FREE MOVEMENT OF TURKISH WORKERS IN THE CONTEXT OF TURKEY'S ACCESSION TO THE EU

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ABSTRACT

FREE MOVEMENT OF TURKISH WORKERS IN THE CONTEXT OF TURKEY'S ACCESSION TO THE EU

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Within the broader scope of free movement of persons, free movement of workers is one of the fundamental freedoms guaranteed by the European Union (EU) law. It is one of most significant rights that are granted to the Union citizens and will be enjoyed by Turkish nationals after Turkey's accession the Union. In this regard, this study examines the free movement of Turkish workers in the EU within the framework of Turkey's EU accession process and two recent EU enlargements since 2004. Along with the legal scope of free movement of workers, transitional arrangements applied in two recent enlargements are analyzed as it could provide some foresights about such freedom with respect to Turkey's EU membership.

Keywords: Free Movement of Workers, Transitional Arrangements, Turkey-EU Relations

ÖZ

TÜRKİYE'NİN AB'YE KATILIMI SÜRECİNDE TÜRK İŞÇİLERİNİN SERBEST DOLAŞIMI

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Kişilerin serbest dolaşımının geniş kapsamı altında, işçilerin serbest dolaşımı Avrupa Birliği hukuku ile garanti altına alınmış temel haklardan biridir. Bu hak, Birlik vatandaşlarına tanınmış olan ve Türkiye'nin Birliğe katılımı ardından Türk vatandaşları tarafından da yararlanılacak olan önemli haklardandır. Bu bağlamda, bu çalışma Türkiye'nin AB'ye katılımı süreci ve 2004'ten bu yana gerçekleşen genişlemeler çerçevesinde Türk işçilerinin AB'de serbest dolaşımını incelemiştir. İşçilerin serbest dolaşımının yasal kapsamının yanı sıra, Türkiye'nin AB üyeliğine ilişkin olarak söz konusu serbesti hakkında bazı öngörüler sunabilmesi açısından son iki genişlemede uygulanan geçiş düzenlemeleri irdelenmiştir.

Anahtar Sözcükler: İşçilerin Serbest Dolaşımı, Geçiş Düzenlemeleri, Türkiye-AB İlişkileri

To My Parents

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CHAPTER I

1. INTRODUCTION

The destructive nature of post-war conditions was felt in almost all spheres of life, i.e. political, social and economic. Among these spheres, economic sphere was seen as the foremost and appropriate one to initiate the process of restructuring of Europe. Hence, the idea of creating a zone mainly based on economic premises came on the agenda and European Economic Community (EEC) was established in 1957. As the word "community" suggests, such an attempt to establish a common platform, which is the Common Market, for the European countries should have provided some advantages to enjoy, which in return required the free movement of goods and services as well as factors of production within the community. The well known four fundamental freedoms foreseen in the founding treaty of the EEC, Rome Treaty, signed in 1957, are free movement of 'goods, services, persons (workers) and capital' upon which the common market was built. One of the most challenging of these freedoms is the free movement of workers which corresponds to a broader scale of policy questions such as migration, social security, social cohesion, other than the purely economic ones.

The rights concerning the free movement of workers are primarily covered within the broader scope of free movement of persons but they have matured through the introduction of additional legal arrangements such as directives and regulations specific to the exercise of such rights. Yet, the main piece of legal sources for the solid conceptualization and interpretation of the rights on free movement of workers is the rulings of the European Court of Justice.

Furthermore, similar to the course of EU integration process, the concept of free movement of workers which was mainly constructed with an economic point of view has also evolved in a way to acquire a social and political dimension. In this regard, Maastricht Treaty, which stands for the Treaty on European Union and was signed in 1992, added the notion of "EU citizenship" in Article 8 where the freedom of movement within the Union was considered as a citizenship right. Thus, as Barnard argues, "workers were no longer simply viewed as factors of production needed to fulfill the objectives of the common market. Now they were seen as EU citizens with rights enforceable against the host State".[1] Amsterdam Treaty, signed in 1997, also served for achieving a better functioning of the free movement of persons with the introduction of necessary provisions concerning visas, asylum and immigration which was initiated by the establishment of Schengen area.

While the legal context was evolved through time, free movement of workers started to be a controversial issue with respect to enlargement and as a result, transitional arrangements which would put certain limitations to the exercise of such freedom came in the EU agenda.

On the other side, attempts of Turkey to join the European Union (EU) were already started following the establishment of the EEC. It was in 1963 when the Ankara Agreement was concluded between Turkey and the EEC, the relations between two parties was set out on a legal basis. Along with the Ankara Agreement, Additional Protocol and the decisions of the Association Council

[1] Barnard (2004), pp. 265.

gave the legislative background of the rights on free movement of Turkish workers within the EU.

In addition, the case law on the interpretation of relevant articles in the abovementioned legal documents played a significant role in turning the theoretical part of such rights into practice. Within the realm of EU accession, free movement of Turkish workers poses several questions or concerns for the EU Member States since Turkey is the most populous candidate country with a relatively younger population and its economic and labour market indicators remain below the EU average.

In this respect, this thesis aims to examine the situation of Turkish workers concerning their rights on free movement within the framework of Turkey's accession process and two recent enlargements since 2004. Although previous enlargements also included special transitional measures, the accession of Central and Eastern European Countries triggered the fears or concerns regarding the impact of free access of migrant workers to the labour markets of the old Member States. Thus, it is important to derive some insights from the experiences gained through the application of transitional arrangements on free movement of workers from the new members within the Union. Such examination of previous experiences could provide a basis for understanding the future of free movement of Turkish workers in the wake of EU accession process. More specifically, it would be useful to know how the free movement of workers is conceptualized and materialized in both EU Law and the Law regulating Turkey-EU relations. It is useful to study the free movement of workers since, in case of EU membership; it

will be one of the most significant rights granted to Turkish nationals which could have a direct impact on their lives. Within this context, questions such as "how should the free movement of Turkish workers be understood within the legal scope of Turkey-EU relations?", "in what way free movement of Turkish workers could be regulated in the light of EU law and experiences gained through recent enlargements?" are tried to be answered throughout the study.

To this aim, first chapter looks at the historical evolution of the legal framework on free movement of workers at the EU level. Within the same logic, second chapter examines the handling of this right within the scope of Turkey-EU relations and the legal tools applied. Having established a legal background for free movement of workers both at the EU level and in terms of Turkey-EU relations, third chapter is dedicated specifically to the transitional measures set for alleviating the fears or threats anchored by the old members concerning the full application of the rights derived from free movement of workers, which are also relevant for Turkey's accession to the EU. Following a similar path, fourth chapter analyzes the future of free movement of Turkish workers in terms of accession process and in the light of recent developments, keeping in mind the approach put into practice in previous enlargements.

In this sense, this thesis will conclude by pointing out that Turkey, after becoming a member to the EU, will face with transitional arrangements, probably even longer than those applied to previous new members, with regards to the free movement of workers. However, imposing permanent restrictions on such a fundamental freedom does not seem to be acceptable in terms of EU integration,

principle of non-discrimination and long history of Turkey-EU relations. Becoming an EU member without the right to freely move in the labour markets of other members could be considered against the logic of membership. It is also unfair from the legal point of view that workers of a Member State, who are also EU citizens, would be deprived of one of the fundamental rights upon which the Union was established.

1.1. Relevant Literature Review

The free movement of workers has a broad scope of study in the literature. A similar tendency can be seen in the literature on the free movement of Turkish workers within the context of Turkey- EU relations. With respect to the free movement of workers in general, although the economic integration theory suggests that the free movement of labour would create a more advantageous picture of economic efficiency, it also brings about the questioning of trade-offs between the countries in the Community concerning the labour market conditions. In other words, while the free movement of labour would result in a higher level of output and consumer surplus, it would also lead to a worse-off in the immigrated country with respect to the wages. As Hitiris argues, with the notion of free movement, the common market provides better allocation of the factors of production and also serves for efficiency and welfare for the member states[2]. However, as he rightly points out, although free movement of labour leads to an

[2] Hitiris, T. (2003) *European Union Economics*, Fifth Edition, Harlow: Prentice Hall, pp.18.

increase in the total income of the common market, some member countries gain some others lose.[3]

Furthermore, examining the fundamental pieces of EU law on four freedoms, Barnard[4] provides a valuable study with regards to the legal context on free movement of workers.

In the context of free movement of Turkish workers, one of the most comprehensive works is presented by Köktaş[5] where the author elaborates on the issue by taking into account the related pieces of EU law and legal sources of Association Law between Turkey-EU. Indeed, he argues that the free movement of Turkish workers should be familiarized with those rights of the EU citizens by perceiving the right of free movement as a reflection of universal rights.[6] He also indicates that the issue should be evaluated in terms of the need of ageing EU for additional labour force[7] and the democratic problems arising from the discriminatory acts on the partial freedom of movement for the third country nationals living in the EU.[8] Furthermore, he argues that the Turkish workers should be considered to have a special status with regards to the Association Agreements and other legal documents; thus, their rights to freely move within the EU should be prioritized and improved.

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[3] Ibid, pp.17.

[4] Barnard, C. (2004) The Substantive Law of the EU: The Four Freedoms, Oxford ; New York : Oxford University Press.

[5] Köktaş, A. (1999) *Avrupa Birliğinde İşçilerin Serbest Dolaşım Hakkı ve Türk Vatandaşların Durumu*, Ankara: Nobel Yayın Dağıtım.

[6] Ibid, pp.153.

[7] Ibid, pp.154.

[8] Ibid, pp.155-156.

Similarly, Berksü points out the need for improving the rights of Turkish workers in the EU. According to her, the main reason behind the inefficient application of such rights was the ignorance of the special status of Turkish workers by the decision making mechanisms and administrative bodies of the Member States[9] and it was mostly political in nature.[10] The special status of Turkish workers is also mentioned in Commission Staff Working Document with the following statement: "The status which Turkish workers at present enjoy under Community law lies between that of European Union citizens and third-country nationals."[11]

Like Berksü, Özdemir presents another work to the literature of free movement of Turkish workers and shares the same view on the insufficient application of their rights due to political and economic reasons. Indeed, the initial steps for the free movement of Turkish workers were taken in a way to ensure such right for all Turkish citizens. Yet, the rights were regulated so as to cover the free movement of Turkish workers legally work in a Member State, especially within a limited scope as formulated in Decision 2/76 of the Association Council. According to Özdemir[12], the reason why Turkey accepted such a limited scope could be assessed in a way that it expected the situation would be offset in time.

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[9] Berksü, Ş. (1999) *Avrupa Birliğinde Yaşayan Türk İşçilere ve Ailelerine Ortaklık Mevzuatıyla Tanınan Haklar ve Avrupa Toplulukları Adalet Divanı Kararları*, Ankara: Azim Matbaacılık, pp. 5.

[10] Ibid, pp. 6.

[11] European Commission (2004) Commission Staff Working Document, *Issues Arising From Turkey's Membership Perspective*, Brussels, 656 final, pp.18.

[12] Özdemir, S. (1999) *Türkiye-Avrupa Birliği İlişkilerinde İşçilerin Serbest Dolaşımı*, DPT Uzmanlık Tezi, Ankara: DPT Yayın No:2494, pp. 74.

Moreover, Yılmaz[13] touches upon the free movement of Turkish workers within a broad scope where he elaborated on the legal framework on free movement of persons in the EU. He also deals with issues such as mutual recognition of professional qualifications, coordination of social security systems and the transitional arrangements applied to free movement of workers.

It can also be inferred from the literature review that the problematic issues such as migration and unemployment associated to a great extent with the free movement of workers in the EU have been a flourishing area of analysis. As the issue has become a subject of discussion with the Eastern Enlargement in 2004, much of the studies focus on the post-enlargement situation since 2004.

Brücker is one of those academicians who have contributed to the literature with significant works concerning free movement of labour, especially potential estimations of migrations and relevant impact analysis of recent enlargements. In one of his articles in collaboration with Boeri, Brücker deals with the implications of 2004 enlargement especially on employment, wages and migration. The authors state that "Policies coping with the accession should necessarily address these concerns as they may otherwise induce short-sighted policies, reaping the long-term benefits associated with the enlargement."[14] In a similar study, Brücker looks at the winners and losers of the Eastern Enlargement and indicates that although the problems concerning the free movement of workers will be resolved

[13] Yılmaz, A. (2008), *Avrupa Birliği'nde Kişilerin Serbest Dolaşımı Müktesebatı ve Türkiye'nin Durumu*, DPT Uzmanlık Tezi, Yayın No: 2758.

[14] Boeri, T. and Brücker, H. (2001) "Eastern Enlargement and EU-Labour Markets: Perceptions, Challenges and Opportunities"in *World Economics*, Vol. 2, No. 1 (Jan/Mar 2001), pp. 2-3.

after the expiry of transitional periods "the resolution of potential conflicts of interest between sending and receiving countries is extremely relevant for other accession candidates, such as Turkey, and the relatively poor countries in the neighborhood of the EU."[15]

Likely, Donaghey and Teague look at the ongoing debates following the accession of Central and Eastern European Countries (CEES) to the EU in 2004 and argue that labour mobility from these countries could possibly have positive impacts. Some of the proposed positive impacts are as follows: the low-skilled workers of CEES could fill the "increasingly significant labour market gaps" in the sectors where workers in Member States "are now reluctant to accept" and also decrease the "labour demand shortages" in the member states due the ageing population.[16]

[15] Brücker, H. (2007) *Labor Mobility After the European Union's Eastern Enlargement: Who Wins, Who Loses?*, Washington: The German Marshall Fund of the United States, pp. 23.

[16] Donaghey, J. and Teague, P. (2006) "The free movement of workers and social Europe: maintaining the European ideal", *Industrial Relations Journal* 37: 6, 652–666, Oxford and Malden: Blackwell Publishing Ltd, pp. 654.

CHAPTER II

2. FREE MOVEMENT OF WORKERS IN THE EU

The legal reference to the rights for workers to freedom of movement could be found even before the foundation of the European Economic Community, in the provisions of the Treaties establishing European Coal and Steel Community (ECSC)[17] and European Atomic Energy Community (EURATOM)[18]. When the EEC Treaty[19] is concerned, Article 3(c) talks about "the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital" in an internal market. It is significant to note that in the initial phase of the Community establishment, free movement of persons was formulated mostly in the context of workers and perceived to be one of the key elements in the way towards a common market. It was then so vital to ensure the free movement of labour, one of the factors of production, in order to achieve a well functioning market among the member states. In other words, the initiative for free movement of workers was mainly motivated by economic purposes. In fact, it is argued that such freedom was seen as a prerequisite for the realization of an economic goal.[18]Moreover, in Article 3(i), it is indicated that "the creation of a European Social Fund in order to improve the possibilities of employment for workers and to contribute to the raising standard of their living" would be included in the

[17] Article 69 of the ECSC Treaty includes the provisions concerning the free movement of workers, in the sectors of coal and steel.

[18] Article 96 of the EURATOM Treaty mentions the provisions on the free movement of workers in the nuclear energy sector.

[19] The signing date of the Treaty was 25 March 1957.

Community activities. This provision could be interpreted as a foresight for the need of integrating social dimension to the free movement of workers.

2.1. The Concept of "Worker" at the Community Level

Before going into the details of the rights of workers regarding free movement, it is noteworthy to define the meaning of the "worker" in the sense of EU legislation. It is significant to assure that the same meaning is inferred by every Member State which is subjected to comply with the rules established Community wide concerning the free movement of workers. When the primary sources are examined, there is no clear definition of the term "worker". However, due to the case law nature of the EU law, the European Court of Justice has provided a comprehensive meaning of the term thus enabled the member states to interpret it on common grounds. In other words, "in order to secure the common market objective of free movement of workers, the European Court of Justice refused to accept Member State definitions and insisted on a meaning of 'worker' covering all persons engaged in economic activity, and not only employees with a contract.[20]

It was in 1963 with the Hoekstra Case[21] that the Court brought a Community concept to the term "worker". According to the Court, just the existence of articles (48-51) regarding the free movement of workers is sufficient to give the term "worker" a Community scope and there is no indication in the provisions that the definition of the term is left to the discretion of the national legislation. Contrarily,

[20] See http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/worker.htm

[21] Case 75/63, Mrs M.K.H. Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten [1964] ECR 177.

the Court argues that Article 48 (2) contains specific features of the concept of "workers" like employment and remuneration, which clearly indicates that there is a Community meaning attributed to the concept. Thus, the ruling leaves no room for different interpretation of the term by national legislation which could in return lead to refraining of providing certain rights through modification of the concept meaning of "migrant worker".

In general terms, a worker is defined to be a person who performs a job with a labour contract and "is engaged in a relationship based on subordination where the individual is under the control of the employer"[22]. It is also significant to note that the economic activity that the worker performs should be "genuine and effective" but not comprise of such as a small scale as to be purely marginal and ancillary. However, this should not be understood as a limitation for part-time workers with respect to free movement. As Köktaş rightly argues, it could threaten the realization of the Treaty as well as the effectiveness of the Community legislation if solely full time workers enjoy the rights arising from the free movement of workers.[23] Hence, the Court interpreted the meaning of "worker" in a broader sense so that part-time workers could well be considered as workers although their wages are below the subsistence level, since part-time employment "constitutes for a large number of persons an effective means of improving their living

[22] Barnard, C. (2004) pp.265. It was also indicated in Case Lawrie-Blum and Case Raulin that "The essential feature of an employment relationship is that for a certain period a person performs services for and under the direction of another person in return for which he receives remuneration." Case 66/85, Deborah Lawrie-Blum v Land Baden-Württemberg [1986] ECR 02121, paragraph 17, Case C-357/89, Raulin v Minister van Onderwijs en Wetenschappen [1992] ECR I1027, paragraph 10.

[23] Köktaş (1999), pp. 117.

conditions".[24] In this context, national courts are given the competence to decide whether the time spent on working addresses that the activities performed by the person is "genuine and effective " or "such as a small scale as to be purely marginal and ancillary".[25]

The concept of worker has further been extended to part-time workers enjoying additional social benefits as in the case of Kempf[26] who was working as a part-time music teacher. The Court stated that Mr. Kempf performed an economic activity which cannot be considered as marginal or ancillary (as ruled by national court) although he was getting financial assistance from the public funds so as to supplement his income. As it was mentioned in several Court rulings, the concept of "worker" was interpreted as broadly as possible in a way to ensure that the freedom of movement for workers apply to a great extent. Such an attitude to give a broader meaning to the concept was reflected in an attempt of the Court to integrate even the job seekers into the definition of "worker"[27] within the context of their rights stemming from freedom of movement.

Having examined the cases that lead to a Community concept of "worker" within the meaning of the Treaty, it is clear that there are mainly three criteria for the definition of a worker. First, the person should perform his/her activities under the control and subordination of an employer. Secondly, the person should engage in a genuine and effective economic activity, that is the activity performed should

[24] Case 53/81, Levin v Staatssecretaris van Justitie [1982] ECR 1035, paragraph 15.

[25] Ibid, paragraph. 17, Case C 357/89 Raulin v Minister van Onderwijs en Wetenschappen [1992] ECR I1027-, paragraph 15.

[26] Case C 139/85, Kempf v Staatssecretaris van Justitie [1986] ECR 01741.

[27] Case C 85/96, María Martínez Sala v Freistaat Bayern [1998] ECR I-02691.

bring about an economic value to the employer, and it should not be marginal or ancillary. Finally, the person should receive a financial reward; remuneration in return for his/her performance.

In this respect, the ECJ provided a common concept of worker at the EU level the features of which should be interpreted consistently in terms of the whole EU law including the law regulating Turkey- EU relations. However, within the context of Community legislation regarding the social security rights of the workers, the concept goes far beyond the abovementioned criteria. In fact, the definition of a "worker" in the sense of Article 48 of the EEC Treaty[28] and Regulation 1612/68[29] do not exactly refer to the same meaning utilized in the Regulation 1408/71[30]. Within the meaning of the Regulation 1408/71, a person is considered to have the status of being employed when s/he is covered by a general or special social security scheme mentioned in Article 1(a) of the Regulation even if only in respect of a single risk, on a compulsory or an optional basis. Thus, irrespective of the existence of an employment relationship, being covered by a social security scheme is sufficient to be entitled as worker in the sense of Regulation.[31]

[28] New Article 45 of the Treaty on the Functioning of the European Union (TFEU) (Consolidated Version), OJ C115/47 of 09.05.2008.

[29] Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, OJ L 257 of 19.10.1968, pp. 13-16.

[30] Council Regulation (EC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149 of 5.7.1971, p. 2.

[31] Case C 85/96, María Martínez Sala v Freistaat Bayern [1998] ECR I-02691, paragraph 3.

2.2. Relevant Sources of Community Law Regarding the Free Movement of Workers

2.2.1. Treaty on European Economic Community- Rome Treaty

Along with the general provisions that could be attributed to the free movement of workers, articles 48-51[32] of the EEC Treaty are specifically arranged on this subject. In Article 48, it is stated that the "freedom of movement for workers would be secured within the Community by the end of the transitional period at the latest". The same article also suggests the removal of all discriminatory practices with respect to employment, remuneration and work/employment conditions on the grounds of nationality. Besides, it puts the limit to such freedom with regards to public policy, public security or public health and excludes those who work in the public sector. Provided that the grounds for limitations and exclusion do not exist, the freedom of movement for workers refers to the right:

> (a) to accept offers of employment actually made;
> (b) to move freely within the territory of Member States for this purpose;
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
> (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

In Article 49, the need for secondary legislation is emphasized for the full applicability of free movement of workers within the Common Market. In this respect, according to the article, issuing of directives and regulations requires a

[32] New articles 45-48 of the TFEU.

close co-operation among public employment services (49-a) as well as gradual and systematic removal of administrative rules and applications in the Member States (49-b). Besides, qualifying periods in order to be eligible to take up employment should also be abolished (49-c). As a complementary measure, the last paragraph of the article talks about establishing a suitable mechanism to match the labour demand and labour supply between Member States while aiming at avoiding "serious threats to the standard of living and level of employment in the various regions and industries"(49-d). In the upcoming years, European Employment Services (EURES) would serve as such kind of mechanism for easing the exchange of labour between member states.

On the other hand, while Article 50 emphasizes the ways to promote the exchange of workers among Member States; Article 51 gives the Council the responsibility to introduce relevant measures for the social security issues in order to facilitate the free movement of workers. However, due to its huge and comprehensive content which requires specific attention and could constitute a subject for a separate study, social security dimension of free movement of workers is left out of the scope of this thesis.

2.3. Secondary Legislation on Free Movement of Workers

In addition to the primary sources of the Community law, the secondary legislation drew the boundaries of the free movement of workers by setting up the necessary measures for the realization of such freedom and gave a broader space to look at the issue in a detailed manner. The main pieces of secondary legislation on the free movement of workers are Council Directive 68/360/EEC of 15

October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families[33] and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.[34] Furthermore, Regulation 1251/70[35] defines the provisions on the right of workers to remain in the member state where they have been employed. However, Council Directive 68/360/EEC was repealed and the articles 10 and 11 of the Regulation (EEC) No 1612/68 were amended by the so-called Citizen's Directive 2004/38 concerning the rights of the citizens of the Union and their family members to move and reside freely within the Union.[36] By the introduction of Directive 2004/38, right of free movement and residence was simplified in a way to cover different legislation applied to workers, self-employed, students and other inactive persons under the citizenship status. Similarly, Regulation 1251/70 was also repealed by Regulation 635/2006.[37]

[33] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257 of 19.10.1968, pp. 13-16.

[34]Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257 of 19.10.1968, pp. 2-12.

[35] Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ L 142 of 30.6.1970, pp. 24-26.

[36] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158 of 30.04.2004, pp. 77-123.

[37] Commission Regulation (EC) No 635/2006 of 25 April 2006 repealing Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ L 112 of 26.04.2006, pp. 9.

2.3.1. Directive 68/360 regarding rights of exit, entry and residence

2.3.1.1. Right of Exit

In order for nationals of a Member State to exercise their rights to freely move within other Member States, they should first be granted the right to leave their State of origin. Within this context, Directive 68/360 introduces the right for workers and family members to depart from a Member State they live in. Nationals and their family members may leave the Member State so long as they provide a valid identity card or passport that the State shall issue or renew for the certification of their nationality.[38] According to Yılmaz, the abolition of internal borders within the EU affected the responsibilities of the Union citizens and their family members regarding the right of exit.[39] As he points out, the requirement to present the passports or identity cards was replaced with the requirement to hold such documents during their departure, along with the Directive 2004/38. Besides, the right to exit was then granted to all citizens and their families regardless of their purpose to leave one Member State, which previously was granted for only those leaving the territory in order to work in another Member State.

2.3.1.2. Right of Entry

Upon the departure from a Member State with a valid identity card or passport, workers and their family members are allowed to enter into another Member State without being obliged to provide any visa or such kind of an entrance document,

[38] The passports issued should be valid for all Member States and if the passport is the only legal means to leave the State, it should have at least five years of validity.

[39] Yılmaz (2008), pp.19.

except for non-EC national family members.[40] It is also not in line with the Directive if a Member State asks from a national of another Member State for information regarding the purpose and duration of the stay or their financial resources before entering its territory.[41]

Most of the time, primary or secondary legislation do not comprise of comprehensive information regarding the rights provided. Similarly, as Berksü rightly argues, Article 48 (3-b) of the Rome Treaty endows persons with the right of free movement in order to accept the offer for a job but does not touch upon those looking for a job in another Member State.[42] In this respect, the case of Royer reveals that particularly looking for or pursuing an occupation or activities as employed or self-employed persons is also considered among the purposes intended by the Treaty regarding the right of entry and residence which are conferred directly by the Treaty or the secondary legislation. [43]

2.3.1.3. Right of Residence

As stated above in the Royer Case, the nationals of a Member State do have the right of residence in another Member State directly adhered to the relevant Treaty provisions (Article 48). Within this context, Directive 68/360 states that workers

[40] Directive 68/360, Article 3. According to the Citizens Directive 2004/38, Article 5(2) "Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure."

[41] Case C-68/89, Commission v. Netherlands [1991] ECR I-2637.

[42] Berksü (1999), pp.16.

[43] Case 48/75, Royer [1979] ECR 497, paragraph 31.

could enjoy their right to reside in another Member State so long as they provide the document of entry to that State territory and a confirmation of engagement from the employer or a certificate of employment. Upon the receipt of such documents, the host State shall issue a residence permit for these workers. As to the family members, they should also provide the document of their entry to the host state as well as a document proving their relationship with the worker and issued by a competent authority (Article 3 of the Directive 68/360).

2.3.1.4. Duration and Validity of Residence Permit

The validity of the residence permit is five years and it can be automatically renewed. However, in the case of employment less than three months, workers could freely reside in another Member State they work in with the documents mentioned above but without any residence permit to be issued. By the introduction of Citizens Directive 2004/38, all conditions and formalities other than the requirement to hold a valid identity card or passport are abolished for Union citizens, even for their family members of third country nationals, who will reside in another Member State for up to three months.

Where the worker performs a job in another Member State for a period of more than three months but not exceeding one year, according to Directive 68/360 s/he was granted with a temporary residence permit covering the period of employment. Such permit could also be issued for seasonal workers who are employed for more than three months. As it was stated in article 7 of the said Directive, ceasing of a worker's employment either due to his temporary incapacity of work as result of illness or accident, or due to his being unemployed

involuntarily, confirmed by the competent employment office, did not count as grounds for withdrawal of a valid residence permit. In other words, a valid residence permit might be withdrawn from a worker in case of voluntary unemployment. According to Berksü, a person who became voluntarily unemployed is not considered as a "worker" in the sense of article 48 of the Treaty which guarantees the right of seeking for a job and accepting the offer for a job.[44]

In Directive 2004/38, however, right of residence for more than three months is regulated in a way to ensure for all citizens, without issuing a residence permit. In this respect, citizens who are workers or self-employed persons in the receiving Member State or who have sufficient means to live there with their family members and with comprehensive sickness insurance during their stay could enjoy the right of residence.

Besides, it was stated in Article 7 (1-c) of the Directive that those citizens who are "enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training" and meeting the same requirements mentioned above are entitled to reside in the host Member State for more than three months.

[44] Berksü (1999), pp. 17.

2.3.2. Regulation 1612/68 on Employment and Family Rights

In the previous sub-section, workers' rights before taking up employment in another member state such as leaving the state of origin, entering to a host state and being entitled to reside in the host state were elaborated. In this sub-section, the rights of workers regarding their eligibility to take up employment, conditions of employment and work will be examined together with the rights entitled to families of those workers. Accordingly, Regulation 1612/68 serves as the main piece of legislation on the free movement of workers and their families with a view to enhance their integration to the host Member State. In this respect, it is indicated that the formulation of the Regulation takes into consideration a "human point of view" as to its significance for worker to live with his/her family and addresses to the importance of the integration of both worker and the family members into the host Member State with same treatment applied to the nationals of that State.[45] Similarly, Barnard evaluates the Regulation 1612/68 as "the most important of the legislative measures on workers".[46]

This Regulation is mainly composed of three parts: the right of access to employment in equal terms, the right to equal treatment while performing the job and the rights of family members.

[45] Case 249/86, Commission v. Germany [1989] ECR 1263, paragraph 11.

[46] Barnard (2004), pp. 271.

2.3.2.1. Access to Employment

Article 1 of the Regulation sets forth the principles concerning the eligibility for employment. Within this context, any national of a Member State has "the right to take up an activity as an employed person and to pursue such activity, within the territory of another Member State" and is subjected to the same legal provisions applied to nationals of the host country. Moreover, nationals of the host State do not have any priority over the nationals of another Member State in the phase of taking up available employment. On the other hand, it is clearly stated that, no legislative measure of a Member State would be applied if it contains discriminatory features limiting the application for and offers of employment for foreign nationals or putting some barriers for them in employment conditions which are not subject to its own nationals. It is also indicated that any legal arrangement that has an exclusive or principal aim or effect hindering the employment of other Member State nationals are not applicable under the Regulation. Yet, provided that the nature of employment requires specific linguistic knowledge, it should not be considered as a breach of the abovementioned provisions.

Within this context, migrant workers should not be treated less favorably than the nationals of the host States in terms of recruitment procedures, advertising of vacancies and conditions of registration with employment offices. Besides, no restriction on number and percentage of employment of foreign nationals should

be introduced and these persons should be provided with the same assistance by the employment offices where they seek jobs, as the nationals of that Member State.

2.3.2.2. Employment and Equality of Treatment

Similar to the provisions laid down for access to employment, the Regulation restricts discriminatory acts based on nationality for the conditions of employment and work. In this respect, same conditions in a Member State would also apply for nationals of another Member State as to remuneration, dismissal, re-employment, social and tax advantages, and access to vocational training. Moreover, these migrant workers shall be treated equally in terms of membership of trade unions, shall enjoy the right to involve in workers' representative bodies as well as rights and benefits related to housing.

2.3.3. Rights of Workers' Families

Defining the freedom of movement as a fundamental right of workers and their families, the Regulation sets forth details of the rights of family members. It is significant to elaborate on these rights, since the case law on the free movement of Turkish workers in the Community, which were stemmed from the indulgence of family rights, relies heavily on the interpretation of the Regulation. According to Köktaş, the equality for workers of a Member State could be ensured provided that their family members, irrespective of nationality, enjoy the social advantages in the host state.[47] In this respect, the Regulation paves the way towards the

[47] Köktaş,(1999), pp.110.

realization of the notions such as family re-unification and integration of the workers to the host State together with their family members. Family members, within the meaning of the Regulation, correspond to spouses, their descendants who are under the age of 21 years or are dependants and dependent relatives in the ascending line of the worker and the spouse. In case of a family member who is not mentioned above is dependent on the worker or living under his/her roof in the country where the worker has migrated from, their admission to the host State should be facilitated by the Member States. In this regard, Barnard indicates that "the rights of all family members are dependent on the rights of the worker unless and until they acquire their own independent rights."[48]

With respect to the family rights, spouse has been defined in a "conventional manner" in the Court rulings[49] and considered within the context of marital relationship. Yet, being entitled to family rights under the Regulation was not confined to the condition that the spouses should live together. In Diatta Case[50], Mrs. Diatta married a French national who resided and worked in Berlin where she also worked. In the mean time, she separated from her husband with the intention of divorce and started to live alone. As the duration of her residence permit she applied for an extension. However, the application was refused since she was not a family member of an EU national anymore since they lived separately. The ECJ decided that the right of a family member to reside could not be subject to the condition that they lived together permanently and unless a

[48] Barnard (2004), pp. 285.

[49] Ibid, pp. 285.

[50] Case 267/83, Aissatou Diatta v Land Berlin [1985] ECR 567.

competent authority terminates the marital relationship, it could not be considered as dissolved.

On the other hand, cohabitees were not considered as suitable within the meaning of spouse. However, Directive 2004/38 has broadened the scope of the term "spouse" in a way to include registered partners so long as such relationship is qualified as marriage with respect to the legislation of the host Member State.

As to the dependants of the workers, being supported by the worker is sufficient to be entitled to family rights.

Family members, irrespective of their nationality, could also enjoy the right of being employed in the host State. Nonetheless, according to Köktaş, the right of third country nationals to work in a Member State which was acquired through a relationship with an EU national does not directly give them the right to reside there irrespective of the status of that EU national as a worker.[51]

In addition, according to Article 12, Member States should ensure that children of migrant workers attend the educational, apprenticeship and vocational training courses with the same conditions applied to nationals of that State.

2.3.4. Regulation 1251/70 on the Right to Remain in the Host State

Along with the right to enter to and take up employment in a Member State, Regulation 1251/70 sets forth the right to reside there after the employment status of the workers have ceased. As explained in the previous sections, the right to

[51] Köktaş (1999), pp. 111.

reside in the host state was considered to be derived from the right to work. However, it is proposed that ex-workers could stay in the host state they had been employed before in certain conditions (Article 2 of the Regulation):

- in case of retirement, so long as they have been employed in that State for at least the last twelve months and has resided there continuously for more than three years,

- in case of incapacity, provided that they have resided continuously in the territory of that State for more than two years; no condition is required with respect to the length of residence, if incapacity is stemmed from an accident at work or an occupational disease for which an institution of that State is entirely or partially responsible,

- in case of frontier work, provided after three years of continuous employment and residence in the territory of that State, they work as employed person in the territory of another Member State, while residing in the territory of the first State, where they return, as a rule, each day or at least once a week.

Nevertheless, the prerequisites of length of residence and employment in order to be entitled to right to remain are not applicable to the worker whose spouse is a national of the Member State concerned or has lost the nationality of that State by marriage to that worker.

As stated in Article 3, the family members of a worker could also enjoy the right to remain in the host country in two circumstances: provided that the worker has been entitled to the right to remain in the territory of that State or dies during his working life and before having acquired the right to remain in that State.

CHAPTER III

3. SOURCES OF FREE MOVEMENT OF TURKISH WORKERS IN THE EU

The legislative framework on the right of Turkish nationals to free movement within the EU is mainly drawn by two legal sources. The first one is the EU legislation laid down in the previous chapter that regulates the rights concerning free movement of nationals of Member States. These rights, also called "derived rights"[52], provide a basis for Turkish nationals in order to enjoy free movement rights within the EU as being a family member of an EU national. In other words, these are the rights granted to Turkish nationals through the EU national who directly acquires the rights on free movement under the Community law. Besides, the subject matter of the case law on the free movement of Turkish nationals is mostly based on such derived rights, together with the rights anchored within the context of law regulating Turkey-EU relations which will be dealt with in following paragraphs.

The second one of the legislative arrangements through which Turkish nationals are entitled certain rights regarding free movement relies on the agreements concluded between Turkey and the Community and related legal arrangements. This set of legal instruments refers to the "direct rights" of Turkish nationals.[53]

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[52] Ateş, M. (1999) *The Legal Basis of the Free Movement Rights for Turkish Nationals within the European Union*, Ankara: DPT Yayın, pp. 2.

[53] According to Ateş, derived rights confers to the "EU internal legislation" on the free movement of Turkish persons/ workers in the EU wheras direct rights are constituted by the "EU international legislation in which Turkey is a contracting party." pp.2.

Within this context, this chapter will elaborate on the direct rights of Turkish workers acquired through primary and secondary sources of the Association Law between Turkey and the Community.

3.1. Primary Sources

3.1.1. Ankara Agreement

The relationship between Turkey and the EU could be traced back to the early years of the establishment of the European Economic Community with the application of Turkey's association membership in July 1959. However, the Community came up with a suggestion of establishing an association with Turkey until it meets the criteria for accession.[54] Within this framework, Ankara Agreement, also known as Association Agreement, was signed on 12 September 1963 and came into force on 1 December 1964. The Agreement is considered as the first fundamental piece of legal document in terms of Turkey-EU relations. It is the second one of the association agreements, first of which was concluded with the Greece in 1961,[55] where the EU expressed its commitment to establish closer links with these countries. In general, Association Agreements are considered to be "mixed type" agreements which are concluded by the country in question, the European Union and Member States. As defined by Rogers, "a mixed agreement is where competence is shared between the Community and the Member States."[56]

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[54] Secretariat General for EU Affairs, "History of Turkey-EU Relations" at http://www.abgs.gov.tr/index.php?p=111&l=2

[55] See Ateş (1999), pp.5 and Rogers, N. (1999) *A practitioners' guide to the EC-Turkey Association Agreement*, Martinus Nijhoff Publishers, pp.1.

[56] Rogers (1999),pp. 6.

Mixed agreements also touch upon various rights and obligations concerning the elements of all three pillars of the Union, hence ratification of these agreements by national parliaments of Member States is required after they are signed.[57] As Pazarcı points out, such agreements have legal consequences for Community organs and also for Member States as well.[58] Hence, they create rights and obligations both at the Member State level and the EU level. Furthermore, upon entry into force, these agreements become an integral part of the EU law.[59]

3.1.1.1. Relevant Provisions of the Ankara Agreement

The legal basis of the Ankara Agreement, signed between the EEC and Turkey, lies within the related provisions of founding treaties of the Community. According to article 238 of the EEC[60], "The Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."

As it was stated in the preamble, Ankara Agreement is concluded with the inspiration of establishing closer links between the parties by ensuring

> continuous improvement in living conditions in Turkey and in the European Economic Community through accelerated economic progress and the harmonious expansion of trade, and to reduce the disparity between the Turkish economy and the economies of the Member States of the Community.

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[57] Doukouré O. and Oger H. (2000) *The EC External Migration Policy: The Case of the MENA Countries,* European University Institute, Italy: Badia Fiesolana, pp.8.

[58] Pazarcı,H (1978) *Uluslararası Hukuk Açısından Avrupa Ekonomik Topluluğu'nun Yaptığı Anlaşmalar*, Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları No: 418,pp156.

[59] Ibid, pp.159.

[60] New Article 217 of the TFEU.

In this respect, it is a framework agreement with a political and economic nature determining the basic principles of the association[61] by introducing rights and obligations based on reciprocity. The Agreement is also considered as a legal document which aims to secure Turkey's full membership in the EEC through the establishment of a Customs Union which would serve as a catalyst in the way of maintaining integration between the EEC and Turkey.[62]

The same period, 1960s, corresponds to the increasing level of labour migration to the European countries, especially to some founding members of the Community, in order to compensate the labour shortages in the post-war period. As Berksü points out, the labour migration which had begun with individual initiatives in the early 1960s and turned out to be a flow in the mean time, led to the conclusion of bilateral labour and social security agreements between Turkey and the host countries, including some Community members. The aim was to ensure that migration would be systematic and Turkish workers would be protected with regards to their working conditions and social security rights.[63] Yet, Association Agreement went beyond the bilateral attempts and introduced a broader and comprehensive framework to the issue of free movement. Thus, it is deemed to be the foremost legal source on the free movement of Turkish workers at Community level. According to Köktaş, this Agreement is the only agreement that was signed

[61] Berksü (1999), pp.44.

[62]Secretariat General for EU Affairs, "History of Turkey-EU Relations" at http://www.abgs.gov.tr/index.php?p=111&l=2

[63] Berksü (1999), pp. 43.

between the EU and a third country, arranging the rights of non EU-nationals on free movement within the EU[64].

Before going into details of the relevant provisions of the legal sources with respect to free movement of workers, it would be fruitful to look at the main characteristics of the Agreement, upon which further legislative arrangements were made, including the rights of migrant workers and their family members.

In Article 2, the aim of the Agreement is defined as

> to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people.

To this aim, it is foreseen that a customs union will be established progressively.

There are three stages of the association which all address the economic dimensions. In this regards, preparatory stage refers to a five-year period[65] where Turkish economy would be strengthened. Upon the completion of the preparatory stage, it is suggested that a progressive establishment of Customs Union and alignment of economic policies would be achieved during the transitional stage of twelve years. Lastly, based on the Customs Union established in the transitional stage, final stage would ensure the closer coordination of economic policies of the parties.

[64] Köktaş (1999), pp. 141.

[65] Article 3 (2) states that "The preparatory stage shall last five years, unless it should be extended in accordance with the conditions laid down in the Provisional Protocol. The change-over to the transitional stage shall be effected in accordance with Article 1 of the Provisional Protocol."

In addition, Article 7 talks about the necessary measures to be taken by the signatories, in order to "ensure the fulfillment of the obligations arising from this Agreement."[66] It also states that parties should abstain from any arrangement that would be risky for the achievement of goals of the Agreement. In accordance with the provisions of this article, the competence to take relevant decisions upon which the parties would take necessary measures was given to the Council of Association with Article 22. In this context, the provisions of the Additional Protocol and the decisions of the Council of Association would serve as the other legal sources for the Association Law between Turkey and the Community.

In the Agreement, the direct reference to free movement of workers is made in Article 12 under Chapter Three of Other Economic Provisions, which once more emphasizes the economic logic attributed to the right to free movement. The article states that "The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them."[67] Köktaş argues that the term "guide" is not clear enough and leaves room for interpretation. According to him, the most significant point for the implementation of this provision is the interpretation of the meaning. Hence, in the absence of a clear meaning, the term should be interpreted in accordance with the spirit and the objective of the Ankara Agreement[68].

[66] OJ No L 361/1 31.12.77, pp.9.

[67] OJ No L 361/1 31.12.77, pp.9.

[68] Köktaş (1999), pp. 141. The author refers to the comment of Commission on the term "guide" which is considered as reference point or framework for enabling the Association Council to take necessary action so as to ensure the implementation of the Ankara Agreement. It is also revealed in

3.1.2. Additional Protocol

The Additional Protocol, which was signed on 23 November 1970 and entered into force on 1 January 1973, is a document which includes more detailed provisions concerning "the conditions, arrangements and timetables for the implementing the transitional stage of association".[69] Similarly, Berksü defines the Protocol as an implementing agreement which would ensure the applicability of the provisions set out in the Association Agreement in line with the economic situation of Turkey.[70] Specifically, provisions to regulate the free movement of Turkish workers in a more concrete way were listed in the articles 36-40.

In Article 36, progressive stages were foreseen so as to ensure the free movement of workers between the parties, between the end of the twelfth and the twenty-second year after the entry into force of Ankara Agreement. It is also indicated in the article that the Association Council would be responsible for establishing relevant rules for the achievement of free movement of workers.[71]

Article 37 talks about the restriction of any discriminatory rules on grounds of nationality, with respect to working conditions and remuneration. Additionally, Article 38 states that the Association Council should take necessary measures for

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the Demirel Case that article 12 makes it possible for the contracting parties to take certain political and economic circumstances into consideration. According to him, such interpretation of the Commission is an example of an effort of the Community to legitimize the tendency to refrain from its liabilities arising from the Agreement due to political, social and economic reasons.

[69] Ateş (1999), pp.7.

[70] Berksü (1999), pp. 44.

[71] According to Köktaş (1999, pp.142), the Association Council was given such a responsibility as means to regulate the free movement of workers in the progressive stage, by taking into consideration the need for preventing possible political and economic problems that might occur during the transitional period of completing the Customs Union and converging economic policies.

the facilitation of employment of Turkish workers, such as work and residence permits. While Article 39 refers to the social security rights of the workers and their family members, Article 40 indicates that Association Council may have recommendations with the aim of facilitating the exchange of young workers.

As it can be inferred from the articles stated above, both the Ankara Agreement and the Additional Protocol foresaw the full achievement of the free movement of workers and tried to put relevant measures in that way. In fact, according to the Additional Protocol, free movement of Turkish workers in the EU would have been ensured by 1 September 1986. However, due to some political and economic developments, the goal of enabling Turkish workers to freely move within the Community could not be achieved.[72]This is very much related to the historical context of Turkey-EU relations which were suspended several times. The first suspension was a result of economic problems Turkey faced in 1970s. According to Karluk, the concessions given to Community with the Additional Protocol were extended due to the enlargement in 1973 and the liabilities of Turkey increased as the Community entered into further economic relations with other international organizations.[73] As it was hugely argued in the literature, the main political issue for the failure of free movement of workers was the military

[72] Köktaş (1999), pp. 144. Also see Rogers (1999) pp. 1-2.

[73] See Karluk, R. (1996) *Avrupa Birliği ve Türkiye*, İstanbul: İstanbul Menkul Kıymetler Borsası, pp. 397. According to the author, Turkey was severely affected by the free trade agreement signed between the EEC and EFTA (European Free Trade Association) in 1972 and Turkey's foreign trade deficit increased since it was kept out of the scope of Generalised System of Preferences which entered into force in 1971. Moreover, the concessions gained by Turkey lost their significance with the extension of Community's external relations and the decrease in the common tariff as a result of the meetings held within the framework of the General Agreement on Tariffs and Trade (GATT) increased the liabilities of Turkey.

coup that was occurred on 12 September 1980. This was the second suspension of Turkey-EU relations that lasted for a period of 6 years.[74] Yet, it is pointed out by Günuğur that it was a move from the EU side upon Turkey's suspension of its commitments regarding its commitments on Customs Union in 1976.[75]

According to Köktaş, the initial aim while designing relevant provisions in Ankara Agreement and the Additional Protocol was to cover all Turkish nationals but due to the abovementioned developments, free movement of workers turned to be considered as a freedom for only Turkish nationals who are legally working in a Member State.[76] In this context, the Association Council Decisions of 2/76, 1/80 and 3/80 drew the boundaries of free movement of Turkish workers legally working in a Member State, in a more detailed manner.

3.2. Secondary Sources

3.2.1. Association Council Decision 2/76

Council Decision 2/76 regulates the detailed rules on the implementation of article 12 of the Ankara Agreement and especially 36 of the Additional Protocol for the first stage which covers 4 years after 1 December 1976 and sets forth the rights of Turkish workers and their family members. According to the provisions of the Decision, giving the priority to workers of Member States of the Community, after three years of legal employment in a Member State of the Community a Turkish worker shall be entitled to respond to an offer of employment, made

[74] Ibid, pp. 398.

[75] Günuğur, H. (2007) *Avrupa Birliği*, Ankara: Avrupa Ekonomik Danışma Merkezi, pp.75.

[76] Köktaş (1999), pp. 144.

under normal conditions and registered with the employment services of that State, for the same occupation, branch of activity and region. After five years of legal employment in a Member State, Turkish workers could enjoy the right to freely access to any paid job in that country.

Furthermore, Turkish workers would be prioritized in case of a need to employ additional workers from non-Community countries. In addition to the rights provided for workers their children could also be entitled to access to general education where the worker is employed. Along with such rights Decision 2/76 includes the *standstill* clause in Article 7 stating that no new restrictions should be introduced to the workers who legally reside and work in a Member State. The Decision 2/76 was designed to be in effect for four years and be replaced by the Decision 1/80. However, the standstill clause in the Article 7 "remains relevant".[77]

3.2.2. Association Council Decision 1/80

Following four years of Decision 2/76, Decision 1/80 was adopted in order to introduce further provisions in the way of developing the Association, regarding the elimination of trade barriers, agriculture on the one hand, and rights on free movement of workers and their families, on the other hand. Indeed, the initial aim of the meeting where the Decision 1/80 was taken was to discuss and set the framework of the last stage upon the progress achieved during the first stage. Yet, as Köktaş points out, rather than to establish the rules for the implementation of the last stage for the application of the provisions in Article 36 of the Additional Protocol, the Decision 1/80 was formulated a little more in favor of Turkish

[77] Rogers (1999), pp. 13.

workers than the Decision 2/76. Likely, According to Özdemir, it brought a "very limited" improvement to the previous one.[78] In this respect, a worker could be entitled to renew his permit to work for the same employer, after one year of legal employment, if a job is available. Moreover, the worker, after having worked for three years, could accept the offers made for the same occupation, whereas the priority would still be given to the Community nationals. Finally, the duration to be employed in any paid job that the worker could freely access to was decreased to four years.

Furthermore, in Article 7, Decision 1/80 introduced certain employment rights to family members:

- right to respond to any job offer in the Member State where the worker is registered to the workforce, after three years of legal residence
- right to access freely to any paid job they desire after five years of legal residence.

Additionally, Article 7 states that:

"children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years."

[78] Özdemir (1999), pp.74.

3.2.3. Association Council Decision 3/80

Decision 3/80, puts provisions for the application of the social security schemes of the Member States to Turkish workers and members of their families. This decision was adopted within the context of Article 39 of the Additional Protocol for the harmonious implementation of the social security rights in parallel with those granted to Community nationals in Regulation 1408/71 and Regulation 574/72 that consists of measures for implementation of the former. As it is stated in the Decision, Turkish workers and their family members would be equally treated with regards to social security rights under the national legislation of the Member State as the nationals of that State. The branches of social security covered under the Decision are listed as sickness and maternity benefits; invalidity benefits, including those intended for the maintenance or improvement of earning capacity; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits and family benefits.

However, due to the comprehensive scope and complex structure of the legal arrangements on social security schemes, social security rights of Turkish workers will not be a subject matter to be dealt with in a detailed way in this thesis and is kept out of the main scope. Yet, it should be noted that the provisions laid down in Decision 3/80 did not fully turned into practice due to the fact that the Council failed to reach a unanimous decision on the implementation of the Decision.[79]

[79] See Van der Mei, A. P. (2003) *Free Movement of Persons within the European Community*: *Cross- Border Access to Public Benefits*, North America: Hart Publishing. pp. 174, Berksü (1999) pp. 59, Köktaş (1999), pp. 212. Van der Mei with reference to Hainler, explains the reason for

Besides, the absence of a provision concerning the entry into force of the Decision enabled certain Member States to raise their arguments against the binding effect of the Decision.[80] The Court of Justice, on the other hand, provided a clear judgment on the entry into force and thus binding effect of the Decision No 3/80 with two pieces of case law (Taflan-Met and Sürül).

3.3. Major Case Law on Free Movement of Turkish Workers within the Community

The last and may be the most significant part of the legal framework on free movement of Turkish workers were shaped by the cases brought in front of the ECJ in order to sustain the applicability of legal rights arising from Ankara Agreement, Additional Protocol and Association Council Decisions. In this respect, it could be said that the evolution of free movement of Turkish workers should be evaluated in the context of case law, including the major cases such as Demirel, Sevince, Kuş, Taflan and also the recent cases. In this part of the thesis, the historical evolution of the free movement of Turkish workers with respect to the Association Law of Turkey-EU will be elaborated in order to facilitate the analysis of the issue within the context of the accession process.

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such a failure as being a result of the unwillingness of Greece, which had newly joined to the Community after the adoption of the Decision, to accept any proposal in favor of Turkey.

[80] Rogers (1999), pp. 41.

3.3.1. Case C-12/86 Demirel[81]

Demirel Case constituted the first example of case-law on free movement of Turkish workers within the community. It was, indeed, the first case where "direct effectiveness" of the provisions laid down in the Ankara Agreement and the Additional Protocol was a matter in question. In this respect, Demirel Case paved the way for further cases to be brought to the Court which created an opportunity for the clarification of the rights of Turkish nationals derived from the Association Law.

The plaintiff in the case was Mrs. Demirel, a Turkish national and the wife of a Turkish worker who had been living and working in Germany since 1979 within the framework of family reunification programme. Mrs. Demirel came to the country with the aim of rejoining her husband without holding a visa valid for the purpose of family re-unification but of visit only. When the duration of her visa had expired, she refused to leave the country and gave birth to her second child. However, her husband could not meet the criteria to be entitled for family reunification at that time, due to the changes made in the relevant legislation which resulted in tighter conditions[82]. Hence, upon the order of German authorities for her being expelled from the country, Mrs. Demirel appealed to the German Court for annulment of the order.

[81] Case C 12/86, Meryem Demirel v Stadt Schwäbisch Gmünd, [1987] ECR 03719.

[82] As it was stated in paragraph 4 of the Case, "those amendments raised from three to eight years the period during which the foreign national was required to have resided continuously and lawfully on German territory."

Within this context, the first question addressed to the Court of Justice was whether Article 12 of the Association Agreement and Article 36 of the Additional Protocol, with reference to Article 7 of the Association Agreement which prohibited further restrictions on freedom of movement, were directly applicable in the internal legislation of Member States.

According to the Court, in order for a provision of an agreement concluded between the Community and a non-member country to be considered as directly applicable, it should refer to a clear and precise obligation, without a requirement to take any further measure. In this regard, Article 12 of the Association Agreement and Article 36 of the Additional Protocol were not found sufficiently clear and precise (unconditional) "to be capable of governing directly the movement of workers".[83] In the same direction, the Court stated that Article 7 of the Agreement did not refer to a prohibition on imposing further restrictions on family reunification but just brought a general obligation for the parties to cooperate for the achievement of the goals of the Agreement. Therefore, the Article 7 could not constitute a ground for an argument to enjoy an individual right such as family reunification which was not directly addressed in the provisions of the Agreement.[84]

As a result, neither of the provisions was considered as a part of Community Law to be directly applicable to the national legislation of the Member States.

[83] Ibid, paragraph 23.

[84] Ibid, paragraph 24

3.3.2. Case C-192/89 Sevince[85]

Similar to the Case of Demirel, Sevince Case covered the "direct effectiveness" of certain provisions of the Association Council Decisions along with the term of "legal employment". In this case, the plaintiff, Mr. Sevince was a Turkish national whose residence permit granted on 22 February 1979 for family circumstances was not extended on 11 September 1980 with the justification that such circumstances ceased to exist any longer. Throughout the period of suspensory effect of appeal, Mr. Sevince qualified to acquire an employment certificate which kept its validity until the final judgement was made on 12 June 1986 against his claims. He also applied for a residence permit on 13 April 1987 on the grounds that he met the condition of legal employment periods laid down in Articles 2 of Decision 2/76 and 6 of Decision 1/80[86] at the time when the judgement was delivered.

After his application was rejected, Mr. Sevince applied to appeal against the decision in Dutch Court which raised the question whether relevant articles of the Decisions 2/76 and 1/80 of the Association Council could be applicable to the national law of the Member States. Having regard to the judgement in Demirel Case, the Court elaborated on the terms of the provisions and reached the conclusion that related provisions of the Decisions 2/76 and 1/80 had direct effect

[85] Case C 192/89, S. Z. Sevince v Staatssecretaris van Justitie [1990] ECR I-03461. .

[86] Article 2(1)(b) of Decision No 2/76, according to which a Turkish worker who has been in legal employment for five years in a Member State of the Community is to enjoy free access in that Member State to any paid employment of his choice, and on the third indent of Article 6(1) of Decision No 1/80, according to which a Turkish worker duly registered as belonging to the labour force of a Member State is to enjoy free access in that Member State to any paid employment of his choice after four years' legal employment.

in Member States. As to the interpretation of the term "legal employment", the Court decided that the time spent during the suspensory effect could not be counted as part of a period for legal employment.

As a result, Sevince Case established the ground for further cases to raise claims on free movement of Turkish nationals with reference to the direct effectiveness of Decisions of 2/76 and 1/80.

3.3.3. Case C 237/91 Kuş[87]

Another significant case brought to the ECJ within the context of the free movement of Turkish workers was about the interpretation of the applicability of article 6 in Decision 1/80 with respect to the term "legal employment" along with the right of residence. In this case, Mr. Kuş was a Turkish national who acquired the residence permit through his marriage with a German national and started work in Germany with a valid work permit. After he got divorced, he applied for an extension of his residence permit which was rejected on the grounds that his marriage was terminated. Upon the decision of rejection, Mr. Kuş took the case to the German Court which delivered the decision on the renewal of his residence permit. Yet, the relevant German authority which ruled out the extension of residence permit appealed to the Higher Court. At this stage, ECJ was asked for a preliminary ruling on the applicability of Article 6 of the Decision 1/80.

In this respect, the first question raised referred to the condition of having been legally employed for at least four years (the third indent of Article 6(1) of

[87] Case C 237/91, Kuş v Landeshauptstadt Wiesbaden [1992] ECR I-06781. .

Decision 1/80). In response to this question, ECJ stated that Mr. Kuş did not meet the condition of minimum period for legal employment

> where he was employed on the basis of a right of residence conferred on him only by the operation of national legislation permitting residence in the host country pending completion of the procedure for the grant of a residence permit, even though his right of residence has been upheld by a judgment at first instance against which an appeal is pending.[88]

The second question was on the applicability of the first indent of Article 6(1) of Decision 1/80 which was interpreted as meaning that a Turkish national who had a residence permit in a Member State with the aim of marrying to a national of that Member State and had worked there for more than one year for the same employer under a valid work permit could enjoy the right to renewal of the work permit although his marriage ceased to exist at the time of his application. Lastly, the third question was whether a Turkish worker has a right directly derived from the abovementioned indents of the relevant article to the renewal of both the work and residence permits. The Court decided that related provisions of Article 6 of the Decision 1/80 could be relied upon for both renewals "since the right of residence is indispensable to access to and engagement in paid employment".[89]

3.3.4. Case C 277/94 Taflan-Met[90]

Being the first case brought in front of the Court of Justice for a preliminary ruling regarding the interpretation of certain provisions of the Decision 3/80,

[88] Ibid, paragraph 18.

[89] Ibid, Summary, paragraph 3.

[90] Case C 277/94, Taflan-Met v. Bestuur van de Sociale Verzekeringsbank [1996] ECR I-04085..

Taflan-Met Case ended the ambiguity on the entry into force and binding effect of the Decision. In Taflan-Met Case, questions were raised to the Court with regards to the proceedings of four similar cases where the plaintiffs based their arguments on the social security rights derived from the Decision 3/80. Three of the plaintiffs, Mrs. Taflan-Met, Mrs. Altun-Baser and Mrs. Andal-Buğdaycı were Turkish nationals and widows of Turkish workers who had been employed in various Member States including the Netherlands. After the death of their husbands, they all applied for a widows' pension in the Member States where their spouses had worked. The Dutch authorities, however, rejected their applications on the ground that their husbands had died in Turkey which hinders their entitlement to claim such social security benefit under the Dutch legislation which allows the insured person or the family members to enjoy the benefit only if the insured risk materializes at a time when the person concerned is covered by that legislation.

The fourth plaintiff was Mr. Akol, a Turkish national who worked in the Netherlands and subsequently in Germany, the latter being his place of residence where his invalidity took place. After being incapacitated, Mr. Akol applied for an invalidity pension in both countries but was refused by the Netherland authorities since he became invalid in Germany. Similar to the previous cases, the justification for such refusal was based on the relevant legislation under which the worker was covered at the time of the risk occurred.

Upon these facts, one of the questions addressed to the Court was whether the Decision 3/80 was applicable in the Community without any further

implementation procedure. In response to this question, the Court decided that Decision No 3/80 entered into force on the date on which it was adopted, namely 19 September 1980, and thus is considered as legally binding on the parties since then. The other question, whether the provisions of Decision, especially Articles 12 and 13 are directly effective in the territory of the Member States, was replied in the following way:

> so long as the supplementary measures essential for implementing Decision No 3/80 have not been adopted by the Council, Articles 12 and 13 of that decision do not have direct effect in the territory of the Member States and are therefore not such as to entitle individuals to rely on them before the national courts.[91]

While reaching this conclusion the Court referred to its previous decisions on Demirel and Sevince cases and stated that the direct applicability and effectiveness of the provisions is possible provided that they are clear and precise without a need of any subsequent measure. Besides, the Court also followed the similar link between the Regulation 1408/71 and Implementing Regulation 574/72, where the adoption of the latter would facilitate the enforcement of the former. Thus, it concluded that although Decision 3/80 entered into force on the date of signature, the provisions thereof could not be applied in the absence of supplementary measures adopted by the Council, which is perceived as "a walking corpse" according to Verschueren.[92]

[91] Ibid, paragraph 38.

[92] Verschueren, H. (1997) 'Na het Arrest Taflan-Met: Is er Leven na de Dood?-Besluit 3/80) (Sociale Zeckerheid) van de Associatieraad EEG-Turkije Bestudeerd, in MR, pp. 29-34, pp.33 quoted from Van der Mei (2003) pp. 175.

CHAPTER IV

4. FREE MOVEMENT OF WORKERS WITHIN THE CONTEXT OF 2004 AND 2007 ENLARGEMENTS

Having touched upon the free movement of workers both at Community level and Turkey-EU relations, this part of the thesis will aim at analyzing the approach of the EU Member States about the implementation and formulation of the rules for free movement of workers with respect to enlargement. In the initial phase of the establishment of the EEC, freedom of persons, actually "workers", was considered to be one of the key elements of the common market. Free circulation of workers within the community could well serve for the restructuring and efficient functioning of the European economy. However, as the number of Member States increased, the population to which such freedom would be applied became a critical issue in terms of enlargement.

In this context, this part of the thesis will be designed with a view to look at the arrangements concerning free movement of labour before and after the accession of the new Member States[93] (since 2004), as it could provide a projection for Turkey's membership, with close reference to the free movement of workers.[94] Thus, the questions to be raised in this part are as follows:

[93] These countries are Czech Republic, Poland, Latvia, Slovakia, Estonia, Lithuania, Slovenia and Hungary, Malta, Cyprus (in 2004 enlargement) which will be called as EU-8 through the thesis, Romania and Bulgaria (in 2007 enlargement).

[94] In a similar way, Brücker, who is one of the main contributors to the literature on the labour mobility within the EU, made an analysis on the economic impacts of migration after Eastern Enlargement and asserted that such an analysis could also serve a beneficial tool for making future expectations on the economic implications of broadening the scope of free movement with new members and candidate countries like Turkey. See Brücker, H. (2007) *Labor Mobility After the*

Why did EU enlargement bring about a relatively restrictive tendency towards the free movement of workers since 2004?

In a general framework, firstly, there was not that much of a need for labour force as it was felt previously. Secondly, old members were curious that potential members could pose economic as well as social threats or fears (unemployment, migration etc.), with their relatively larger and poorer population. The transitional periods foreseen for Greek, Spanish and Portuguese workers in the accession processes of these countries was an example of such fears. However, as Brücker points out, the joining of new members to the Community did not lead to a migration problem in the past.[95] He states that "even with the accession of Greece, Portugal and Spain migration increased only modestly if at all."[96] It is most probably the reason why period for transitional arrangements were ended one year earlier in the accession of Spain and Portugal. Like Brücker, Favell also argues that Southern Enlargement did not result in a huge migration flow but rather led to "manageable flows, positive development trends in the new southern member-states, and high levels of return or circular migration".[97] According to him, the

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European Union's Eastern Enlargement: Who Wins, Who Loses?, Washington: The German Marshall Fund of the United States, pp. 6.

[95] See also Littoz-Monnet A. and Villanueva Penas, B (2005) *Turkey and The European Union: The Implications of A Specific Enlargement*, IRRI/KIIB papers, Royal Institute of International Relations: Brussels, pp.14, available at www.egmontinstitute.be/papers/050404Turquie-ALM-BVP.pdf

[96] Brücker (2007), pp. 5.

[97] Favell, A. "The New Face of East West Migration in Europe" in *Journal of Ethnic and Migration Studies* ,Vol. 34, No. 5, July 2008, pp. 701-716, pp.703.

integration of this new labour force did serve as a kind of inspiration so that further enlargements came into the EU agenda.

Yet, the main challenge on the issue aroused from the accession of ten members on 1 May 2004. These new members were mainly the countries of Central and Eastern Europe which are totally big in population and not easy to absorb. Therefore, transitional arrangements were also applied in 2004 enlargement. In this respect, it is beneficial, in this part of the thesis, to look at the legal framework of such arrangements introduced in the accession of new members since 2004 and ask:

How the free movement of workers was handled in the Accession Agreements and Treaty of Accession of new members and how transitional arrangements were perceived and applied by the old members?

4.1. Free Movement of Workers in the Accession Agreements

When the Council Decisions on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the countries which would become members to the EU in 2004 and 2007 enlargements are examined, it can be seen that free movement of workers are covered in a broader framework under the heading of free movement of persons. The main elements of the framework refer to the relevant legislative and administrative arrangements that

should be done for the mutual recognition of professional qualifications and diplomas, and for the coordination of social security.[98]

On the other hand, no sign or reference to transitional measures that could be introduced for new member states existed in these documents of Accession Partnership. Transitional arrangements which would limit the exercise of the right to free movement of workers for a certain period of time was rather included in the Treaty of Accession.

In this respect, it is useful to base a ground for the definition of transitional arrangements, examine their legal basis and look at their basic features set out in the legal documents as well as supporting documents issued by the Commission.

4.2. Transitional Arrangements

By and large, transitional arrangements are considered as a mechanism to handle possible flow of labour migration from the new member states in a more systematic way. In other words, old member states are given a certain period of time to close their labour markets to free movement of those workers coming from new members. As defined by the Commission,

[98] For some candidate countries, there may be additional provisions such as alignment with the acquis of the Community for ensuring equal treatment for migrant workers. Furthermore, candidate countries should make necessary preparations in order to take part in the EURES network when they become members. See 2003/396/EC and 2003/397/EC: Council Decisions of 19 May 2003 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Bulgaria, OJ L 145, 12.6.2003, pp. 1–20 and Romania, OJ L 145, 12.6.2003, pp.21-29.

> The transitional arrangement for the free movement of workers, as agreed between current and future Member States basically means that the present system, whereby people from the future Member States need to get a work permit to work in the EU, continues to operate for some years after accession.[99]

In this respect, transitional arrangements are designed as a tool used for easing the process of labour integration within the common market mostly in favour of the old members.

They can also be perceived as a remedy for the immediate concerns of those members regarding the distortion of their labour markets together with the social consequences of labour migration. On the other hand, in line with the principle of reciprocity, these transitional arrangements could well be imposed by the new members to the old ones, which in return, leave room for both to adjust their labour markets to the common market. However, it is also argued by Carrera that these transitional periods constitute "a real and unnecessary obstacle to the principles of free movement of persons and non-discrimination on grounds of nationality, which lie at the root of the concept of EU citizenship".[100]

In summary, during the period of transitional arrangements, existing national measures or bilateral agreements would apply to labour migration between these countries, unless otherwise is agreed upon by the parties. To put it differently, the

[99]See *Free Movement For Persons – A Practical Guide For An Enlarged European Union* at http://ec.europa.eu/enlargement/archives/pdf/press_corner/publications/55260_practica_guide_including_comments_en.pdf

[100] Carrera, S. (2004), *What Does Free Movement Mean in Theory and Practice in an Enlarged EU?*, CEPS Working Document No. 208/October 2004, pp.8.

discretion power over the application of transitional arrangements is left solely to the Member State itself.

As it was mentioned above, transitional arrangements were introduced to the Southern European countries joining the EU since their huge population and relatively bad situation in economies and labour markets posed a threat for the Union. Transitional arrangements which may cover a total period of 7 years[101] were also applied to eight new members (EU-8) while Malta and Cyprus were exempted from these transitional restrictions.

4.2.1. Transitional Arrangements in the Treaties of Accession 2003 and 2005

The main reference to the transitional arrangements for free movement of workers could be found in the fourth part of the Act of Accession, which constitutes an integral part of the Treaty of Accession 2003, called "Temporary Provisions", under the Title I "Transitional Measures" and Article 24.

As it is indicated in the Article 24, the transitional arrangements for each new Member State except Cyprus are regulated in the related Annexes to the Treaty; from Annex V to Annex XIV. Although Malta is exempted from transitional restrictions together with Cyprus, there is a special provision in its annex stating that Malta was granted the possibility to invoke transitional measures when it

[101] The paper prepared by the Commission on "The Transitional Arrangements For The Free Movement Of Workers From The New Member States Following Enlargement Of The European Union On 1 May 2004" is available at ec.europa.eu/social/BlobServlet?docId=144&langId=en. The paper explains how the 7 year-period would be applied and points out that "These arrangements are complex, but comparable to those agreed at the time of the accession of Spain and Portugal to the European Community.", pp.1.

faces or expects serious disturbances in its labour market. The details of the transitional arrangements that will be applied to new members are specified in each of the annexes for each new member under the heading of "Freedom of Movement for Persons".

Besides, in the phase of 2007 Enlargement, the Treaty of Accession was signed in 2005 between Bulgaria and Romania and the EU. The transitional arrangements for the new candidate countries were referred in the same manner, under the same headings of the Accession Treaty 2003, but this time in Accession Protocol and Article 20 of the Treaty of Accession 2005. In this respect, Annexes VI and VII encapsulate the general rules on transitional measures foreseen for Bulgaria and Romania respectively, under the heading of "Freedom of Movement for Persons".

Having mentioned the legal grounds for transitional arrangements, it is of great importance to examine those measures which set forth the features of the restrictions that would be applied to the new members. Such examination could also present an opportunity to have a general idea on the measures that Turkey could face after its accession to the EU.

4.2.2. Stages of the Transitional Arrangements and General Rules

According to the provisions set out in the annexes of the Treaties of Accession 2003 and 2005, and the Commission papers issued for the transitional arrangements that would be applied to eight new countries, the seven years of transitional arrangements were formulated in three stages, known as "2 plus 3 plus 2" formula.

At the first stage of the period, old Member States will apply their own national rules for two years after the enlargement whereas they can also open up their labour markets to new Member States at the time of accession. However, in the latter case, it is only possible to lift the transitional arrangements under national law. That is to say, labour migration from one Member State to the other, which both fully opens their labour markets, can exist so long as the national requirements are met by the immigrant worker. Contrarily, Community law on freedom of movement could not be applied during this period even if the receiving Member States do not impose transitional arrangements.[102]

Before the end of the two-year period, the Council will review the report prepared by the Commission on the functioning of the transitional arrangements. In this case, it is necessary that the old Member States notify the Commission whether they will remove those arrangements and ensure the rights on free movement of workers; or whether they will continue to execute national measures for an additional three year period. It is the second stage of the transitional arrangements, when the old members choose to keep transitional arrangements for three more years. It is possible that one more review could be made by the Council upon the request of the new Member State before five year period expires.

By the end of the second stage, it is expected that all the transitional arrangements will be lifted and free movement of workers will be ensured within the Community. Nevertheless, the old Member States can have the right to extend the duration of these arrangements up to two years provided that they notify the

[102] Ibid, pp.3.

Commission on serious disturbances or a threat of such disturbances exist in their labour markets. It is also specified in the Commission document that workers of a new Member State which enjoys free movement of workers under Community law may be automatically issued with a work permit by the old Member State. This may last up to seven years after the accession, with a view to enable the old Member State to record some statistical data concerning migration flows, as a monitoring tool for their labour markets.[103]

Finally, seven years following the accession, all transitional arrangements should be removed and Community law should be applied to workers of all Member States. It should also be kept in mind that transitional arrangements which call for the application of national legislation or bilateral agreements during the relevant period shall not lead to an imposition of further restrictions than those existed at the date of the Accession Treaty[104] was signed. It is the standstill clause which the Member States choosing to employ transitional measures following the enlargement should comply with.

It is also significant to note that old Member States which prefer to end transitional arrangements and welcome workers from the new Member States in their labour markets have the chance to re-impose some limitations, called "safeguard clauses" as well, to free movement of workers. In such case, the Member State which requests to introduce restrictions is expected to have some

[103] Ibid, pp.3.

[104] The Accession Treaty or The Treaty of Accession of the EU-10 was signed on 16 April 2003 between these countries and the EU.

distortions in its labour market of which it should prove in order to justify its request. The same safeguard clause could be introduced between the new Member States which have already opened up their labour markets to each other, so long as an old Member State continuously applies transitional arrangements to a new Member State.

It is also noteworthy to bear in mind again that a new Member State may also impose the same restrictions reciprocally to those old members who apply transitional measures to it.

Yet, when the documents issued by the Commission as guidelines on the implementation of the transitional arrangements are examined, it can be inferred from the language of these documents that old Member States are in a more secure and favourable position. In fact, almost all the sentences in the documents takes the "old Member State" as the main beneficiary of these transitional arrangements and new members were put in a situation where they can just react to the decisions of the old members. On the other side, it can be argued that such concentration on the language of the documents was utilized in a way that the reader could easily understand the rights and obligations of the members; old and new ones. Nevertheless, the wording of these guidelines somehow may give the impression that the old members are the leading actors on the stage whereas the new comers have supporting roles.

Since transitional arrangements partly comes out of an aim to diminish the tensions felt by old Member States for an influx of immigration into their labour markets, it should not be surprising that such favourable mechanisms were

developed. Yet, when the privileged status of old members as regards to free movement of labour is taken into consideration, Carrera, analyzing free movement in terms of the concept of citizenship, argues that such treatment to the nationals of new member states make those people as "second class citizens" or "quasi-outsiders".[105]

As stated before, transitional arrangements were applied not only to EU-8 countries but also to Bulgaria and Romania, following the 2004 enlargement. What lies behind extending the transitional measures to these new Member States were those similar concerns shared by old members regarding the free movement of workers. Actually, the papers issued by the Commission on how the free movement of workers will be put into practice in the new member states in 2004 and 2007 enlargements were almost the same.

In both papers, it is emphasized that such transitional arrangements would be applied to only workers; thus they are not restrictive for the free movement of persons at all. In a broad sense, during the transitional period, the workers of new member countries could enjoy their rights according to the national laws and policies of the older members and the bilateral agreements concluded with them. However, as stated in both papers, those workers of new Member State nationals could have "direct access to labour market" of the Member state where they are

[105] Carrera (2004), pp. 9-10.

"legally working at the date of accession" and "have a work permit or authorization for more than 12 months or longer."[106]

These papers also include other provisions to be assessed in terms of the transitional arrangements. What is interesting for such arrangements is that one of the vital mechanisms in achieving a well functioning common or single market, which is the free movement of workers, were regulated at the discretion of individual member states for a maximum period of 7 years. In this respect, this part of the thesis will elaborate on the procedures applied by individual or group of member states on transitional arrangements. Accordingly, this could possibly open a road for a comparison between different applications with respect to the costs and benefits of free movement of workers.

4.2.3. Application of Transitional Arrangements to EU-8-New Member States by the Old Member States

On 1 May 2004, only three countries decided to open their labour markets to the nationals of all new Member States. These were the United Kingdom, Ireland and Sweden. They also did not intend to re-impose the transitional arrangements to these new members. However, the United Kingdom preferred to provide free access to its labour market by applying mandatory workers registration scheme to the new members. The literature on the impact of 2004 enlargement, known also as Eastern Enlargement, reveals that these three countries enjoyed rather positive

[106] See "Free Movement Of Workers To And From The New Member States – How Will It Work In Practice?" at http://ec.europa.eu/employment_social/free_movement/docs/pr_en.pdf and "Free Movement Of Workers To And From Bulgaria And Romania –How Will It Work In Practice?" at http://ec.europa.eu/employment_social/free_movement/docs/accession_2007_en.pdf

outcomes of the free movement of workers both on their labour markets as well as their economies.[107]

When the first stage of the transitional arrangements expired on 1 May 2006, Greece, Spain, Portugal and Finland decided not to continue to impose restrictive measures anymore and opened their labour markets. These countries were followed by Italy, Netherlands, Luxembourg and France respectively.

On 1 May 2009, when the transitional restrictions should be lifted in principle, Belgium and Denmark announced that they would comply with the principle and no longer apply transitional arrangements. However, Germany and Austria used the option to further extend the period of those temporary measures on the grounds that they had faced distortions in their labour markets. Those two countries are the only ones which keep restrictions.

When the EU-8 countries are examined with respect to the implementation of reciprocal restrictions to the old members, it is seen that Czech Republic, Estonia, Latvia, Lithuania and Slovakia did not apply reciprocal measures since their

[107] The Estearn Enlargement opened up a wide spectrum for research on the impact of enlargement on labour mobility. Most of the works dedicated to the intra-mobility of labour force after enlargement were designed in the forms of: surveys on potential migration tendencies of the sending countries, extrapolations from previous migration flows and finally, econometric models with regression analysis. A review of previous estimations on labour mobility within the EU is available in European Integration Consortium (2009), Final Report on *Labour mobility within the EU in the context of enlargement and the functioning of the transitional arrangements*, Nuremberg, pp.33. Furthermore, a table on the relevant studies performed by several authors on the estimations of the impact of enlargement on migration trends is provided in one of the Papers published by the European Central Bank. See Heinz, F. F. and Ward-Warmedinger, M.E. (October 2006), *Cross-Border Labour Mobility within an Enlarged EU*, Occasional Paper Series, No. 52, Frankfurt: European Central Bank, pp.11.

accession to the EU. In the mean time, Slovenia, Poland and Hungary lifted their reciprocal arrangements to old members respectively.

In the case of 2007 enlargement, however, more member states decided to introduce transitional measures for Bulgaria and Romania. As stated in the Communication issued by the Commission on the impact of free movement workers in the context of EU enlargement for the first stage of the transitional arrangements applied to these two countries, only ten Member States[108] out of EU-25 provided these new comers with free access to their labour markets.[109] Thus, remaining fifteen Member States applied their national legislation concerning the labour market regulations which ended up with diversified systems on the restrictions imposed. [110]

Significantly enough, among these members who decided to close their labour markets to the new comers were Ireland and the United Kingdom which had pioneered the decision not to apply any restrictions to new Member States in 2004 enlargement. It is thought to be a result of the changing route of labour migration towards those countries which immediately opened up their doors to workers from new members in 2004. As Brücker argues, Eastern Enlargement was followed by

[108] These countries were Finland and Sweden for EU-15; Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Poland, Slovenia and Slovakia for EU-10.

[109] European Commission (2008), *Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty*, Brussels, COM(2008) 765 final.

[110] As mentioned in the Communication, the restrictions have diverging paths according to the national measures applied. While countries like Austria, Belgium and Luxembourg impose simplier procedures, some countries (Austria, France, Hungary, Germany) prefer not to conduct labour market tests before issuing work permits. Even, it is possible that some countires (Denmark, Hungary and Italy) do not call for work permits for certain occupations or under specified conditions, pp.3.

"diversion in the migration flows away from countries which pursued a restrictive immigration policy to those which decided to open their labour markets largely or completely."[111]However, he reminds the reader that this pattern was only reflected in the UK and Ireland, but not in Scandinavian countries like Sweden and Denmark, by stating that language and dynamics of the labour markets in the former countries might have given way to such change after enlargement.

As a result, those countries who had received relatively higher levels of labour from new members after 2004 enlargement were concerned about receiving huge amounts of labour migration also from Bulgaria and Romania. Therefore, they ended up with the idea that they should impose some restrictions during the transitional period to avoid problems of over-migration.[112]

The second stage of the transitional arrangements for Bulgaria and Romania started on 1 January 2009. The recent data about the preferences of the old Member States on transitional measures is presented as of 1 May 2009, the last stage of those measures to be applied to EU-8 Member States. As, it can be seen from Table 1, five more Member States (Denmark, Greece, Spain and Portugal from EU-15; Hungary from EU-10) opened up their labour markets for Bulgarian and Romanian workers.

[111] Brücker (2007), pp. 7.

[112] Ibid, 10.

Table 1 Recent Data on the Application of Transitional Arrangements in the EU (as of 1 May 2009)

Member State		**Workers from the EU-8/EU-15**	**Workers from Bulgaria and Romania/EU-25**
EU-15	Belgium	Free access (1 May 2009)	Restrictions with simplifications
	Denmark	Free access (1 May 2009)	Free access (1 May 2009)
	Germany	Restrictions with simplifications*	Restrictions with simplifications*
	Ireland	Free access (1 May 2004)	Restrictions
	Greece	Free access (1 May 2006)	Free access (1 January 2009)
	Spain	Free access (1 May 2006)	Free access (1 January 2009)
	France	Free access (1 July 2008)	Restrictions with simplifications
	Italy	Free access (27 July 2006)	Restrictions with simplifications
	Luxembourg	Free access (1 November 2007)	Restrictions with simplifications
	Netherlands	Free access (1 May 2007)	Restrictions with simplifications
	Austria	Restrictions with simplifications*	Restrictions with simplifications*
	Portugal	Free access (1 May 2006)	Free access (1 January 2009)
	Finland	Free access (1 May 2006)	Free access (1 January 2007)
	Sweden	Free access (1 May 2004)	Free access (1 January 2007)
	United Kingdom	Access-mandatory workers registration scheme (1 May 2004)	Restrictions with simplifications
EU-10	Czech Republic	No reciprocal measures	Free access- national law (1 January 2007)
	Cyprus	-	Free access (1 January 2007)
	Estonia	No reciprocal measures	Free access (1 January 2007)

Table 1 (cont'd.)

	Latvia	No reciprocal measures	Free access (1 January 2007)
	Lithuania	No reciprocal measures	Free access (1 January 2007)
	Hungary	No reciprocal measures (1 January 2009)	Free access (1 January 2009)
	Malta	-	Restrictions
	Poland	No reciprocal measures (17 January 2007)	Free access (1 January 2007)
	Slovenia	No reciprocal measures (25 May 2006)	Free access (1 January 2007)
	Slovakia	No reciprocal measures	Free access (1 January 2007)
EU-2	Bulgaria	-	No reciprocal measures
	Romania	-	No reciprocal measures

*Restrictions also on the posting of workers in certain sectors
Source: *Summary table of Member State policies* available on http://ec.europa.eu/social/main.jsp?catId=466&langId=en

4.2.4. The Need for Applying Transitional Arrangements

As stated severally above, the need to introduce transitional arrangements in the phase of further enlargements was mainly driven by the concerns of the old members regarding the distortion of their labour market situations, together with the social consequences of labour migration. The main bunch of those concerns are related to negative implications on GDP, wage and employment conditions in

the receiving countries as well as the potential burden on welfare systems, especially with respect to social security.[113]

4.2.4.1. Income Gaps

First of all, the relatively bad economic performance of the new members with respect to GDP per capita and wages make the old members more willing to take actions in favour of transitional measures. In fact, income gap and wage differentials between sending and receiving countries are counted among the main (economic) determinants of migration.[114] Hence, it is not surprising that the estimations on migration flow from new members were grounded on existing situation of those members with respect to the key economic indicators at the time of their accession.

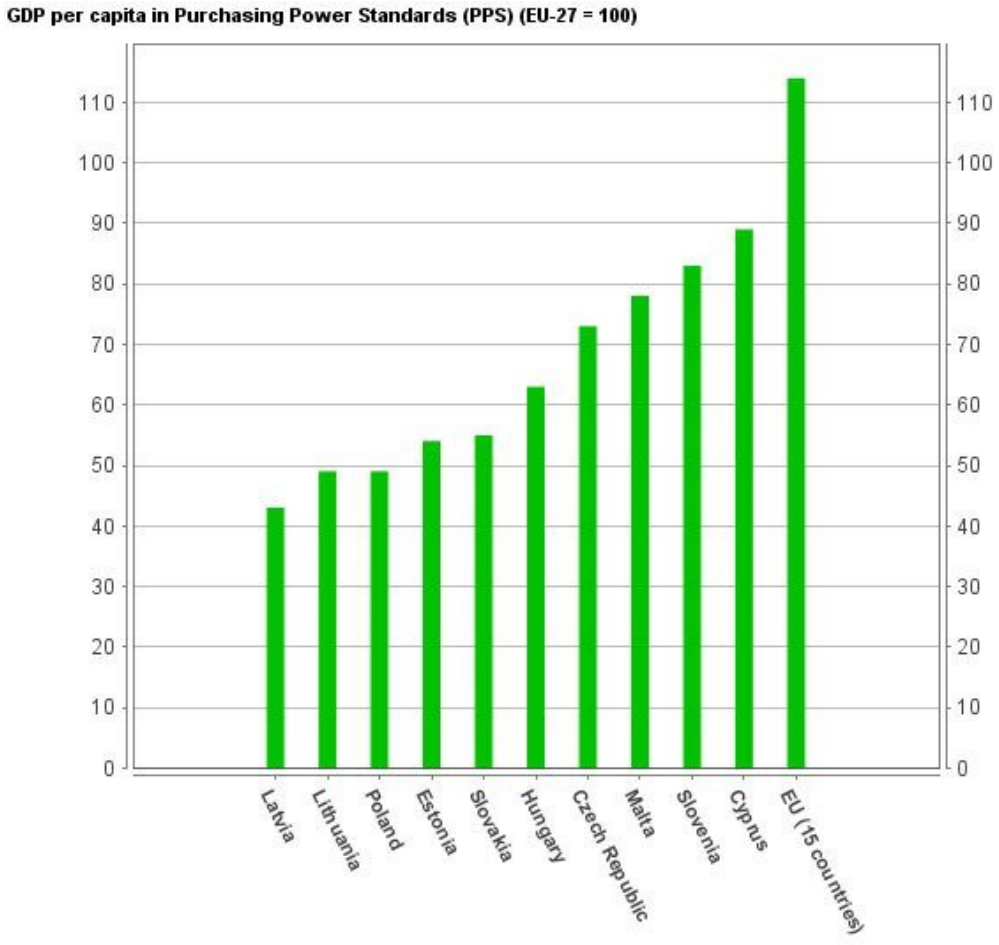
[113] See Heinz, F. F. and Ward-Warmedinger, M.E. (October 2006), *Cross-Border Labour Mobility within an Enlarged EU*, Occasional Paper Series, No. 52, Frankfurt: European Central Bank, pp.8, Brücker, H. (2007) Labor Mobility After the European Union's Eastern Enlargement: Who Wins, Who Loses?, Washington: The German Marshall Fund of the United States, European Integration Consortium (2009), Final Report on *Labour mobility within the EU in the context of enlargement and the functioning of the transitional arrangements*, Nuremberg.

[114]Heinz and Ward-Warmedinger (October 2006), pp.15. Determinants of migration are examined within the context of the study published by The European Central Bank. According to the summary provided in this study, wage differentials are cited among the most significant determinants of migration under neo-classical approach which puts individual's decision at the core of decision to migrate. More specifically, it is suggested that an individual may be attracted by high wage differentials, thus migrate to countries with higher wage opportunities even though they are unlikely to be employed there. Additionally, income of the individual relative to the society is crucial from the perspective of "new economics of migration" theory, which takes the household as the main decision-maker for migration. It argues that individuals who are poor in a rich society tend to emigrate more than those who are poor in a poor society. Thus, it considers income imbalances within the society as a variable for migration tendencies. See Fertig, M. and C. Schmidt (2002), *Mobility within Europe – What do we (still not) know?*, IZA discussion paper No. 447.

In this respect, when the GDP per capita in Purchasing Power Standard (PPS) is analyzed, it can be seen that all potential members had GDPs below the average of the old members; i.e. EU-15 in 2003, right before 2004 enlargement (Graph 1).

According to the statistical data, the top three countries who had relatively good records among new members with regards to income were Cyprus and Malta (exempted from transitional restrictions) and Slovenia in 2004 enlargement.

Graph 1 GDP per Capita in Purchasing Power Standards (PPS) in 2004 Enlargement



Source: Eurostat, 2003. Extracted data for comparison between EU-15 and ten new members.

It is useful to bear in mind that data provided by Eurostat takes the GDP per capita at purchasing power standards. However, Brücker reminds that the high level of absolute income gap between the old members and candidate countries before Eastern Enlargement also holds true when GDP per capita is measured at current exchange rates, but with less convergence. He also states that for both calculations, the GDP levels of eight Central and Eastern European countries

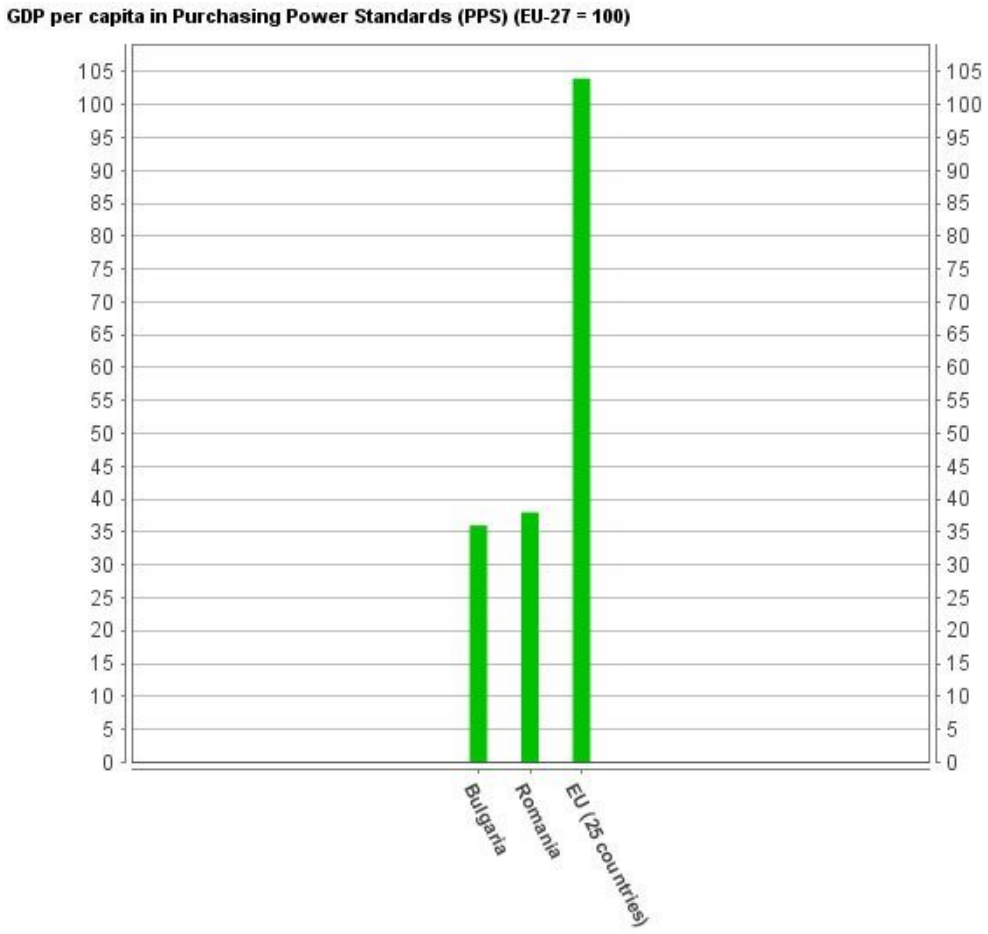
(EU-8, after enlargement) were higher (46 % and 23 % of the EU-15 average, respectively) than the average of all candidate countries (EU-10, after enlargement) in 2001.[115] Furthermore, he points out the fact that the income gap between the EU and the potential new members of 2004 enlargement was relatively higher with respect to previous enlargements.[116]

In the case of 2007 enlargement, Romania and Bulgaria only had approximately one third of the GDP per capita in PPS created in EU-25 in 2006, before the last EU enlargement (Graph 2). In this respect, the comparison of Graph1 and Graph 2 reveals that EU-8 countries were economically stronger than Bulgaria and Romania at the time of their joining the EU. This may also be one of the factors that result in higher number old members which preferred to limit access to their labour markets by two new comers. Hence, it should not be surprising that more Member States imposed transitional arrangements to these two countries which had a big income gap with the EU, also having the worst records in income levels when compared to the countries of all enlargements.

[115] Brücker, H. et al. (2003), *Potential Migration from Central and Eastern Europe into EU-15-An Update*, Berlin: DIW, pp.6.

[116] Ibid, pp.7.

Graph 2 GDP per Capita in Purchasing Power Standards (PPS) in 2007 Enlargement



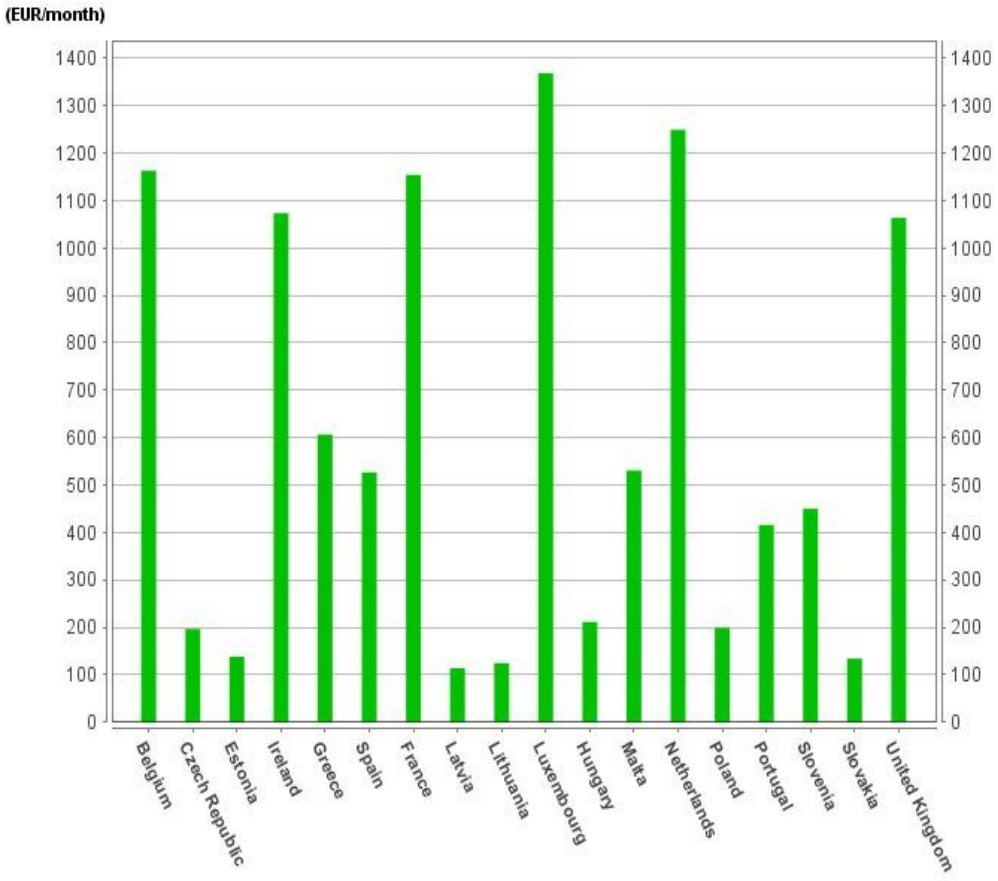
Source: Eurostat, 2006. Extracted data for comparison between EU-25 and two new members.

4.2.4.2. Wage Differentials

The analysis of wage differentials was also one of the common denominators of the studies dedicated for the assessment of possible migration trends after EU enlargements. Similar to the situation in income levels, the minimum wages in the new Member States were also lagging behind most of those in old members. This

led to an economic concern for the latter in the sense that their labour markets would be exposed to migration flows from those poorer countries where the labour markets were offering less. In 2004 enlargement, Graph 3 indicates that all accession countries (except Cyprus) had considerably lower levels of minimum wages than the average of nine countries in the EU-15. Among these countries joining the EU, Malta and Slovenia were in a better position even though they were far below the EU average.

Graph 3 Minimum Wages



Source: Eurostat, 2003. Extracted data for comparison between EU-15 and ten new members. There is no data available from Sweden, Finland, Austria, Cyprus, Italy, Denmark and Germany from EU-15 and Cyprus from EU-10.

When minimum wages were considered in the wake of 2007 enlargement, the data reveals even a worse situation in terms of Bulgaria and Romania, which both had significantly lower levels in comparison with old members. In fact, none of the EU-10 countries did have such a low level of minimum wage at the time of their accession.

The economic logic of the labour migration suggests that people would prefer to migrate to countries where wages are higher sufficiently enough than their national labour markets. Therefore, it is not unusual that right after 2004 enlargement, Ireland and the UK, which enabled the new members with free access to the labour markets with higher wages, became the main destinations of intra-EU migration. Yet, Heinz, and Ward-Warmedinger suggest that there is not a clear, strong positive relationship between wage differentials and the tendency to migrate. According to them, the decision of labour migration may change with regards to the measurement used for wage determination.[117]

4.2.4.3. Unemployment Rates

Together with economic determinants mentioned above, the unemployment rates of old and new member states are also considered to be a significant variable for the pattern of labour migration. It is believed that people tend to migrate to the countries where unemployment rates are low and more job opportunities are available, together with higher amounts of wages.

[117] Heinz and Ward-Warmedinger (October 2006), pp.16. According to the authors, generally it could be more appropriate to make the comparison on wage levels at purchasing power parity for labour migration flow. For commuters however, they suggest that wage differential at exchange rates would be more important in their migration decisions.

When the unemployment rates of old and potential new members are examined before 2004 enlargement, it can be seen that half of these new comers had lower levels of unemployment than the average of EU-15 whereas the other half were almost suffering from higher unemployment rates. Especially, Poland, with its relatively big population, had the highest level of unemployment (almost 20 %) among the new member states, which created the fear of invasion by the so-called "Polish plumber" to the labour markets of old members. Together with Poland, Slovakia had also a huge number of unemployed people before the accession period. At the same time, these two countries were the most disadvantaged potential members in the phase of enlargement with regards to youth unemployment, which was considered among the main challenges for the old members to decide on the application of Community law on free movement of workers. In fact, the youth unemployment rates in Poland (41.9 %) and Slovakia (33.4 %) were far beyond the EU-15 average (15.3%) in 2003. Within this context, Poland and Slovakia, having high unemployment rates, also within their young population, were supposed to be the major sending countries in the labour migration flow to old members.[118]

In 2007 enlargement, while the total unemployment rate of Bulgaria (9 %) was higher than EU-15 (7.7 %) and EU-25 (8.2 %) levels, Romania had lower levels of unemployment (7.3 %) with comparison to both EU averages in 2006. On the other hand, the unemployment rate among the young population for both countries were also above the EU- 15 (15.7 %) and EU-25 (16.9 %) averages, yet with

[118] Ibid, 20.

slight differences (Bulgaria: 19.5% and Romania: 21.4 %) when compared to the experience of previous enlargement with Poland and Slovakia.

To sum up, differences in income, wages and unemployment rates were mostly covered under the major determinants of labour migration. When all the statistical data is analyzed, it is obvious that all accession countries have divergent levels with respect to those determinants. Yet, what is significant in terms of free movement of workers is that the average performance of these countries was lagging behind the EU averages at the time of their accession. As a result, transitional arrangements were foreseen as a remedy to manage the challenges that could arise from the abovementioned issues and be posed by new comers for the old members. Nevertheless, all these variables are argued to be significant for the labour migration trends in the short-term. Furthermore, it is also asserted that the impact of such migration would not be unique for all Member States since some members attract more labour migration than the others. In this respect, it would be better to keep in mind the suggestions made for the medium to long-term that the labour mobility would tend to decrease if the economic performance of the new members after EU membership would enable them to catch-up with the average of old members. Besides, as their population would also enter into an ageing phase, the likelihood of migration flow from new member states is expected to fall down.[119]

[119] Ibid, 21.

4.2.5. The Assessment of Free Movement of Workers and Transitional Arrangements after 2004 and 2007 Enlargements

The functioning of the transitional arrangements on free movement of workers was analyzed in the Reports prepared by the Commission to the Council with reference to the relevant annexes of Treaties of Accession of 2003 and 2005.

In 2004 enlargement, the first phase of transitional arrangements that were applied to EU-8 Member States ended in 30 April 2006 and the Commission Report published in February 2006[120] summarized the main findings related to the impact of transitional arrangements. The main argument of the document was that labour migration to the old member states was not high as it was expected but remained modest.

According to the report, the impact of free movement of workers on the economies of the countries which opened up their labour markets to the new members was generally positive. On the other hand, it was stated by some countries which decided to impose restrictions (Germany and Austria) that transitional arrangements enabled them to manage the migration flows. In this respect, they found it beneficial to keep such arrangements in future phases in order to cope with the concerns of absorption capacity, integration of migrant population and modified internal structures etc. However, different forms of

[120] European Commission (2006), *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty(period 1 May 2004-30 April 2006)*, Brussels, COM (2006) 48 final.

employment by the new comers emerged in these countries so that posted workers or self-employed were seen as a reflection of such measures. Similarly, it was emphasized in the Report by the social partners that restrictions on the free movement of labour resulted in an increase for undeclared work, together with self-employed work; work on contractual basis and also for service provision. According to Ooik and Mathis, this increase in the number of migrants who were self-employed from the EU-10 should be associated with the fact that no transitional arrangements were foreseen on the freedom of establishment and to provide services while such measures were imposed on the free movement of workers.[121]

In order to examine the implications of transitional arrangements on labour mobility before and after the enlargement, the Commission used the national data provided by the Member States on work or residence permits and all relevant administrative information. Additionally, the statistical data of Eurostat was also utilized in the analysis, since aggregation of national data could not be easily done due to differences in data collection between countries.

One of the main findings of the Report is that the number of workers from EU-10 has increased in the EU-15 Member States after the enlargement but the share of residence and work permits issued for these workers in proportion to the total working age population remained relatively low. Besides, it was also reported by some countries that most of residence and work permits were issued for short-

[121] Van Ooik, R.H. and Mathis, J.H. (2010) *Legal aspects of Turkey's Accession to the European Union: Temporary and Permanent Derogations from the EU's Economic Acquis?*, pp.8. Paper presented in Summer Course and Expert Conference on European and International Law, 14 June – 2 July 2010, Yeditepe University, Istanbul, Turkey.

term or seasonal basis. Nevertheless, it was also pointed out that these national data might not reflect the real situation since they neglected the level of return migration and duration of the permits. That is to say, the data excluded the number of EU-10 nationals who return to their country of origin after the enlargement but at the same time included the number of permits issued for EU-10 nationals before the enlargement. Therefore, statistical evidence from the Labour Force Survey of Eurostat was provided as a better/complementary source for the actual situation.

In this respect, the figures on the resident working age population by nationality before and after the enlargement could yield a good comparison for the impact of transitional arrangements on labour mobility. Two years after the enlargement, the number of the working age population from the EU-10 countries who reside in EU-15 Member States was relatively low in proportion. In fact, the data remained almost constant during this period except for countries such as Austria where there was an increase from 0.7 % to 1.4 % and Ireland where 2% of its working age population was constituted by EU-10 nationals in 2005. In total, the proportion of those EU-10 nationals within EU-15 was just increased by 0.2 % in two years. Despite all the data provided by the national authorities and Eurostat statistics, the Commission alerts the reader that they do not necessarily yield a direct correlation between the size of labour migration from new Member States and the transitional arrangements applied. In fact, it is asserted that the main driving force for the labour mobility within the EU is determined by the demand and supply in the labour markets of members.

The report also evaluated the impact of enlargement on the employment rates which referred to a positive result in terms of receiving countries. More specifically, the data indicated that the EU-10 nationals had considerably high levels of employment after their accession, which even turned out to exceed the level of nationals of that country. In addition, it was argued in the Report that the migration flow from the EU-10 members did not led to a substitution for the national workforce in the receiving countries. On the contrary, the sectoral distribution of the jobs acquired by the EU-10 nationals revealed that the number of those workers employed in construction sector was more than the nationals of the EU-15 Member States. Furthermore, the workers who took up employment in the receiving old members had quite good skills with mostly medium-level qualifications. As a result, the migration flow from the EU-10 Member States was considered to be complementary to the workforce of the EU-15 Member States, and thus had positive impact on their labour markets and economic performance.

The second piece of documents issued by the Commission on the assessment of free movement of workers after further enlargement was the Report on the first phase of the transitional arrangements introduced in 2007 enlargement.[122] This Report also covered the findings related to the second phase of the transitional arrangements applied to the EU-10 Member States. As stated in the Report, annual increase in the level of Romanian and Bulgarian workers who moved to EU-25 countries between 2003 and 2007 was almost 290.000. Thus, even before

[122] European Commission (2008), *Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty*, Brussels, COM(2008) 765 final.

the enlargement the ascending tendency for labour migration from these new members had already been started. Of these two new Member States, Romania had a share of 19% of the total migration within the EU-27, whereas Bulgaria had 4%. The number of workers from these countries to EU-15 just moved from 0.2 % in 2003 up to 0.5 % in 2007. In the same year, this increase in the labour migration from EU-2 was concentrated mainly in Spain and Italy, where the proportion of Bulgarian and Romanian nationals in those countries' population reached 1.9% and 1.1 % consecutively.

In the case of EU-10 Member States, about 1.1 million people migrated to EU-15 since 2004. When the main destination countries were examined, Ireland was the first country to host heavily nationals of EU-10 with respect to its working age population (5%), and then came the UK (1.2 %). It is also emphasized by the Commission that the average flow of migration from both EU-10 and EU-2 members to the EU-15 countries fell short of those third-country nationals and other EU-15 citizens.

Other findings of the Report revealed that most of the labour mobility after two enlargements was temporary in nature. Moreover, migration flows from the EU-10, where Ireland and the UK were the main destinations, did no longer seem to continue in the same direction due to the existence of return migration and extension of free access to labour markets of other EU-15 countries. This argument is also raised for the EU-2 countries which had quite high amounts of migration flows to the EU during previous years; thus additional migration flows are not expected to be huge. These suggestions were also supported by the

relevant data regarding the positive developments in the economies and labour markets of the sending countries, so that the possibility of further migration is considered to be limited.

As regards to the analysis of the labour market situation after two enlargements, the data indicated that most of those who migrate from new members took up employment in the receiving countries. It was reflected in the average employment rates in the sense that Bulgarian and Romanian migrants had almost the same employment levels with the EU-15 in 2007, whereas migrants from the EU-10 had higher levels. The sectors where the migrant workers were employed were similar to the data provided by the Commission Report in 2006. This time, Bulgarian and Romanian migrants heavily worked in agriculture, construction and services sectors and migrants from EU-10 took up employment mainly in manufacturing, construction and services sectors. As reported in 2006, workers from EU-10 possessed jobs with medium and low level skills and the same trend was observed in EU-2 with less share of high skilled employment than the EU-10. On the other side, the unemployment rates for migrants from EU-2 to the EU-15 were higher when compared to EU-10 and EU-15.

CHAPTER V

5. THE FUTURE OF FREE MOVEMENT OF TURKISH WORKERS IN THE LIGHT OF RECENT DEVELOPMENTS

The history of Turkey's efforts for accession to the EU dates more than fifty years ago, with ups and downs and Turkey's accession has been a subject of discussion since then.[123] On the other hand, since the 2004 and 2007 enlargements, EU went into debates of absorbing the new member states and future enlargements. Within this context, main issues associated to Turkey's membership have been its geographical positioning, the big size of its population, and its relations with neighbors, cultural and religious differences, and economic implications on the EU.[124] Of these issues, the economic and migration concerns could be well related to the free movement of Turkish workers. It is pointed out in the Commission Staff Working Document that full application of free movement of workers would result in further migration in the long run. It is also emphasized that the consequences of such migration could be both positive as it could "contribute to mitigating the possible reduction of the growth potential of the EU due to its

[123] Free movement of workers was an integral part of these efforts from the very beginning of legal relations between Turkey and the EU. In fact, according to Karluk, solving the problems stemming from the free movement of workers was one of the main aims of Turkey's application for full membership in 1987. Karluk (1996), pp. 447.

[124] See Lejour, A. M. and de Mooij, R.A. (2005) "Turkish Delight: Does Turkey's Accession to the EU Bring Economic Benefits?" in Kyklos, Vol. 58- 2005, No. 1,pp. 87-120. and Tarifa, F. and Adams, B. (2007) " Who is the Sick Man of Europe? A Wavering EU Should Let Turkey In" in Mediterranean Quarterly (Winter 2007) 18:1, pp. 52-74.

ageing population" and negative as it could "lead to disturbances in the EU labour market".[125]

In order to have an idea about the future of free movement of Turkish workers, this part of the thesis will look at the relevant parts of the legal documents in the negotiation process where specific provisions are set with regards to free movement of workers. Moreover, economic and labour market indicators which were taken into consideration in previous enlargement waves will be examined. Additionally, recent developments in the case law and permanent safeguard clauses which are foreseen for Turkey's potential membership will be touched upon. Hence, in this part of the thesis the following questions will be addressed: what are the EU concerns in relation to free movement of Turkish workers in case of accession and how the free movement of Turkish workers will be formulated?

In order to have a view on the future of the free movement of Turkish workers within the EU, it is of vital importance to look at the recent legal documents concerning Turkey-EU relations and see how this issue is dealt within the framework of Turkey's membership.

5.1. Free Movement of Workers after Candidacy: Accession Partnerships, National Programmes and the Negotiating Framework

In 1999, when Turkey was entitled to the candidacy in the Helsinki Summit, it was also stated by the European Council that an Accession Partnership would be established for Turkey. To this aim, a Council Regulation on assistance to Turkey

[125] European Commission (2004), Commission Staff Working Document, *Issues Arising From Turkey's Membership Perspective*, Brussels, 656 final, pp.15-16.

in the framework of the pre-accession strategy, and in particular on the establishment of an Accession Partnership, also known as Framework Regulation was adopted on 26 February 2001.[126] Upon this Regulation, the first and main legal document addressing the principles, objectives and priorities of Turkey's accession to the EU, i.e. the Accession Partnership Document for Turkey was published on 8 March 2001.[127] Nonetheless; the free movement of persons or workers was not covered under this document. However, the Turkish National Programme prepared for the adoption of the Acquis in 2001 set out the necessary arrangements to be taken in the way to align with the acquis with regards to medium-term priorities such as right of residence, free movement of workers and the coordination of social security systems, all which are covered under free movement of persons. [128]

In fact, in the executive summary of the National Programme 2001, potential application of transitional arrangements on the free movement of persons was also mentioned with the following statements:

> It has been envisaged that many issues related to the free movement of persons, considered to be a very sensitive issue by EU member states, will be dealt with at the full member stage, and possibly through transitional arrangements.
>
> However, Decisions Nos. 1/80 and 3/80 of the Turkey-EU Council laying down the procedures related to the entry of Turkish workers and their families to the EU employment market and their wages and working conditions, need to be updated by taking into consideration the interpretations of the European Court of

[126] Official Journal L58/1 of 28.02.2001

[127] Council Decision on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, 2001/235/EC, Official Journal of the European Communities L 85, pp 13-23.

[128] Turkish National Programme for the Adoption of the Acquis 2001, pp.115-128 available at http://www.abgs.gov.tr/index.php?p=195&l=2

> Justice. There is a need for new Association Council Decisions that will permit our citizens working legally and residing in member states to exercise the right to free movement without having to wait for Turkey's full membership.

It was in 2003, when the revised document on Accession Partnership[129] was issued that the free movement of persons was included in the document under medium term priorities. Accordingly, harmonization of the acquis on the recognition of professional qualifications was stated as the main goal to be achieved in the field of free movement of persons.[130] In correspondence to the provision of the Accession Partnership, Turkey made some commitments concerning the alignment with the EU legislation and defined the necessary steps for the legal arrangements to establish the system for mutual recognition of professional qualifications in its 2003 National Programme for the Adoption of the Acquis.[131]

In 2004, the Commission published the Recommendation on Turkey's progress in the accession process and stated that there had been little progress in the field of free movement of persons. It was in the same year, in the Brussels Summit held on 17 December that the starting date of negotiations was announced with a couple of decisions concerning Turkey and the negotiation process.

As a turning point in Turkey's EU accession process, the negotiations started on 3 October 2005 and Negotiating Framework[132] which set the principles to be

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[129] Council Decision of 19 May 2003, on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Turkey, 2003/398/EC , published in Official Journal L145/40 of 12.06.2003.

[130] Ibid, pp.51.

[131] Turkish National Programme for the Adoption of the Acquis 2003, pp.120-127, available at http://www.abgs.gov.tr/index.php?p=196&l=2

[132] Negotiating Framework (3 October 2005) Luxembourg, available at http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf

followed during the negotiations was also adopted. In this document, it was envisaged that accession would be the main goal. Accordingly, this goal would be achieved through an open-ended negotiation process where the outcome could not be anticipated beforehand. As argued by Andoura, "the negotiating framework contains conditions that are more restrictive than those imposed by the EU to former acceding countries."[133]

The main reference made upon the free movement of persons was related to the measures to be considered in the form of long transitional periods, derogations, specific arrangements or permanent safeguard clauses, which were stated in the Article 12 of the Framework.[134] In this respect, the inclusion of possible precautious arrangements to be imposed on free movement of persons could well be perceived as a signal that Turkey would face problems with fully enjoying the rights on free movement of persons. As Yılmaz rightly figures out, transitional arrangements which were covered not in the Negotiating Frameworks of the EU-10 but in Accession Treaty of 2003 were addressing exclusively to the free movement of workers. Thus, the same logic should also hold true for Turkey's accession.[135] In fact, it was already stated in the annexes of the Accession Treaty 2003 that those transitional arrangements would neither limit the exercise of free movement of persons with respect to right of residence nor be applied to the provisions on the coordination of social security systems.

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[133] Andoura, S. (2005), *European Union's Capacity to Absorb Turkey*, Egmont European Affairs Program Paper, November, 2005, pp.1.

[134] It was also stated in the Council Decisions of the Brussels Summit in 2004.

[135] Yılmaz, A. (2008), pp.116. The author supports his argument with the existence of the chapter 2 which was called "free movement of workers", but not persons.

Such strict provisions emphasized in the Negotiating Framework can also be linked to the fears or concerns of the EU on the absorption capacity for further enlargements, especially for a huge country as Turkey. As it was mentioned in the previous chapter, similar fears for 2004 enlargement shared by most of the old members were reflected in the imposition of transitional arrangements upon the new members. Since such concerns on the last enlargement of 2004 were relevant for the EU at the time of starting the negotiations with Turkey, it is not surprising that the Council gave specific utterance to the transitional measures.

On the other hand, it was mentioned that the individual Member State should be provided with a significant role in the decision making process for the establishment of free movement of persons, to a great extent. Furthermore, it was pointed out that the application of such measures should be considered in accordance with the influence they had on the functioning of the internal market and competition.

According to Yılmaz, the opening of the negotiations between Turkey and the EU in 2005 made it necessary to revise the Accession Partnership once more.[136] In this context, the revised Accession Partnership was published on 26.01.2006 and it was stated in the document that it

> provides the basis for a number of policy instruments which will be used to help the candidate state in the preparations for membership. In particular, the revised

[136] Ibid, pp.109.

> Accession Partnership will serve as a basis for future political reforms and as a yardstick against which to measure future progress.[137]

In the revised document, substantial harmonization with the acquis on recognition of professional qualifications was again foreseen among the medium term priorities but this time within the context of the right of establishment and freedom to provide services.

Two years following the 2006 Accession Partnership, the Council issued a new Accession Partnership in 2008[138] which repealed the older one. Again under the medium term priorities but now under the heading of free movement of workers, it was pointed out that Turkey should "ensure that the Public Employment Services have adequate capacity to guarantee participation in the EURES (European Employment Services) network" and "continue to strengthen administrative structures, in particular for the coordination of social security schemes."[139]

Upon this last Accession Partnership of 2008, Turkey adopted its recent National Programme for the Adoption of the Acquis in 2008 where it set out the plan for measures to be taken in order to meet the medium term priorities with regards to free movement of workers stated above, enclosed with a timetable.

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[137] Council Decision of 23 January 2006, on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Turkey, 2006/35/EC , published in Official Journal L22/34 of 26.01.2006,pp.35.

[138] Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, 2008/157/EC, Official Journal of the European Communities L 51/4-18, 26.02.2008.

[139] Ibid, pp.15.

5.2. Negotiation Process on Chapter 2 Free Movement of Workers

As stated by the Commission, accession negotiations are held according to the Negotiation Framework which covers the methodology and the principles concerning the negotiations.[140] The negotiations are conducted through several chapters which are determined with respect to specific policy areas. The free movement of workers is entitled under the second chapter.

The first stage of the accession talks is the analytical examination or screening of the relevant acquis. The screening is further divided into two parts first of which stands for the explanatory meeting and the second for the country session. In this regard, after the accession negotiations started on 3 October 2005, the negotiation process for the free movement of workers was initiated with the Explanatory Meeting held on 19 July 2006.[141] Those meetings are organized for all candidate countries by the Commission to inform them with the relevant acquis which they should abide by. In this meeting, the Commission presented the general legislation on the free movement of workers, EURES, coordination of social security systems and European Health Insurance Card.

The second part of the screening, the country session or bilateral meeting, is organized between the Commission and the individual candidate country in order to enable the latter to explain its readiness/preparedness and future plans with

[140] European Commission website, "How does a country join the EU?" Available at http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm

[141] The coordination of the accession talks is conducted by the Secretariat General for EU Affairs. All the relevant documents concerning the accession negotiations can be found at http://www.abgs.gov.tr/index.php?p=37&l=2 and for the screening process at http://www.abgs.gov.tr/index.php?p=38&l=2

regards to the acquis on the relevant chapter. The country session on Chapter 2 for Turkey was held on 18 September 2006 where Turkey provided the Commission with information about its preparedness and plans for the alignment of the acquis on the abovementioned subjects which were presented by the Commission in the explanatory meeting. Currently, the draft screening report concerning the Chapter 2 on the free movement of workers is among those chapters for which the Council and the Commission agreed on sending the screening report[142] which is still being discussed at the Council of the European Union, thus not approved and sent yet.

5.3. Recent Case Law on the free movement of Turkish workers in the EU

5.3.1. Joined Cases C 317/01 and C369/01 Abatay-Şahin [143]

One of the recent cases, subject matter of which is based on free movement of workers, was the joint cases of Abatay and Others and Şahin vs. Bundesanstalt für Arbeit. In the former of these cases were the plaintiffs Mr. Abatay and others, who were residing in Turkey and working as lorry drivers for a Turkish company established in Turkey, and also subsidiary of a German company, established in Germany. The work permits issued by the German authorities to be valid until 30 September 1996 were not extended.

Besides, Mr. Şahin, a German national since 1991 with Turkish origin, owns a company in Germany operating in logistics sector, which has a branch in Turkey.

[142] As of July 2010. See the document published in the website of the Secretariat General for EU Affairs at http://www.abgs.gov.tr/files/fasillar/current_st__acc_.pdf

[143] Case 317/01 and Case 369/01, Eran Abatay and Others v. Bundesanstalt für Arbeit (C 317/01) and Nadi Sahin v.Bundesanstalt für Arbeit(C 369/01), Joined Cases, [2003] ECR I-12301.

His company has several lorries, registered in Germany, for the use of international haulage. These lorries were used by the Turkish lorry drivers mentioned above. According to the German legislation, before 1 September 1993, these lorry drivers were not required to get work permits. Nonetheless, from the middle of 1995, the German authority removed the exemption from work permits for the foreign drivers who were used to drive vehicles registered in Germany, even if those drivers were employed by foreign companies.

Within this context, both plaintiffs applied to the Court for the interpretation of relevant articles of the Additional Protocol and of the Council Decision 1/80 on standstill clauses, upon which they grounded their arguments that those drivers should not be subjected to the authorization of work permits. The Court ruled that those articles on the standstill clauses

> pursue the same objective, which is to create conditions conducive to the gradual establishment of freedom of movement for workers, of the right of establishment and of freedom to provide services by prohibiting national authorities from creating new obstacles to those freedoms so as not to make the gradual achievement of those freedoms more difficult between the Member States and the Republic of Turkey.[144]

However, the standstill clause which prohibits further restrictions is relevant for those Turkish nationals who are legally residing in the territory of a Member State at the date when the Council Decision 1/80 came into force. Thus, the Decision urges the integration of Turkish workers into that territory through the pursuit of lawful employment for a certain period of time, which was not found applicable in the case of Abatay and others as they did not belong to the labour force of

[144] Ibid, paragraph 72.

Germany for a substantial period. On the other hand, the Court also held the decision that "the standstill clause of the Additional Protocol may be relied on by an undertaking established in Turkey which is lawfully providing services in a Member State and by the Turkish drivers employed by such an undertaking.", which, nevertheless, was not applicable to Şahin's case.[145]

5.3.2. Case C 228/06 Soysal

Similar to the case of Abatay-Şahin, Soysal and Savatlı Case[146] was taken to Court ruled by Turkish lorry drivers, the plaintiffs who requested the interpretation of the stand still clauses but this time with specific reference to the freedom to provide services. The lorry drivers, Soysal and Savatlı are employed by a company which is established in Turkey and also lawfully provides services in Germany. Since these workers are not employed by the German company, which owns the lorries, but serving under a sub-contract concluded between the German and Turkish companies, they are subjected to obtain visas in order to provide service in the said Member State. Yet, this did not hold true at the time of the entry into force of Additional Protocol. Accordingly, Turkish nationals working in Germany for road transportation could enter into the territory without any visa requirement which was only introduced in 1980.

As it was stated in Abatay-Şahin Case, that the Turkish workers, as plaintiffs of the case, are entitled to appeal to the court and "may invoke, in respect of the

[145] Press Release No 92/03, 21 October 2003 on Judgment of the Court in Joined Cases C 317/01 and C369/01 Eran Abatay and Others v Bundesanstalt für Arbeit available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-03/cp0392en.pdf

[146] Case C 228/06, Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland [2009] ECR I-01031.

activity carried out, the protection of Article 41(1) of the Additional Protocol"[147] since "the employees of the provider of services are indispensable to enable him to provide his services".[148]

The Article 41(1) of the Additional Protocol sets for the provision of the standstill clause with respect to the right of establishment and freedom to provide services. In this respect, the plaintiffs asked whether the application of visa requirement contradicts with the standstill clause, and restricted the exercise of the rights granted. Within this context, the Court decided that Article 41(1) of the Additional Protocol prohibits the imposition of further restrictions, such as the work permit requirement for the Turkish lorry drivers employed by a company established in Turkey to provide services in a Member State, which did not exist at the time of the Additional Protocol enter into force in the said Member State.

As it can be inferred from the Court rulings since Case Demirel, the scope of relevant legal sources concerning the free movement of Turkish nationals within the EU has been extended through time via the interpretations made by the ECJ.[149]

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[147] Ibid, paragraph 32.

[148] Ibid, paragraph 46.

[149] Along with the cases of Demirel, Sevince, Kuş, Taflan-Met and the cases that will be dealt with in this part, there are also other cases brought to the ECJ on freedom of movement of Turkish nationals in the EU. These are: Case C-355/93, Hayriye Eroglu v. Land Baden Württemberg [1994] ECR I-5113, Case C-434/93, Ahmet Bozkurt v. Staatssecretaris van Justıtie [1995] ECR I-1475, Case C-171/95, Recep Tetik v. Land Berlin [1997] ECR I-329, Case C-351/95, Selma Kadıman v. Freistaat Bayern [1997] ECR I-2133. Case C-386/95, Eker v. Land Baden-Württenberg [1997] ECR I-2697, Case C-285/95, Suat-Kol v. Land Berlin [1997] ECR I-3069, Case C-36/96, Faik Günaydın and Others v. Freistaat Bayern [1997] ECR I-5143, Case C-98/96, Kasım Ertanır v. Land Hessen [1997] ECR I-5179, Case 210/97, Haydar Akman v. Oberkreisdirektor des Rheinisch-Bergischen-Kreises [1998] ECR I-7519, Case 1/97, Mehmet Birden v. Stadtgemeinde Bremen [1998] ECR I-7747, Case C-262/96, Sema Sürül v. Bundesanstalt für Arbeit [1999] ECR I-2685, Case 340/97, Ömer Nazlı v. Ville de Nurenberg [2000] ECR I-957, Case C-102/98, Ibrahim Kocak v Landesversicherungsanstalt Oberfranken und

This, in return, facilitated the exercise of rights granted to Turkish nationals/workers in the EU.

5.4. Issues on Turkey's Accession to the EU: EU Concerns and Solutions

5.4.1. Analysis on the Turkish Economy and the Labour Market

One of the concerns raised on Turkey's EU membership is related to its economic performance. In fact, in almost every document released by the Commission such concerns are reflected to a great extent. That is not unusual, however, that economic considerations constitute much of the debate on the accession of a new member or a group of members if the economic logic is taken into account as an initial step for the establishment of the EU and also for further steps of EU integration. In this respect, the economic developments that Turkey will achieve throughout the accession process will be perceived positively in the way towards its membership. As stated in the Commission Working Document of 2004, those

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Mittelfranken [2000] ECR I-1287, Case 329/97, Sezgin Ergat v. Stadt Ulm. [2000] ECR I-1487, Case C-37/98, The Queen, ex parte: AbdulNasir Savas v. Secretary of State for the Home Department [2000] ECR I-2927. Case C-65/98, Safet Eyüp v. Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg [2000] ECR I-4747, C-188/00, Bülent Kurz, né Yüce v. Land Baden-Württemberg [2002] ECR I-10691, Case C-16/05, Veli Tüm ve Mehmet Darı v Secretary of State for the Home Department [2007] ECR I-7415, Case C-337/07, İbrahim Altun v. Stadt Böblingen [2008] ECR 00; Case C-453/07, Hakan Er v.Wetteraukreis [2008] ECR I-07299; Case C-294/06, Ezgi Payir, Burhan Akyuz, Birol Öztürk v. Secretary of State for the Home Department [2008] ECR I-00203; Case C-325/05, İsmail Derin v. Landkreis Darmstadt-Dieburg [2005] ECR I-6181; Case C-4/05, Hasan Güzeli v. Oberbürgermeister der Stadt Aachen [2006] ECR I-10279; Case C-502/04, Ergün Torun v. Stadt Augsburg [2006] ECR I- 01563; Case C-230/03, Mehmet Sedef v. Freie und Hansestadt Hamburg [2006] ECR I-2133; C-136/03, Georg Dörr v. Sicherheitsdirektion für das Bundesland Kärnten and İbrahim Ünal v.Sicherheitsdirektion für das Bundesland Vorarlberg [2005] ECR I-04759; Case C-374/03, Gaye Gürol v. Bezirksregierung Köln [2005] ECR I-06199; Case C-467/02, İnan Çetinkaya v. Land Baden-Württemberg [2004] ECR I-10895; Case C-275/02, Engin Ayaz v. Land Baden-Württemberg [2004] ECR I-08765.

future developments in the economic field will define the nature of the economic impact of Turkey's membership on the EU[150].

In this respect, it is useful to look at the major indicators that could reflect the situation of Turkey concerning the issues arouse with respect to free movement of workers, which were also taken into consideration in previous enlargements.

5.4.1.1. Economic Performance-Income Gap

Since the last crisis of 2001, the statistical data on the economic situation of Turkey revealed a recovery from economic downturn which lasted until the global financial crisis. In terms of real GDP growth rates, the increasing trend of the economic growth started to decrease from 2004 (9.4%) and end up with a rate of 0.4 % at the time of the global economic crisis.[151] As indicated by the latest data, the Turkish economy contracted by 4.9% in 2009 with respect to the previous year. However, Turkey became one of those countries who succeeded to achieve a gradual positive economic growth and according to the Eurostat forecasts; Turkey is expected to have real GDP growth rates of 4.7% and 4.5% in 2010 and 2011 respectively. When compared with EU countries, the economic panorama of Turkey is envisaged to be in a better position than those of EU-27 and EU-25 for 2010 and 2011 (1.0% and 1.7%), as well as of EU-15 (0.9% and 1.6%), Bulgaria (0.0% and 2.7%) and Romania (0.8% and 3.5%). In this respect, the economic

[150] European Commission (2004), Commission Staff Working Document: *Issues Arising From Turkey's Membership Perspective*, Brussels, 656 final, pp.5

[151] Eurostat, Real GDP growth rate, available at http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsieb020

outlook of Turkey seems not to yield a big concern for EU Member States with regards to its economic performance for the eligibility of accession.

Table-2: Real GDP Growth Rates

	2005	2006	2007	2008	2009	2010	2011
EU 27	2,0	3,2	3,0	0,5	-4,2	1,0f	1,7f
EU 25	1,9	3,2	3,0	0,5	-4,2	1,0f	1,7f
EU 15	1,8	3,0	2,8	0,3	-4,2	0,9f	1,6f
Turkey	8,4	6,9	4,7	0,4	-4,5	4,7f	4,5f

Source: Eurostat.

This upwards trend in the economy since 2001 crisis was positively interpreted by Littoz-Monnet and Villanueva Penas, hence they suggest that

> If it cannot be established whether this is the beginning of a sustainable higher medium and long term growth path, it seems, however, that Turkey's economic situation does not constitute a major obstacle – if compared to that of first round CEECs and second round CEECs – to its membership.[152]

When the GDP per capita income in PPS is examined, however, the statistical figures do not seem to give such a positive picture. According to the recent data, the figures for 2008 shows that GDP per capita income in Turkey was considerably lower than the EU levels. When the EU-27 average is set equal to 100, Turkey had 46 points whereas EU-25 had 103 and EU-15 111 in 2008. As regards this data, Turkey resembles to Bulgaria (43 in 2008) and Romania (42 in 2007)[153], which have the worst records among EU Member States. In this respect,

[152] Littoz-Monnet, A. and Villanueva Penas, B. (2005), pp.7.

[153] Eurostat, GDP per capita in PPS, available at http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsieb010

it can be concluded that even though Turkey has prominent figures on economic growth, this promising development could not be reflected in narrowing the income gap with respect to the EU averages. This, in return, could encourage the views of those opponents for Turkey's membership in terms of economic concerns.

5.4.1.2. Minimum Wages

According to the recent data, minimum wages in Turkey (around 338 €) are well behind the top three countries (Luxembourg, Ireland and the Netherlands, consecutively) in the EU-25 which had the highest levels of minimum wages. When average minimum wage in the EU-27 is taken into account, it can be seen that Turkey also falls short of the average of those 20 Member States (approximately 674 €) with available data.[154] However, the minimum wage in Turkey is higher than many of the EU-8[155] and both EU-2 Member States which have recently joined the EU within the last two enlargement processes.

5.4.1.3. Demographic Indicators

As it was severally mentioned in the literature on the analysis of Turkey's EU membership, demographic situation is considered among the major fields of concerns, which is also interrelated to certain issues regarding migration, labour market, social security system, social integration and etc.

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[154] There is no data available in Eurostat for Denmark, Germany, Austria, Sweden, Itay, Finland and Cyprus.

[155] Except Malta (654 €) and Slovenia (597€). Cyprus does not provide Eurostat with data on minimum wages.

As of 31 December 2009, Turkey's population was recorded 72.561.312 with an annual growth rate of 14.5 in thousands.[156] It is estimated that the mid-year population will be 76.598 thousand by 2015, 80.257 thousand by 2020 and 83.566 thousand by 2025. These numbers will amount almost 15% of the EU-27 in respective years.[157]

The population of Turkey is considered to be rather young with the median age of 28.8 for 2009. Yet, the projections on annual population growth rate reveal that the figures will slightly decrease over years. Therefore, Turkey will be able to enjoy the potential advantages of its young population within a limited time.

Furthermore, according to the TURKSTAT Labour Force Survey, working age population (51.686 thousand people) constitutes almost two thirds of the total population in Turkey in 2009. In May 2010, this number was even increased by 856.000 and reached to 52 million 431 thousand people[158], which sounds quite encouraging for the labour market which is characterized with a dynamic population.

On the other hand, it is clear that Turkey has a relatively younger population at the working age than EU countries. As of 2009, the population between age of 15 and 64 was 11.513 thousand.[159] Having such a big share of young population, Turkey

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[156] TURKSTAT (2009), *Address Based Population Registration System Population Census Results*, Press Release, Number 15 of 25 January 2010. According to the Labour Force Survey, however, the non-institutional population was 70.542 thousand in 2009.

[157] EUROSTAT, Population Projections.

[158] TURKSTAT (2009) *Labour Force Statistics, Labour Force Status by Non-institutional Population, Year and Sex.*

[159] TURKSTAT (2009) *Labour Force Statistics, Labour Force Status of "15-24 Age Group" by Years and Sex.*

has been argued to foster its economy if it may use the so called demographic opportunity window which will possibly be closed in next two decades. Similarly, it is argued that Turkey could provide a solution for the ageing EU population. According to Littoz-Monnet and Villanueva Penas, although Turkish membership will possibly not result in a big impact on EU economy, "Turkey's demographic profile could however play a positive economic impact on the EU, which is suffering from its aging demographic profile."[160]

However, when the labour force is concerned, those high numbers seen in population statistics suddenly decrease by half. In other words, Turkey has not fully realized its population potential in terms of the labour force participation. As of 2009, labour force participation rate among the total population amounted to 47.9% whereas it was 38.7% for the young population. Yet, the worst feature of the Turkish labour force is revealed by relatively high unemployment rates, which concerns the EU member states to a great extent while taking decisions on transitional arrangements for free movement of workers.

5.4.1.4. Unemployment Rates

Similar to other EU countries, Turkey has also been severely affected by the negative consequences of the global financial crisis. The most obvious impact was felt in the labour market with sharp increases in the unemployment rates, especially for the youth. The total unemployment rate in Turkey has been quite

[160] Littoz-Monnet, A. and Villanueva Penas, B. (2005), pp.14.

high since the crisis and it was recorded as 14 % for 2009 according to TURKSTAT (12.5% in Eurostat).

As the negative impact of the crisis on the labour market has been in a recovery phase, the latest data indicates that unemployment rate dropped by 2.6 % to 11% in May 2010, in comparison with the previous period.[161]Besides, the unemployment rate has become even more problematic for the youth during the last years (approximately 20%). In fact, the younger population in the labour force was further hit by the recent crisis, especially in 2009 where the annual youth unemployment rate climbed up to 25.3% (22.7% in Eurostat). Similar to the descending trend in the overall unemployment rate, youth unemployment rate has decreased to 19.8% in May 2010, which is still quite high.

On the other side, when compared with the EU average, it is seen that unemployment rates in Turkey are higher, which could strengthen the views of opponents to Turkey's membership concerning the unemployment problem. It could also serve as a negative impression on the Member States, especially on those with low unemployment rates accompanied by relatively high wages, for the opening of their labour markets to Turkish workers.

According to the Eurostat data, Turkey had higher unemployment rates (12.5%) than the EU averages (almost 9% for EU-27, EU-25 and EU15) in 2009. However, due to the negative impact of the crisis on labour markets, some EU-8 countries such as Estonia (13.8%), Latvia (17.1%), Lithuania (13.7%), Hungary

[161]TURKSTAT (2009) *Labour Force Statistics, Labour Force Status by Non-institutional Population, Year and Sex.*

(9%) and Slovakia (12%) also had higher unemployment rates than the average. Yet, Spain (18%) was suffering most among all the members, in terms of unemployment.

In terms of youth unemployment rate, it can be seen that most of the EU countries have similar problems with Turkey (22.7%). The average level of unemployment among the youth in the EU was approximately 20% in 2009. Additionally, the number of members having higher youth unemployment rate than the average is higher than the case of total unemployment. Spain (37.8%), Latvia (33.6%) and Lithuania (29.2%) were the top three countries in the youth unemployment statistics.

In this respect, it can be argued that the relatively bad record Turkey has with regards to unemployment is not a unique case, especially at the time of the crisis. On the one hand, this could be interpreted positively in a sense that even though unemployment rate in Turkey is well above the average, it is not the only country having this unemployment problem which has also being experienced by other EU Member States. On the other hand, this could yield further concerns about Turkey's unemployment problem for those countries which also have high unemployment in their labour markets. Thus, accession of Turkey may pose a threat of additional unemployment within the Union, which could mean that more people would search for a job in the EU labour market. It could even be a more crucial concern in terms of the youth, whose propensity to migrate is considered to be relatively high. As a result, it would not be surprising that Turkey could face with longer transitional periods on free movement of workers, if the negative

impact of the crisis on the labour markets of EU members could not be overcome at the time of its accession. However, one should bear in mind that permanent safeguard clauses for free movement on labour are not acceptable since the accession to the EU without a fundamental right enjoyed by Turkish nationals is contrary to the spirit of the membership. Moreover, it is illogical from the side of acceding country that Turkish nationals who would become EU citizens would be deprived of one of their major rights and this, in return, would be against the principle of equal treatment.

5.4.2. Potential Migration Estimates

The potential migration from Turkey to the EU has also attracted the attention of some scholars, although most of the studies on Turkey's accession to the EU focused on purely economic and political dimensions of the accession. Yet, it should be kept in mind that migration is an integral part of the economic considerations of enlargement. Besides, the issue of migration is interrelated with social and cultural conceptualizations of the impact of further enlargement. Thus, beyond reflecting the numerical change in the resident and working population in one Member State, migration is a crosscutting phenomenon which could be analyzed from a wide range of different perspectives (demographic, economic, cultural and social etc.).

Many studies focusing on the estimations of potential migration flows from candidate countries or new member states to the EU usually apply certain variables such as income and wage differentials, unemployment rates,

demographic indicators and etc. in order to make a comparison between the two and predict migration trends.

When examining the economic impacts of Turkey's accession to the EU, Lejour et. al. consider migration responses to the free movement of labour as one of the major points in membership process.[162] Taking the economic and demographic indicators into account, they made a migration estimation of 2.7 million in the long term (by 2025). They also emphasize that the estimated amount of migrants would be concentrated mostly in countries (mainly Germany, France and Netherlands) where there is a significant level of migrant population who have already resided.[163]

Krieger and Maitre provided a study on potential migration from Turkey together with the EU-10, Bulgaria and Romania.[164] Based on Eurobarometer data, their study included identical surveys conducted in each of these countries in order to have an idea about the tendency of the respondents to migrate, i.e. general intention, and also about the firm intention. Among the countries involved in the surveys, Turkey has the biggest share for general intention to migrate (6.2%) while it has the lowest level with regards to the firm intention (0.3%). In terms of

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[162] See Lejour, A. M., de Mooij, R.A. and Capel, C.H. (2004), *Assessing The Economic Implications of Turkish Accession to the EU*, CPB Netherlands Bureau for Economic Policy Analysis Document No: 56, March 2004.

[163] Ibid, pp.35.The authors also built up two simulations so as to assess the economic impact of potential labour migration after Turkey's accession to the EU and based those simulations on the skill composition of the migrant labour; skilled as equal to EU counterparts and unskilled. Those simulations revealed different outcomes, especially in terms of the wage ratios, which resulted in an imbalance in the EU, for the simulation based on migration flow which is composed of only unskilled workers. See pp.47.

[164] Krieger, H. and Maître, B. (2006) *Migration Trends in an Enlarging European Union*, Turkish Studies, Vol. 7, No. 1, 45–66, March 2006.

preferences of specific groups, similar to other countries in the survey, Turkish youth and male population have higher tendency to migrate than older and female population respectively. The same propensity holds true for high skilled and educated people. Likely, Krieger defines higher education as "a pull and facilitating factor" for migration as it "pulls potential migrants by prospects for improved income in the potential target countries" and at the same time "facilitates search and information behavior."[165] Such higher intention to migrate shared by the youth and the high skilled is argued to pose a threat of brain drain. However, Lejour points out that despite the possibility of such a threat, the assumption of brain drain has not been empirically verified in the full sense.[166]

Another study on the potential migration from Turkey to the EU was conducted by Erzan et al. by introducing different simulations of free movement of labour and guest worker and scenarios ranging from membership and full labour mobility to suspension of the accession process accompanied by zero labour mobility. For the simulation based on the experiences of all EU countries from free movement of labour, migration from Turkey to the EU-15 is expected to be around 1.1 million by 2030. The estimate under guest worker simulation, on the other hand, is 1.8 million. In case of successful accession process together with high growth and free access to EU labour market from 2015, their estimations amount between 1 and 2.1 million for 2004-2030 period. However, in case of a failure or suspension in the accession process, followed by low growth and no free

[165] Krieger, H. (2004) *Migration Trends in an Enlarged Europe*, European Foundation for the Improvement of Living and Working Conditions, Luxembourg: Office for Official Publications of the European Communities, pp.64.

[166] Lejour, de Mooij and Capel (2004), pp.20.

movement of labour, the forecast reveals a migration flow more than 2.7 million. According to the authors "the result is a warning that if the membership perspective is lost, EU may end up having more immigrants from Turkey despite strict restrictions on labor mobility."[167]

Besides, in a recent article on the literature for studies about potential migration, Elitok criticizes the inadequateness of these studies due to their wide range, as well as lack of good quality data and clear, precise and consistent methodologies. As regards the subject matter of these studies, she argues that potential migration would be one of the hard issues to manage in the process of Turkey's accession to the EU and could be considered as a challenge for both parties; however it can be turned into an opportunity if these parties could come up with a sound plan for managing the potential migration.[168]

In addition to the studies on potential migration, according to a recent article released by Eurostat, an increasing trend in the population of the European Union has been remarked as a result of high level of migration majority of which is constituted by European citizens in 2008.[169] Among the resident population of the EU 27 who are non-nationals, Turkey accounts for the largest share, with 2.4

[167] Erzan, R., Kuzubaş, U. and Yıldız, N. (2004) "Growth and Immigration Scenarios for Turkey and the EU", Centre for European Policy Studies, EU-Turkey Working Documents, No. 13/December 2004.

[168] Paçacı- Elitok, S. (2010) "Estimating the Potential Migration from Turkey to the European Union: A Literature Survey", Hamburg Institute of International Economics (HWWI) Policy Paper 3-11, Hamburg, May 2010, pp.6.

[169] "Citizens of European countries account for the majority of the foreign population in EU-27 in 2008", Eurostat, Statistics in Focus, 94/2009, available at http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09-094/EN/KS-SF-09-094-EN.PDF

million people or 7.9 % of all foreigners living in the EU-27 in 2008. As regards the main destination countries where Turkish citizens has migrated, Denmark, Germany, Netherlands, France, Romania and Switzerland are cited as the countries where Turkish citizens as non-nationals reside in big numbers in 2008. Indeed, 76% of the total non-nationals in Germany is composed of Turkish citizens. In this respect, it can be concluded that the current data support the arguments raised in the estimates on potential migration flows mentioned above, with respect to the countries of destination for Turkish migrants.

Having all these arguments in mind, it could be appropriate to look at a proposal conceptualized for managing the possible migration trends in case of Turkey's membership, i.e. permanent safeguard clauses.

5.4.3. The Issue of Permanent Safeguard Clauses

It is most likely that Turkey will face with the same transitional arrangements applied in the recent enlargements, in case that it gains the status of full membership. Nevertheless, the current debate started to go in a direction that Turkey could also be subjected to permanent derogations as the Commissioner Olli Rehn suggested in one of his interviews.[170] Such possibility was also expressed in Communication of the Commission[171] and the article 12 of the Negotiation Framework signed on 3 October 2005. This, in return, arouses the

[170] "EU considers 'safeguards' for Turkish workers" published on Thursday 20 November 2008 at http://www.euractiv.com/en/enlargement/interview-eu-considers-safeguards-turkish-workers/article-177363

[171] European Commission (2004), Communication from the Commission to the Council and the European Parliament, Recommendation of the European Commission on Turkey's Progress towards Accession, 656 final, pp.5.

question of privileged partnership as a way to mitigate the problematic issues of Turkish membership, such as the disturbance of the labour market and migration flows as a result of free mobility of workers.

As it was anchored in the Negotiating Framework, permanent safeguard clauses could be applied for Turkish workers after Turkey's membership. Although transitional arrangements and safeguard clauses were integrated in the Accession Treaties of the previous enlargements of 2004 and 2007, the permanent nature of such restrictions had never been asserted. At this point, Yılmaz proposes the argument that safeguard clauses described in the annexes of the Accession Treaty of 2003 allowed the EU-15 Member States to take certain measures limiting the free movement of workers, irrespective of the period for transitional arrangements, if a disturbance or a threat as such aroused in their labour markets. He points out that the term "permanent" in the Negotiating Framework should be viewed within this perspective and this term should just stand for the right upon which such measures could be taken but not for the transitional measures themselves.[172] In other words, it is the right to take such measures which is permanent not the duration of measures.

However, it would not be appropriate to have such an argument that old members reserve the right to re-invoke the restrictive measures after the period of transitional arrangements expired. In fact, it is clearly stated in the Article 7 of the Annexes for each EU-10 Member States that old members are granted the right to resort the procedure, so called safeguard clause, "until the end of the seven year

[172] Yılmaz (2008), pp. 117.

period following the date of accession". In other words, the option for applying "safeguard clauses" could be possible within the time limit of transitional arrangements specified in the Treaty. In this respect, Yılmaz also rightly argues that other perceptions of the term "permanent" than he defines above would refer to "permanent restrictions" to the free movement of persons which, in return, could not be acceptable for Turkey.[173] Likely, Günuğur points out that imposing permanent restrictions to the free movement of workers has never been seen in the EU enlargement history and it is against the logic of the common market.[174]

Furthermore, Ooik and Mathis look at the transitional arrangements in case of Turkey's accession to the EU and concluded that Turkey will also be subject to such measures on free movement of labour, like other members of previous enlargements. They also predict that transitional measures for Turkey could be longer when the size of its labour force is taken into consideration. Additionally, they mention the argument about the possible introduction of permanent derogations with respect to free movement of workers but they, as well, do not think it as an acceptable option since "free movement of workers, as being part of the broader free movement of persons, is one of the *fundamental freedoms* of the internal market".[175]

On the other hand, Boeri and Brücker argue that instead of the transitional periods introduced to the new members, imposing quotas could be a more useful way of mitigating the possible economic and social problems. They supported this idea

[173] Yılmaz (2008), pp. 117.

[174] Günuğur (2007), pp. 86.

[175] Van Ooik and Mathis (2010), pp.6.

by saying "immigration quotas could provide information on future migration pressures, thereby reducing the uncertainty associated with projections of migration flows, and allow to smooth pressures on host labour markets at the same time."[176]

[176] Boeri and Brücker (2001), pp. 16.

CHAPTER VI

6. CONCLUSIONS

Throughout the thesis, the aim is to examine the situation of Turkish workers concerning their rights on free movement within the framework of two recent enlargements since 2004 and Turkey's accession process.

In order to have a better idea of the rights granted with free movement of workers, the legal background of such freedom in the EU is examined in the first chapter. It is seen that free movement of workers emerged under the scope of free movement of persons with economic motives. The rights concerning this freedom were initially formulized with a logic which considers the worker mostly as a factor of production. However, during the course of further attempts of EU integration, free movement of workers was started to be conceptualized within the framework of citizenship and the social dimension of such freedom was integrated into legal documents. As significant as the changes in the scope of legal documents, the rulings of the ECJ brought a more concrete and clear meaning to the exercise of certain rights regarding the free movement of workers.

Keeping the Community framework in mind, the second chapter deals with the legal sources on free movement of Turkish workers in the EU. It is concluded that articles both in the Ankara Agreement and the Additional Protocol envisaged the necessary steps for the full achievement of the free movement of workers. However, certain political and economic developments hampered the establishment of full freedom of movement in the EU for Turkish workers. Given

the special status of Turkey, who has concluded an Association Agreement long before the start of accession talks, it is expected that provisions stated in those legal documents should have been implemented in a way to ease the free movement of Turkish workers.

Apart from the legal backgrounds stated above, the changing approach of the European Union on the application of transitional arrangements to free movement of workers is dealt with in the third chapter. The changing nature of the EU approach to the free movement of workers is of great importance for Turkish workers, in case of membership. It is revealed by the previous experience that, the level of migration estimated before the enlargement was not realized. To a large extent, old Member States who opened up their labour markets were not severely affected by free movement of labour but rather enjoyed several economic benefits. Yet, the internal debate regarding enlargement forced EU members to have a stricter attitude towards future enlargement waves which Turkey could also be a part of.

Finally, the future of free movement of Turkish workers within the framework of EU accession process is analyzed in the fourth chapter. It is evaluated that Turkey will face with transitional arrangements, even longer than those applied to previous new members. Nevertheless, imposing permanent restrictions on such a fundamental right does not seem to be acceptable. In fact, becoming an EU member without the right to freely move in the labour markets of other members could well be considered against the logic of membership. It could also be argued that introducing permanent safeguard clauses for free movement of Turkish

workers would not be fair from the legal point of view as this fundamental right is granted on the basis of citizenship. Furthermore, none of the candidate countries in previous enlargements were subjected to such an extremely restrictive measure. Therefore, it will be against the principle of equal treatment if Turkish nationals who will also become EU citizens in case of membership are not allowed to move freely within the labour markets of the old Member States.

Given the special legal status of Turkey, a candidate country which concluded an Association Agreement with the EU which foresaw the full achievement of free movement of workers, Turkish workers should be able to enjoy the right to free movement which they had deserved long time ago. Yet, considering the economic indicators and labour market situation of Turkey in comparison to the EU averages, it is most likely that transitional arrangements will be on the EU agenda at the time of Turkey's accession, as was the case in previous enlargements. In this respect, the nature of transitional arrangements can be determined according to the performance of Turkey in realizing its commitments regarding the chapter on free movement of workers, as well as the pace of improvements in its economy and labour market.

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