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The Standstill Clause as a Travesty: The ECJ's fresh (yet 'familiar') approach to the EU-Turkey Association

June 16, 2016

Current EU-Turkish relations are all but tranquil. Controversial issues like the 'refugee deal', the visa waiver roadmap and the promise of revitalized accession negotiations continue to be front page news. Not surprisingly, they eclipse developments in the EU-Turkey Association, the institutionalized international regime established as long ago as 1963 that is intended to foster cooperation and gradually prepare Turkey for full accession. And yet, attention to what takes place in the Association should not be merely reserved for lawyers specialized in this particular legal area. The EU-Turkey Association constitutes an important part of the legal backdrop of current EU-Turkey relations, something that policymakers do not always acknowledge. Thus, the much talked about visa waiver for Turkish nationals (as a 'tit for tat' in the refugee deal) is in fact under the Association's standstill clauses, a right (economically active) Turkish nationals are already entitled to, at least when they travel to the 'older' Member States like the Netherlands, Germany or Denmark. As already noted in an earlier post, Council and European Parliament never took up the Commission's proposal to alter Visa Regulation 539/2001 to incorporate these obligations flowing from the Association's standstill clauses. Living up to longstanding legal obligations is fine, but apparently not if this reduces the strength of one's 'bargaining chips'. However, in recent judgments of the Court of Justice, the standstill clauses are being changed beyond recognition.

It should be remembered that the standstill clauses are a pivotal element in the Association. As all standstill clauses, they intend to freeze in time existing restrictions (if any) and ban the introduction of new restrictions that hamper the economic activities of EU- and Turkish nationals. The Association contains two such clauses: one for Turkish nationals who want to take up self-employment (Article 41(1) of the Additional Protocol) and one for Turkish workers (Article 13 of Decision 1/80 of the EU-Turkey Association Council). They entered into force in 1973, respectively 1980, for the nine oldest Member States and for the other EU Member States upon the date of their accession to the EU. Since the official 'legislator' of the Association, the Association Council has not delivered the progressive establishment of full economic freedoms between the EU and Turkey, these standstill clauses are often the only rules available to test the legality of Member State and EU legislation that affect Turkish nationals who wish to deploy economic activities in the EU. This is particularly so for visa- and immigration rules that are constantly being tightened.

The Court of Justice has indeed made the most of the standstill clauses, confirming their direct effect, that they cover 'first admission' of Turkish nationals to Member States and that, where possible, they must be interpreted analogous to the internal market rules on workers and

establishment. In numerous judgments, the standstill clauses did what they were intended to do: as ironclad, inflexible, rules, they allow for no excuses regardless of changing political agendas on issues like immigration- and visa policies for Turkish nationals.

Yet, this era of 'progressive' case law has ended. Starting with judgments like *Ziebell*, the Court has qualified the Association as a 'purely economic enterprise'. This new appraisal of the Association has not proven to be hollow rhetoric. In *Demirkan*, it was used as an argument to deny that the standstill clause on services would also cover the *reception* of services (so much for 'analogous interpretation'....).

But more surprisingly, the Court has also used the 'purely economic' nature of the Association to completely restyle the standstill clauses themselves. In fact, right after *Demirkan*, the Court embarked on a new strand of case law in which it regarded the standstill clauses as if they provided 'rights' from which the Member States may deviate when justified by *overriding reasons of public interest*, subject to conditions of suitability and proportionality. Thus, in *Demir*, when assessing the newly introduced Dutch law that made it harder for Turkish nationals to obtain a residence permit, the Court, for the first time, considered whether this new restriction could be justified by the overriding reason of public interest of 'preventing illegal entry'. Soon after, in *Doğan*, the Court did exactly the same when assessing a German law on family reunification that imposed new restrictions upon Turkish nationals legally residing in Germany. The changing political climate in Germany had resulted in much stricter rules as opposed to those in place when the standstill clause entered into force in 1973 introducing German language tests upon the family member still in Turkey. Although the ECJ regarded the new measures as disproportional, it accepted that the 'promotion of successful integration' provides another *overriding reason of public interest* that can justify a derogation from the (hitherto inflexible) standstill clause. Where *Demir* and *Doğan* were judgments of the Court's Second Chamber, the following *Genc* case gave the Court's Grand Chamber the opportunity to rule on a similar matter, this time on (new!) Danish law on family reunification. The larger setup did however nothing to change the Court's new course. Mr Genc, a Turkish worker in Denmark, could not be reunited with his son who still lived in Turkey. Under older Danish legislation the reunification would have been relatively easy. The new, stricter, rules thus presented a clear-cut breach of the standstill clause in Decision 1/80. Yet, again the Court proceeded to assess this breach in the context of the *overriding reason of public interest* of 'promoting successful integration in Danish society'.

Those familiar with the internal market will immediately recognize the 'internal market logic' that the Court applies to the standstill clauses of the EU-Turkey Association. The *overriding reasons of public interest* mimic the *rule of reason* as an established internal market concept. Although in all three cases the proportionality or suitability tests were eventually not met, it is evident that the acceptance of a rule of reason opens the floodgates for all kinds of (future) national policies that restrict the previous rights of Turkish nationals. At first sight, such an 'internal market approach' might seem to fit well with the newly discovered 'economic nature' of the Association. But of course such a vision is severely flawed. Had the Association over the years established full-fledged economic freedoms for Turkish nationals, who wish to work, provide services or establish themselves in the EU, then a type of *rule of reason* might have been considered. The general picture would then still be one of overall improvement and provide an environment in which new national considerations might be taken into account, as they would also be in the internal market proper. But the current state of the Association is a far cry from such a situation. Apart from some substantive achievements for Turkish workers, there is little else than the standstill clauses. Admittedly, no one had thought that the standstill clauses would have lasted as long as they did. They are stark reminders that by now there should have been real economic freedoms for Turkish nationals, rendering the standstill clauses obsolete. The 'dressing up' of the clauses *as if* they

provide full economic rights that allow for *rule of reason*-style exceptions is in that sense a sad travesty. Of it speaks an acquiescence of the Court that this is ‘as good as it gets’; that the Association is not going to evolve and that the days of the inflexible standstill clauses are over.

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Case law, Europe's East No comments

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