement and by its additional protocol and not even by Decision n. 1/80 of the association council. On the contrary, in the context of EU law, the protection of the freedom to provide passive services is based on the objective consisting of the realization of an internal market, conceived as a space with no internal borders, eliminating all the obstacles that stand in the way of realization of such a market. Precisely this objective differentiates the treaty of association agreement which pursues an essentially economic purpose.

Moreover, on this point CJEU then returned to a case concerning once again a request for a preliminary ruling concerning the interpretation of art. 41, par. 1 of Protocol[29]. In speciem, CJEU recalled its constant jurisprudence concerning the standstill clause contained in the protocol, referring to Demirkan sentence and

[29]CJEU, C-138/13, Naime Dogan v. Bundesrepublik Deutschland of 10 July 2014, ECLI:EU:C:2014:2066, published in the electronic Reports of the cases.

reiterated that this clause can concern the conditions of entry and stay of Turkish citizens in the territory of member states alone as constitutes the corollary of the exercise of an economic activity. CJEU, considering family reunification as an indispensable tool to allow Turkish workers' family life in member states to live the family, considered the German legislation on family reunification that subordinates the release of visa for the spouse who intends to reach the Turkish citizen residing in the ability to express himself in German at least in an elementary way.

Returning to the Demirkan sentence which gave a different outcome, CJEU's second argument is based on the fact that the interpretation of the concept of freedom to provide services under the provisions of the association agreement and its additional protocol as well as to the pursuant to provisions of the treaty depends on the time frame in which these provisions are inserted. The freedom to provide services has been conceived as the freedom to provide services. Only with the Luisi and Carbone sentence of 1984, CJEU indicated that the freedom to provide services within the meaning of the treaty included the freedom to provide passive services. Therefore, there is nothing to indicate that the contracting parties to the association agreement and the additional protocol had at the time of their signature signed the freedom to provide services, also including the freedom to provide passive services. CJEU concluded by stating that the concept of freedom to provide services pursuant to art. 41, par. 1 of the additional protocol must be interpreted as meaning that it does not include the freedom for Turkish citizens, recipients of services, to go to a member state in order to benefit from a provision of services.

The sentence in question has inevitably caused great disappointment on the Turkish side considering that the motivation of CJEU seems artificially oriented to the achievement of the decision. The realities opening up to Turkish citizens the concept of free provision of services as also including passive service would have entailed a significant opening of Union's borders to Turkish citizens, all potential consumers, in other words an affirmation of their free circulation. It would therefore seem that CJEU wanted to anticipate and avoid any dangerous drift that a real opening could have involved not necessarily with reference to the Turkish population but in relation to any potential analogical extension towards anyone of such an interpretation.

Following the Demirkan case, CJEU returned to the standstill clauses contained in the protocol and in the decisions of the Association Council.

The first sentence (Tezcan-Idriz, 2017, pp. 264ss)[30] from a preliminary ruling made by the Court of appeal of the East Danish region, CJEU was asked to assess the

[30]CJEU, C-561/14, Caner Genc v. Integrationsministeriet of 12 April 2016, ECLI:EU:C:2016:247, published in the electronic Reports of the cases.

compatibility with art. 13 of the Decision n. 1/80 and art. 41, par. 1 of the additional protocol to the association agreement of the Danish legislation applicable to the family reunification of economically active third-country nationals by economically inactive family members. The Danish law on foreigners as amended in 2004 provides that the release of the residence permit for family reunification is possible only if the family member to be admitted has or can have a sufficient bond with Denmark to allow a successful integration. Moreover, according to Danish law, this condition would only apply if the application was presented two years after the Danish resident family member obtained a permanent residence permit. The doubts of the Danish appeals court looked precisely at whether the changes introduced by the Danish legislation of 2004 could constitute new restrictions incompatible with the standstill clauses envisaged by Decision no. 1/80 and from the additional protocol, considering that precisely on the basis of this new legislation, the Danish office for immigration and then the same Ministry of Integration had rejected Mr. Genc's residence request, justifying the decision with the fact that the applicant did not or could not have a link with Denmark sufficient to allow him a successful integration into that member state.

CJEU highlighted how the standstill clause contained in art. 13 of the Decision n. 1/80 does not refer to Mr Genc, the appellant in the main proceedings but to his father, the only person who, as a regular worker in the Danish labor market and holder of a permanent residence permit in that member state, falls within the scope of the prohibition on introducing new restrictions on the conditions of access to employment for workers and their family members who are regularly staying and employed in the territory of a member state. In assessing whether the Danish legislation in question constituted a new accident restriction on the exercise by the Turkish workers of an economic activity in the territory of the member state concerned, CJEU, recalling its previous case law of the Dogan case of 2014[31] declared the clause of standstill concerning the free movement of workers pursuant to art. 13 of the Decision n. 1/80 and that concerning the exercise of freedom of establishment pursuant to art. 41, par. 1 of the additional protocol to the association agreement as having the same purpose and concluded that the Danish legislation makes family reunification more difficult by tightening the conditions of the first admission, on the territory of the member state concerned of the children of Turkish citizens residing in that member state as workers compared to those applicable at the time of entry into force of Decision no. 1/80 and which is likely to compromise the exercise of an economic activity by citizens in the territory of the host state constituting a "new restriction" pursuant to art. 13 of this decision to the exercise by Turkish citizens of free movement and workers in that member state.

CJEU also stated once again recalling its previous jurisprudence[32] that a new

[31]CJEU, C-138/13, Dogan of 10 July 2014, op. cit.

[32]CJEU, C-225/12, C. Demir v. Staatssecretaris van Justitie of 7 November 2013, ECLI:EU:C:2013:725, published in

restriction likely to compromise the exercise of a fundamental freedom by Turkish citizens is prohibited unless it falls within the limitations of art. 14 of the Decision n. 1/80 attributable to the traditional reasons of public order, security and health or is justified by an imperative reason of general interest, and is suitable to guarantee the achievement of the legitimate objective pursued and does not go beyond what is necessary to obtain it.

Identified in the objective of successful integration pursued by Danish legislation an imperative requirement that is certainly among those worthy of protection, CJEU observes as the fact that the Danish rule imposes the limit on entry only in cases where the request for family reunification is presented after two years of obtaining a residence permit from the applicant, it does not appear to be consistent with the objective of successful integration and decides in the sense of violating the standstill clause which is however motivated not so much on the content of the measure as on the formal conditions for its application.

As if the Danish legislation had imposed proof of an indiscriminate successful integration to any family intending to apply for reunification regardless of the time it was presented, it could reasonably be concluded that the EU judge would have had no problem declaring it compatible with EU law.

CJEU returned in March of 2017[33] to the standstill clauses confirming how the correct management of migratory flows is to be considered an imperative reason of general interest, however in this case while generally recognizing the proportionality to the objective pursued, CJEU judged the application of national legislation to the concrete case is disproportionate. The national court of reference has asked CJEU by preliminary ruling if art. 3 of the Decision n. 1/80 should be interpreted in the sense that the objective of achieving effective management and migration flows is an imperative reason of general interest such as to justify a new national measure such as the aforementioned obligation for children under 16 to possess a permit of and if so, whether this can be said to be proportionate to the objective pursued. Noting that the internal measure in question is a new restriction and that in principle it is in contrast with the right of the union that acts as a parameter in this case, CJEU has identified in the objective of opposing entry and residence illegal an overriding reason of general interest. The measure is also suitable for achieving the identified objective. Recalling the reasons with which the national authority had denied the residence permit to the minor concerned, CJEU observes how child's removal against the possibility of subsequent family reunification and return to Germany by means of a visa procedure, exceeds what necessary for the achievement of the intended objective, having already in fact the

the electronic Reports of the cases.

[33]CJEU, C-652/15, Furkan Tekdemir v. Kreis Bergstraße of 29 March 2017, ECLI:EU:C:2017:239, published in the electronic Reports of the cases.

competent authority of the elements necessary to decide on the right of residence of the child as a family reunification.

Despite the Turkish disappointment following the judgment given in the Demirkan case, CJUE continued to protect the preferential treatment reserved for Turkish citizens legally residing in the territory of a member state. With reference to the last sentence, CJEU although pronouncing itself on a very delicate athematic in this historical moment dominated by the debate on a migration phenomenon that knows no precedent, managed to prevent a dogmatic compromise between an undeniable priority such as the correct management of flows of migrants and the rights deriving for Turkish workers from the association agreement recognizing both the need to combat illegal entry and stay and the freedoms of third country workers legally residing in a member state without sacrificing too much to each other and the other way around.

The intent of CJEU seems to be to combine correct management of migratory flows with the guarantee of fair treatment of third-country nationals, Turkish citizens in specific cases, who are legally resident in member states, thus strengthening the measures of fight against illegal immigration, the promotion of closer cooperation with third countries in all sectors by encouraging a uniform development of rights and duties for legal immigrants comparable to that of European citizens whose states will not be able to disregard.

The treatment of British and European citizens after Brexit.

The European council meeting in the composition "article 50" on 15 December 2017, approved the guidelines for the Brexit negotiation (Bosse-Platière et al., 2016, pp. 760ss) contained in the joint report on 8 December 2017, considering the progress made during the first phase of sufficient negotiations and considering that the time was ripe for the transition to the second phase which will include the definition of both a transitional period following the withdrawal of the United Kingdom and the framework of the future relations between London and Brussels which are still in progress.

In par. 8 of the orientation of 29 April 2017 relating to EU citizens living in United Kingdom reads: "(...) the right of every citizen of the European Union and his family to live, work or study in any state Member of the Union is a fundamental aspect (...) on the date of withdrawal, the statue and rights deriving from the Union law of Union citizens and the United Kingdom and of the relative families affected by the withdrawal of the United Kingdom from Union. These guarantees must be effective, enforceable, non-discriminatory and comprehensive and include the right to obtain permanent residence after a continuous period of 5 years of legal

residence (...)"[34].

The fundamental principles of common understanding among negotiators seem to allow both EU citizens and British citizens as well as their respective family members to continue to exercise their rights under EU law in their respective territories, where these rights are based on life choices made before a specific date that the joint report calls cut-off dates and that should be that of the withdrawal on March 30, 2019 without prejudice to the possibility of identifying in the second phase of the negotiations a possible transitional period that as seen in even today this date is not respected.

The joint report provides that both Union citizens residing in the United Kingdom and citizens residing in a member state as well as their family members can continue to live, work or study as they currently do, under the same conditions as EU law, benefiting from the application of the prohibition of all discrimination based on nationality. The only restrictions applicable are those derived from EU law.

Those who have not yet acquired the right of permanent residence if they have not lived in the host state for at least 5 years will be fully protected by the agreement and will be able to acquire permanent residence rights even after the withdrawal.

The status of permanent resident will be guaranteed in compliance with the principles of transparency, proportionality, necessity and non-aggravation of the administrative procedure, even if subjected to certain limitations, taken from those relating to long-term residents, such as the impossibility to leave the state of residence for more than 5 consecutive years, under penalty of losing the rights deriving from this status.

It was also agreed that the withdrawal agreement will protect the rights of spouses, registered partners, parents, grandparents, children, grandchildren and people in a lasting relationship who do not yet have the same status as a citizen of the Union or the United Kingdom to join to them in the future, as long as the family bond exists on the specific date and lasts until the reunion.

In the EC communication on the state of negotiations[35], it is hoped that the granting of the right to family reunification will also be extended to future partners or spouses of Union citizens and of the United Kingdom. The joint report refers to national legislation, although it is clear that with reference to British citizens residing in a member state who request the reunification of the partner or spouse

[34]EUCO XT 20004/17 of 29 April 2017.

[35]Communication from Commission to the European Council (art. 50), 8 December 2017, on the state of progress of the negotiations with the United Kingdom of the treaty on European Union, COM (2017) 784 fin.

with whom the link did not exist at the specific date, the Directive 2004/86/EC on the family reunification of third-country nationals.

As for the applicable procedures, the joint report ensures simple and quick procedures to allow citizens to exercise their rights so for example it is envisaged that those who already have a permanent residence document can change it with a free and immediate procedure with the special status provided from the future withdrawal agreement. To ensure a consistent interpretation and application of citizens' rights established in the withdrawal agreement the joint relationship.

In order to ensure a consistent interpretation and application of citizens' rights established in the withdrawal agreement, the joint report provides that the agreement contains an explicit provision that citizens can rely directly on the rights contained therein and that the rules inconsistent or incompatible will be disapplied. CJEU is also recognized as the ultimate arbiter of the interpretation of EU law and the courts and courts of United Kingdom will have to take due account of the relevant decisions of CJEU adopted even after the date of withdrawal and must be able to be enabled to ask CJEU where questions of interpretation of these rights are deemed necessary. This mechanism should be available for disputes within 8 years from the date of withdrawal. The British judge may still activate the preliminary ruling procedure even if only for questions of interpretation and not even of validity and only in relation to the rights concerning the agreement in question.

It is true that no specific obligation can be placed on the British courts which according to the joint report must only have due regard to Court of Luxembourg jurisprudence. Moreover, since the United Kingdom will no longer be part of the Union, a possible obligation would be imperfect given the impossibility of reacting by the Union to any failure to comply with the indication in question.

Always in order to guarantee the certainty of the rights of British and European citizens and therefore a consistent and uniform interpretation of these rights, the joint report provides for a system of informal and continuous dialogue between English courts and CJEU, the possibility for the London government to intervene in pertinent cases before the Luxembourg judge and mutually of the EC to intervene before the British courts, as well as a monitoring system entrusted, within the Union, to EC and within the United Kingdom to an independent authority, whose specific functions will be specified in the withdrawal agreement.

EC in the aforementioned communication on the state of negotiations underlined how in order to guarantee reciprocity and reflect EC role, the independent national authority should have the power not only to receive complaints from European citizens residing in the United Kingdom that they consider that their rights under the withdrawal agreement have been flown but also by those who take legal action

before the United Kingdom courts.

It is true that the joint relationship has no obligatory but simply political juridical value, nevertheless it represents the normalization of the joint will of the negotiators and is expressive of the renewed confidence between the parties. The European Council wanted to clarify how the negotiations of the second phase can progress only to the extent that all the commitments made in the first phase are fully respected and faithfully translated in legal terms as soon as possible. New scenarios and always in progress could emerge following the preliminary ruling to CJEU raised by Dutch judges following a lawsuit filed by some British citizens residing in the Netherlands in claiming the maintenance of their rights as European citizens also following the withdrawal from the Union of United Kingdom, requested the intervention of the Court of Luxembourg. The questions put to CJEU concern the possible automatic loss of the rights deriving from European citizenship to the detriment of a member state citizens that withdraws from the Union or if this were not the conditions required to keep these rights alive following the withdrawal.

It is difficult to hypothesize the conclusions of Luxembourg judges; however it is undeniable that the preliminary ruling is a victory for the applicants as it is inevitable that whatever the final CJEU decision will affect the continuation of negotiations concerning the withdrawal.

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