REPORT FOR THE HEARING
delivered in Case 12/86 *

I — Facts and procedure

1. The agreement establishing an association between the European Economic Community and Turkey (hereinafter referred to as 'the Agreement') was signed on 12 September 1963 at Ankara by the Republic of Turkey, on the one hand, and the Member States of the European Economic Community and the Community, on the other, and concluded, approved and confirmed in the name of the Community by a decision of the Council of 23 December 1963 (Official Journal 1973, C 113, p. 1).

2. According to the Interpretive Declaration on the definition of the expression 'Contracting Parties' used in the Agreement, which constitutes the third declaration in Annex I to the Final Act of the Agreement, (Official Journal 1973, C 113, p. 16) the meaning to be given to that expression in each particular case, namely the Community and the Member States or alternatively the Member States alone or the Community alone on the one hand, and the Turkish Republic on the other, is to be deduced from the context of the Agreement and from the corresponding provisions of the Treaty establishing the Community.

3. The aim of the Agreement, according to Article 2, which is contained in Title I dealing with principles, is to promote the continuous and balanced strengthening of trade and economic relations between the parties. The association is to comprise a preparatory stage permitting Turkey, according to Article 3, to strengthen its economy, with aid from the Community, a transitional stage which, according to Article 4, is to serve the progressive establishment of a customs union and the alignment of economic policies, and a final stage which, according to Article 5, is to be based on the customs union and is to entail closer coordination of economic policies. According to Article 28, the Agreement should make it possible in the longer term to examine the possibility of the accession of Turkey to the Community.

4. According to Article 7, the contracting parties are to take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from the Agreement and to refrain from any measures liable to jeopardize the attainment of the objectives thereof.

5. Title II of the Agreement, dealing with the transitional stage, contains a Chapter 1 dealing with implementation of the customs union, a Chapter 2 dealing with agriculture and a Chapter 3 containing other economic provisions. According to Article 12, which forms part of Chapter 3, the contracting parties agree to be guided by Articles 48, 49 and 50 of the EEC Treaty for the purpose of progressively securing freedom of movement for workers between them.

6. Articles 22 and 23, in Title III containing general and final provisions, provide for the establishment of a Council of Association consisting of members of the Governments of the Member States and members of the Council and Commission of the Community on the one hand and members of the Turkish Government on the other. The Council of Association acts unanimously and has the power to take the decisions necessary in order to attain the objectives of the Agreement. Article 25 permits the contracting parties to submit to the Council

* Language of the Case: German.

of Association any dispute relating to the application or interpretation of the Agreement or to submit the dispute to the Court of Justice.

7. Article 1 of the Agreement on measures to be taken and procedures to be followed for the implementation of the Agreement (Journal Officiel 1964, No 217, p. 3703) lays down the arrangements for the adoption of a common position by the representatives of the Community and the Member States within the Council of Association.

8. In order to fix the conditions, arrangements and time-table for implementing the transitional stage, the contracting parties signed at Brussels on 23 November 1970 an Additional Protocol (hereinafter referred to as 'the Protocol'), concluded, approved and confirmed by Regulation No 2760/72 of the Council of 19 December 1972 (Official Journal 1973, C 113, p. 17).

9. Article 36 of the Protocol, contained in Chapter I dealing with workers, in Title II concerning movement of persons and services, provides that freedom of movement for workers between Member States of the Community and Turkey is to be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement between the end of the 12th and the 22nd year after the entry into force of that agreement and that the Council of Association is to decide on the rules necessary to that end.

10. Article 38 gives the Council of Association power to review all questions arising in connection with the geographical and occupational mobility of workers of Turkish nationality and to make recommendations to the Member States to that end. Article 41, in Chapter II concerning the right of establishment, services and transport, contains an express standstill clause concerning the introduction of new restrictions on the freedom of establishment and the freedom to provide services.

11. The negotiations on the achievement of the first stage of freedom of movement for workers led to a decision of the Association Council, No 2/76 of 20 December 1976, on the implementation of Article 12 of the Agreement in which the Member States of the Community and Turkey accord each other priority as regards access by their workers to their respective employment markets. Decision No 1/80 of the Association Council of 19 September 1980 on the development of the association is essentially intended, in regard to employment and freedom of movement for workers, to consolidate the legal position of Turkish workers already belonging to the labour force of a Member State. Article 13 of the decision contains an express standstill clause concerning the introduction of new restrictions on the conditions of access to employment applicable to Turkish workers.

12. In the Federal Republic of Germany, the sixth indent of Paragraph 10, subparagraph 1, of the Ausländergesetz (Aliens Law) (*Bundesgesetzblatt* I, p. 353), as amended, provides that an alien may be expelled if he has infringed the rules concerning residence.

13. According to paragraph 2.5.8 of the 'Verwaltungsvorschrift des Innenministeriums des Landes Baden-Württemberg zur Ausführung des Ausländergesetzes' (Circular of the Ministry of the Interior of the *Land* of Baden-Württemberg for the Implementation of the Aliens Law) in the version resulting from the first amendment of that circular on 30 March 1982 (*Gemeinsames Amtsblatt des Landes Baden-Württemberg*, 1982, p. 383) and to paragraph 2.6.2.2 of the circular, in the version resulting from the second amendment to the circular on 1 August 1984 (*Gemeinsames Amtsblatt* 1984, p. 725), the reunification of families, in regard to

foreign nationals who themselves entered the Federal Republic of Germany under the rules on the reunification of families or who were born there may be authorized only if, *inter alia*, the alien has lived regularly on the territory of the Federal Republic of Germany for an uninterrupted period of eight years. The two previous orders of the Minister for the Interior of the *Land* of Baden-Württemberg, dated 25 July 1966 and 31 January 1975, required a period of residence of only three years. In German law, such ministerial circulars do not have the force of law but are internal administrative instructions.

14. The plaintiff in the main proceedings, Meryem Demirel, is a Turkish national who married on 24 August 1981 a Turkish national who has resided in the Federal Republic of Germany since his arrival under the rules on the reunification of families in September 1979.

15. On 17 March 1984, Mrs Demirel went with her son to the Federal Republic of Germany on a visa which had been issued on 5 March by the German Embassy in Ankara and was valid until 9 June 1984 under the following restrictive conditions: not issued for reunification of families; valid only for the purposes of a visit; paid activities not permitted.

16. Contrary to her declaration made on 8 June 1984 to the authorities of the City of Schwäbisch Gmünd that she intended to return to Turkey, Mrs Demirel remained in the Federal Republic of Germany after the expiry of her visa and there gave birth to a second child.

17. On 28 May 1985, the City of Schwäbisch Gmünd adopted a decision ordering Mrs Demirel to leave the country on pain of expulsion under the sixth indent of Paragraph 10, subparagraph 1, of the Aliens Law on the ground that she had infringed the conditions of her stay. It further stated that she did not fulfil the conditions to be admitted under the rules on the reunification of families since her husband had not lived on the territory of the Federal Republic of Germany for eight years and that the personal reasons advanced, namely that she was once again pregnant and referring to the difficulty of re-establishing herself in Turkey, did not take precedence over the public interest inherent in the expulsion.

18. The objection lodged by Mrs Demirel against that decision was rejected on 9 July 1985 by the Regierungspräsidium (Regional Administrative Authority) Stuttgart.

19. On 1 August 1985, Mrs Demirel brought an action before the Verwaltungsgericht Stuttgart for the annulment of the decisions of 28 May and 9 July 1985.

20. The Verwaltungsgericht Stuttgart considered that the case involved an interpretation of the Association Agreement between the EEC and Turkey and therefore decided, by order of 11 December 1985, to stay proceedings until the Court of Justice had given a preliminary ruling under Article 177 of the EEC Treaty on the following questions:

(1) Do Article 12 of the Association Agreement between the European Economic Community and Turkey and Article 36 of the Additional Protocol thereto, in conjunction with Article 7 of the Association Agreement, already lay down a prohibition that under Community law is directly applicable in the Member States on the introduction of further restrictions on freedom of movement applicable to Turkish workers lawfully residing in a Member State in the form of a modification of an existing administrative practice?

(2) Is the expression 'freedom of movement' in the Association Agreement to be understood as giving Turkish workers resident in a Member State the right to bring children under the age of majority and spouses to live with them?

21. In the long statement of the grounds for its order for reference, the Verwaltungsgericht sets out the reasons why the questions should be answered in the affirmative.

22. The Verwaltungsgericht Stuttgart's order was lodged at the Court Registry on 17 January 1986.

23. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 25 February 1986 by the City of Schwäbisch Gmünd, the defendant in the main proceedings, represented by Dieter Schädel, of the City's Legal Department, and by the Vertreter des öffentlichen Interesses (Representative of the public interest), who intervened in the main proceedings in support of the City of Schwäbisch Gmünd, represented by Professor Harald Fliegauf, Leitender Oberlandesanwalt (Senior Regional Prosecutor), on 21 April 1986 by the Government of the Federal Republic of Germany, represented by Martin Seidel, Ministerialrat in the Federal Ministry of Economics, and Jochim Sedemund, of the Cologne Bar, and by the Commission of the European Communities, represented by its Legal Adviser, Peter Gilsdorf, on 22 April 1986 by the Government of the French Republic, represented by Gilbert Guillaume, Director of Legal Affairs in the Ministry of Foreign Affairs, on 7 May 1986 by the United Kingdom, represented by B. E. McHenry, of the Treasury Solicitor's Department, and on 12 May 1986 by the Government of the Hellenic Republic, represented by Iannos Kranidiotis, Secretary in the Ministry of Foreign Affairs, assisted by Stelios Perrakis, Legal Adviser in the European Communities Section of the Ministry of Foreign Affairs.

24. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. The City of Schwäbisch Gmünd, the defendant in the main proceedings, supports the observations of the Vertreter des öffentlichen Interesses. The latter refers to the position adopted by the Commission in Case 268/85 *Bozdag* v *City of Backnang* (removed from the register) that Article 36 of the Protocol, read together with Articles 7 and 12 of the Agreement, contains no prohibition directly applicable in the Community legal order on the introduction of new restrictions on the admission of members of the families of Turkish workers lawfully resident in a Member State. The provisions of the Agreement concerning freedom of movement constitute at most an international law obligation for the Federal Republic of Germany but confer no right on an individual Turkish national. According to Article 12 of the Agreement, the contracting parties have agreed to be guided only by Articles 48 to 50 of the EEC Treaty for the purpose of progressively securing freedom of movement for workers, which implies that the Federal Republic of Germany is not required to permit Turkish nationals to benefit from the rules on freedom of movement applying within the Community. Article 12 may thus be distinguished from Article 44 of the Association Agreement with Greece of 9 July 1961, according to which freedom of movement for workers under Articles 48 and 49 of the Treaty is to be secured between the Member States and Greece. Reunification of families is not covered by the concept of freedom of movement in the EEC Treaty. At very most, it may be deduced from the scheme of the

Treaty or by recourse to Article 8 of the European Convention on Human Rights. Even less may a right to the reunification of families be based on the Agreement.

2. The Government of the Federal Republic of Germany states that the Agreement and the Protocol are so-called 'mixed' agreements, concluded by the Member States and the Community, on the one hand, and Turkey, on the other, the essential purpose of which is the establishment of a customs union. Freedom of movement for workers is the subject of less concrete provisions and is to be secured progressively by the Council of Association. From the end of the 1970s, there were some delays in achieving the objectives of the Agreement. Decision No 1/80, in which the Council of Association attempted to relaunch the association, contains a number of provisions concerning freedom of movement for workers which deal essentially however with the legal position of Turkish workers already belonging to the normal labour force in the Member States. All progress ceased following the military *coup d'état* in Turkey in 1980.

On the preliminary question of whether the provisions at issue form part of Community law, the Federal Republic of Germany states that the classification by the Court of Justice of public international law agreements concluded by the Community with a non-member country as part of Community law does not mean that individuals obtain rights thereunder nor that they may rely on them before a national court. Since the agreement at issue is a mixed agreement the Court of Justice must consider whether the undertakings concerning freedom of movement for workers were entered into by the Community or solely by the Member States. In the latter hypothesis, its power of interpretation is limited to a finding to that effect. There are a certain number of reasons which would support that interpretation. The mixed nature of the agreement proves that certain commitments entered into *vis-à-vis* Turkey could not and must not have been entered into by the Community. The rules concerning freedom of movement have a different meaning for each of the Member States which, in accordance with the wishes of the contracting parties, undertook commitments towards Turkey. Moreover, implementation of the agreement is a matter for the Council of Association, which may adopt decisions only with the approval of all the Member States.

The reply to the first question referred to the Court involves three stages. It is necessary first of all to set out the conditions for direct applicability, secondly, to analyse the extent and scope of the obligations flowing from Article 12 of the Agreement and Article 36 of the Protocol, particularly at the end of the transitional stage, and, finally, to consider the existence of a standstill obligation.

(a) According to the judgments of 26 October 1982 (Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641) and 29 April 1982 (Case 17/81 *Pabst* v *Hauptzollamt Oldenburg* [1982] ECR 1331), the provisions of an association agreement may be directly applicable if they contain clear and precise obligations. In order to assess whether such obligations exist, it is necessary to interpret the agreement; according to the interpretation rules laid down in the Vienna Convention on the Law of Treaties, that entails, first, consideration of the terms of the Agreement, which is to be complemented by an interpretation in the light of its object and purpose. The Court of Justice has accepted that the EEC Treaty and treaties concluded under international

law with non-member countries are intended to achieve different objectives and as a result an identical provision may have a different meaning according to the nature of the Treaty.

(b) With regard to the scope of the obligations flowing from Article 12 of the Agreement and Article 36 of the Protocol, it must be pointed out that those texts contain a certain number of restrictions on the rules on freedom of movement applicable under the EEC Treaty. Thus, Article 12 merely requires the parties to be 'guided' by the rules contained in the EEC Treaty for the purpose of 'progressively' securing freedom of movement. Article 36 speaks of freedom of movement being 'secured by progressive stages' in accordance with the principles set out in Article 12 and with the rules necesssary to that end adopted by the Council of Association.

(aa) A literal interpretation of those articles reveals that the undertaking to secure freedom of movement is no more than a general principle. Article 48 *et seq.* of the EEC Treaty merely provides inspiration and guidance and the contracting parties retain important powers in regard to the implementation of freedom of movement. Article 12 is not sufficiently precise to be directly applicable.

Furthermore, the rules on freedom of movement in the EEC Treaty, by which the contracting parties are to be guided, do not themselves lay down fundamental guidelines. Article 49 (d) expressly permits restrictions on freedom of movement in order to avoid serious threats to the standard of living and level of employment in the Member States. Freedom of movement was given its present form only by Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

The end of the transitional stage does not constitute a time-limit beyond which the rules concerning freedom of movement have direct effect, as the Court decided in regard to Articles 52 and 59 of the EEC Treaty. Article 12 of the Agreement and Article 36 of the Protocol are not as clear and precise as Articles 52 and 59 of the EEC Treaty. They speak only of the progressive securing of a certain level of freedom which is not more precisely defined. The Court of Justice cannot substitute its assessment for that of the Council of Association, the political body competent in regard to securing freedom of movement acting unanimously and taking account of the question of reciprocity.

(bb) Interpretation of the agreement in the light of its object and purpose confirms the literal analysis. The absence of concrete obligations in regard to freedom of movement may be explained by the parties' wish to maintain the flexibility necessary in the general context of the development of the association, of which freedom of movement was only one part. It follows from the preamble and from Article 2 of the Agreement that the association is to be brought about according to the parties' possibilities and taking account of reciprocity. Determination of the contractual obligations through the judicial process would circumvent that relationship of interdependence.

The provisions of other Association Agreements, such as Article 44 of the Agreement with Greece, contain more specific rules on freedom of movement. Moreover, it would be unacceptable for Turkey to enjoy more favourable treatment in regard to freedom of movement than the new Member States which are subject to transitional rules.

(c) No standstill obligation can be deduced from either Article 12 of the Agreement, Article 36 of the Protocol or Article 7 of the Agreement.

(aa) To base such an obligation on Article 12 of the Agreement and Article 36 of the Protocol would be to disregard the fact that the nature of freedom of movement makes it necessary to retain a large measure of flexibility and to take account of practical and social factors.

The scheme of the Agreement and the Protocol also militate against such a solution. The existence of express standstill obligations in Article 41 of the Protocol, concerning freedom of establishment and freedom to provide services, and in Article 13 of Decision No 1/80 of the Council of Association, dealing with access to the labour market of foreign workers legally resident on the territory of a contracting party, prove that the parties to the Agreement did not wish to adopt such rules in regard to freedom of movement for workers.

No standstill obligation may be deduced from the alleged dynamic regulatory powers, for the implementation of which Article 12 of the Agreement and Article 36 of the Protocol contain no concrete rule. the Court of Justice holds that a standstill obligation exists only where there are very specific provisions, such as Article 45 (1) of the Act of Accession of the Hellenic Republic (judgment of 23 March 1983 in Case 77/82 *Peskeloglou* v *Bundesanstalt für Arbeit* [1983] ECR 1085).

(bb) Article 7 of the Agreement, which prohibits the parties from taking any measures liable to jeopardize the attainment of the objectives laid down in Article 2, does not constitute an independent obligation with a specific substantive regulatory scope but is an express formulation of the principle of bona fide performance of treaties in public international law. It is only in exceptional cases that such an obligation may be equivalent to a standstill obligation.

According to the Court's case-law, Article 5 (2) of the EEC Treaty contains no standstill rule but imposes a general obligation the actual significance of which depends, in each particular case, on the provisions of the Treaty or on the rules laid down within its general framework. The same is true *a fortiori* of Article 7 (2) of the Agreement, which forms part of traditional public international law.

In the German Government's view the reply to the first question should therefore be that:

'Article 12 of the Association Agreement between the EEC and Turkey of 12 September 1963 and Article 36 of the Additional Protocol of 23 November 1970, combined with Article 7 of the said Agreement, do not lay down a prohibition that is directly applicable under Community law on the introduction of further restrictions on the reunification of the families of Turkish workers lawfully resident in a Member State of the Community.'

Since the reply to the first question is in the negative, there is no need to reply to the second question.

3. The Government of the French Republic states that according to the case-law of the Court (judgment of 30 April 1974 in Case 181/73 *Haegeman* v *Belgium* [1974] ECR 449), the provisions of an agreement concluded by the Communities with a non-member country form an integral part of Community law. However, those provisions are directly applicable only if the Court has so deduced from the object and purpose of the agreement and the context of the provisions at issue. Such an analysis,

applied to Article 12 of the Agreement and Article 36 of the Protocol, shows that they do not have direct legal effect. The rules on freedom of movement are complementary to those concerning the customs union, establishment of which is the essential purpose of the Agreement. Only the Council of Association may lay down the detailed arrangements for implementation of freedom of movement. Even at the end of the transitional stage, Article 12 cannot be directly applicable since it does not contain an unconditional provision capable of being relied on before the national courts. Article 12 merely requires the parties to be guided by Article 48 *et seq.* of the EEC Treaty for the purpose of establishing definitive rules on the movement of workers in the context of Turkey's possible accession to the Community. In the meantime, the movement of Turkish workers in the Member States is a matter for national rules and bilateral agreements. The expulsion of a Turkish national on grounds which are in conformity with national law cannot therefore be regarded as a new restriction on freedom of movement. Furthermore, Article 48 (3) of the Treaty expressly provides for limitations justified on grounds of public policy, public security or public health. The Court has decided, in its judgments of 4 December 1974 in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337 and of 28 October 1975 in Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219 that the determination of the requirements of public policy is a matter for the Member States. Even in the highly unlikely event that the Court considered that Article 12 had direct effect, the Member States would therefore be entitled to rely on the requirements of public policy to prohibit the movement or residence of a Turkish national on their territory. The second paragraph of Article 7 of the Agreement cannot confer on Article 12, combined with Article 36 of the Protocol, the nature of an obligation sufficiently precise and unconditional to be directly relied on.

The right to the reunification of families cannot be based on Article 12 of the Agreement but only on national rules. Furthermore, the concept of freedom of movement in Article 48 of the EEC Treaty does not include the right to reunification of families, which is covered by Articles 10 and 11 of Regulation No 1612/68. Nor may such a right be deduced from a general principle of Community law, based on Article 8 of the European Convention on Human Rights. According to the case-law of the European Court of Human Rights, Article 8 of that Convention does not impose on the contracting States a general obligation to respect a married couple's choice of the country of their matrimonial residence and unconditionally to allow foreign spouses to settle in that country (judgment of the European Court of Human Rights of 28 May 1985 in the *Abdulaziz* case).

The reply to the national court should therefore be:

'(1) Neither Article 12 of the Association Agreement between the European Economic Community and Turkey nor Article 36 of the Additional Protocol, combined with Article 7 of the said Agreement, have direct effect in the legal orders of the Member States nor do they confer on individuals rights which may be relied on before the national courts;

(2) Having regard to the foregoing, there is no need to reply to the second question.'

4. According to the United Kingdom, the first question raises the problem of the legal nature of the Agreement and the Protocol and the direct effect of the articles in question.

(a) The Agreement and Protocol constitute in legal terms a mixed agreement in which the Community has competence in relation to some matters and the Member States have competence in relation to others. The measures adopted by the Council approving those instruments in the name of the Community in accordance with Article 228 of the EEC Treaty as well as the Court of Justice's power of interpretation under Article 177 relate only to the provisions which are within the powers of the Community. The EEC Treaty does not confer any powers on the Community either to legislate or to enter into external agreements with regard to the movement of workers from non-member countries. The competence of the Member States in that matter is confirmed by Article 38 of the Protocol under which the Council of Association may make recommendations to the Member States concerning freedom of movement for Turkish workers. Article 238 of the EEC Treaty does not confer upon the Community power to enter into an association agreement which covers matters outside the Community's powers but expressly requires in such a case that the procedure under Article 236 be used. For that reason, association agreements containing provisions falling outside the powers of the Community are concluded in the form of mixed agreements. A consistent and uniform interpretation in all Member States of the irrelevant provisions of the Agreement can be ensured on the basis of Article 25 of the Agreement and Article 62 of the Protocol, which permit the Council of Association to submit any dispute regarding interpretation to the Court of Justice.

(b) Since Article 12 of the Agreement and Article 36 of the Protocol fall outside the competence of the Community, they are incapable of being given direct effect. In any event, those provisions are not sufficiently unconditional, clear and precise to give rise to direct effect. According to Article 12 of the Agreement, the contracting parties are to be guided by Article 48 *et seq.* of the Treaty for the purpose of progressively securing freedom of movement. Similarly, Article 36 of the Protocol provides that it is for the Council of Association to decide on the rules necessary to secure freedom of movement. The objectives of the Agreement, including the securing of freedom of movement, which, under Article 7, the parties are to refrain from jeopardizing, are not defined with sufficient precision for Article 7 to have direct effect. Moreover, the express standstill clause in Article 41 of the Protocol does not refer to freedom of movement.

(c) With regard to the question of reunification of families, it must be pointed out that the Court of Justice cannot confer rights on individuals, on the basis of the European Convention on Human Rights, which are distinct from those conferred by Community law. It merely endeavours to interpret Community law in a manner compatible with the Convention. In any event, the European Court of Human Rights has not deduced from Article 8 of the Convention a general obligation on the part of the contracting States to respect a married couple's choice of the country of their matrimonial residence and to permit foreign spouses to settle in that country.

The United Kingdom proposes the following reply be given:

'Article 12 of the Agreement and Article 36 of the Protocol do not give rise to direct effect in Community law.'

Having regard to the reply to the first question, the second question does not arise.

5. The Government of the Hellenic Republic states that the Court has not been called upon to reply to a question concerning the interpretation and legal effect of Articles 7 and 12 of the Agreement and Article 36 of the Protocol in the Member States' internal legal systems but rather to a question concerning the standstill rule implicit in those provisions. According to the Court's case-law, a provision is directly applicable only if it contains the clear and precise obligation the implementation and results of which are not subject to the adoption of another measure. However, Article 12 is drafted in a broad and equivocal manner and does not define the meaning of freedom of movement for workers in the context of the Agreement. Similarly, the wording of Article 36 leaves some matters open and gives the Council of Association the task of securing freedom of movement. To accept that Article 36 gives rise to direct effect would amount to prejudging the decisions of the Council of Association and to upsetting the balance of the implementation of the Agreement, which is based on reciprocity. According to the Court's case-law, the direct effect of provisions of Community law may not be transposed to similarly drafted provisions to be found in international agreements. The fact that the spirit, scheme and wording of the Agreement at issue is marked by a large degree of flexibility and the considerable margin of discretion left to the Member States, it cannot be regarded as having direct effect.

The reply should therefore be:

'Article 12 of the Association Agreement between the EEC and Turkey and Article 36 of the Additional Protocol, combined with Article 7 of the said Agreement, are not directly applicable in the Community legal order and do not confer on individuals rights upon which they may rely before the courts of the Member States.'

6. The Commission makes a detailed analysis of the Agreement, which is a combination of an association for the purposes of development and an association prior to accession, and of the objectives and arrangements of the preparatory, transitional and final stages of the association. Notwithstanding the fact that the association was relaunched by Decision No 1/80 of the Council of Association, the realization of its objectives, and in particular the establishment of the customs union, has been very much delayed.

(a) Since the Agreement and the Protocol are mixed agreements, it is first necessary to analyse the nature of the provisions at issue as a matter of Community law. The Court of Justice has jurisdiction to interpret those provisions under Article 177 of the EEC Treaty only if they fall under the Community's treaty-making powers and not a power reserved to the Member States.

Article 238 of the EEC Treaty is a valid and sufficient legal basis for the Community to conclude an agreement concerning rules for the free movement of workers in the context of an association agreement with a non-member country. The concept of association has a very wide scope and covers various forms of relationship. The agreement in question falls into the category of those intended to prepare for future accession. In order to be distinct from agreements confined to trade or certain sectors, an association agreement must

include areas, such as that of freedom of movement for workers, which are part of the single internal market, but in regard to which the Community does not in any event already have external competence, whether expressly, for example under Article 113, or impliedly. An agreement preparatory to accession must therefore be capable of dealing with all the matters to be covered by the future accession treaty. The position of Article 238 in the Treaty, following Articles 235, 236 and 237, which relate to accession, shows that it confers on the Community a general power to conclude agreements. That explains the strict procedural requirements, namely a unanimous decision of the Council after consulting the Assembly, as distinct from simpler decision-making processes such as that of Article 113 of the Treaty.

The criticisms made of that view are without foundation. The argument that the EEC Treaty concerns only freedom of movement between the Member States and that the Community cannot claim more extensive powers in its external dealings than it has within the Community fails to take account of the fact that the purpose of Article 238 is not to deduce an external competence from an existing internal one but to accord a specific external competence. The argument that the Community's internal and external competences are parallel and that Article 48 does not confer on the Community any powers concerning policy in regard to migrant workers from non-member countries is irrelevant. On the one hand, the legal nature of the undertaking as part of Community law is not affected by the fact that implementation of the undertakings entered into by the Community *vis-à-vis* the non-member country is a matter for the Member States. On the other hand, the Community has internal competence in this matter based, if necessary, on Article 235. Thus, although the Community's external competence is based on Article 238, it would also be possible in theory to add as a basis the internal competence under Article 235. The fact that the Member States are in principle responsible for the supervision of foreigners does not exclude the exercise of powers at Community level where that is justified by the requirements and purposes of the Community. Furthermore, the Member States can always free themseleves from their international obligations going beyond the scope of Community rules.

Like Article 235, Article 238 gives the Community a power which is potential in the sense that it is for the Community to decide whether a matter falling within its sphere of competence is to be included in an association agreement. Once it has been decided that a matter is to be included, it is necessary to determine whether there is, apart from the nucleus of powers which may be exercised only by the Community, a second series of matters in regard to which the Community may refrain from exercising its powers in favour of the Member States, which undertake the obligation as contracting parties to the mixed agreement in their own right. Such a sharing of spheres of competence is theoretically possible in a mixed agreement in which the Member States undertake obligations of a different nature and scope but it is hardly compatible with the structure and purpose of a comprehensive agreement. In any event, the question does not arise in this case, in which the undertakings concerning freedom of movement are homogeneous as far as the Community is concerned and leave no discretion to the Member States in regard to their implementation.

No readily identifiable powers have been reserved to the Member States in the area of freedom of movement. The form of a mixed agreement was chosen because of the differences of opinion existing in the Community from the very beginning regarding the scope of the Community's treaty-making powers under Article 238. Without drawing a line of demarcation between the respective powers, it can be said that, according to the contracting parties, certain matters are within the jurisdiction of the Community and certain others within that of the Member States and still others within the jurisdiction of both, as is confirmed by the interpretive declaration on the definition of the expression 'contracting parties'. Furthermore, that division of powers is evolving in the sense that the Community's powers are continually growing. The fact that Article 36 of the Protocol refers to freedom of movement for workers between Turkey and the Member States and that it is for the latter to adopt the necessary implementing measures does not alter the Community nature of the international obligation. The internal agreement concerning the implementation of the Association Agreement merely confirms that the contracting parties envisaged different powers for the Community and for the Member States without making a real division. In its judgment of 23 November 1977 in Case 65/77 *Razanatsimba* [1977] ECR 2229, the Court did not hesitate to interpret the provisions concerning freedom of movement and freedom to provide services contained in an association agreement, thus implicitly recognizing their Community nature. Since the obligations entered into towards Turkey are of a Community nature, there is no need to consider the extent to which the Member States also undertook a 'complementary' obligation from the point of view of international law.

The mixed nature of the agreement may be explained by the level of development reached at that time by the Community and by the evolving nature of Community powers. In 1964, in the absence of case-law, there was no absolute legal certainty in regard to the Community's powers. Participation of the Member States in the agreement was politically convenient. Finally, the Community's powers were limited since the transfer of powers within GATT from the Member States to the Community took place only after the entry into force of the Common Customs Tariff. The fact that the Protocol took the form of a mixed agreement was due to political reasons and established usage. Certain current factors may also be relied upon in favour of the participation of the Member States in the agreement. The first two financial protocols provided for the financing of projects in Turkey out of the budgets of the Member States. Certain aspects of economic and technical cooperation affected a sector traditionally falling within the jurisdiction of the Member States. The objectives of economic and monetary policy are general and do not necessarily have to be achieved in an identical manner by all the Member States. Finally, the Council of Association has a decision-making power which could in certain cases go beyond the normal bounds of the Community's powers.

(b) The questions referred to the Court themselves seek to establish whether Articles 7 and 12 of the Agreement and Article 36 of the Protocol contain a clear and directly applicable prohibition addressed to the Member States preventing them from introducing new restrictions in regard to freedom of movement, such as an extension of the waiting period. The question of the existence of a standstill obligation is closely linked to that of direct applicability in the sense that a genuine standstill obligation is necessarily unconditional and clear. Besides those criteria, the Court's case-law on direct

applicability lays emphasis on the interpretation of the provisions at issue in the light of the spirit, content, purpose, scheme and terms of the convention. In that regard, it must be pointed out that the accord is preparatory to the accession of Turkey to the Community and performs to a large extent functions parallel to those of the EEC Treaty.

(aa) First of all it is necessary to determine the scope of the obligation to secure freedom of movement at the end of the transitional stage. Article 48 *et seq.* of the EEC Treaty, by which the contracting parties are to be guided according to Article 12 of the Agreement, define only the basis of freedom of movement within the Community. Implementing rules have been laid down by subordinate legislation, in particular Regulation No 1612/68, the substantive content of which was not compulsorily laid down in the EEC Treaty. Moreover, Article 49 (d) expressly recognizes that the existence of serious threats to the standard of living and level of employment in certain regions constitutes a problem inherent in freedom of movement. Since the literal meaning of the expression 'be guided' is not clear, reference must be made to its spirit and purpose, as they can be deduced from the general tenor of the Agreement. In order to ensure satisfactory functioning of the Agreement, in accordance with its objective, the parties must have a certain freedom to lay down the rules governing freedom of movement in such a way as to take account of the developments in general and the position of the agreement as a whole without that giving rise to a requirement of reciprocity. The rules to be laid down concerning freedom of movement exist in the context of a relationship of association which, even in the final stage, does not correspond to accession. The open formula contained in Article 12 allows the parties to take account of certain political considerations. It may be distinguished from Article 44 of the Association Agreement with Greece, which left the contracting parties much less room for manoeuvre. Finally, Turkey cannot have the benefit at the end of the transitional stage of rules on freedom of movement more favourable than those applied to the new Member States, which are subject to transitional rules.

The Council of Association is to decide on the measures necessary for the progressive achievement of freedom of movement according to a procedure of a political nature, based on unanimity. The end of the transitional stage cannot be regarded as a date on which freedom of movement is automatically achieved and rights are conferred on individuals.

None the less, since the freedom of movement to be secured must be analogous to that provided for in Article 48 *et seq.*, there may perhaps exist an essential core of rights, which, however, is very difficult to identify. Since the action before the Verwaltungsgericht concerns the conditions for the reunification of families, consideration of that question would in any event be purely hypothetical.

(bb) No general standstill obligation may be deduced from Article 7 of the Agreement, which expressly prohibits any measures liable to jeopardize the attainment of the objectives of the agreement and not measures adopted to attain those objectives. In exceptional cases, the obligation imposed on one party to put an end to conduct jeopardizing those objectives could be equivalent to a standstill obligation. In any event, changes in the conditions for reunification of families cannot jeopardize the

objectives of Article 2. Even in the largely integrated legal order of the Community, the Court has not considered that the second paragraph of Article 5 of the EEC Treaty, the text of which is equivalent to the second paragraph of Article 7 of the Agreement, has independent direct effect but has relied on it solely in order to prohibit the Member States from frustrating measures adopted by the Community institutions or the first steps towards a common policy. The rules of the Treaty or of the Agreement concerning freedom of movement are *leges speciales* in relation to Article 5 of the Treaty or Article 7 of the Agreement and any failure to comply with those rules must be sufficiently clear in itself without there being any need to have recourse to those general provisions. In its judgment of 23 March 1983 (Case 77/82, cited above), the Court deduced a prohibition of the introduction of new restrictions on reunification of families from the actual terms of the Act of Accession of Greece, without having recourse to Article 5 of the Treaty.

An alleged standstill obligation may also not be based on the dynamic regulatory powers deduced from Article 12 of the Agreement and Article 36 of the Protocol. The existence of express standstill clauses, such as Article 41 of the Protocol concerning freedom of establishment and freedom to provide services, and Article 13 of Decision No 1/80 of the Council of Association concerning access to the labour market for Turkish workers, shows that the contracting parties did not wish to lay down such a clause in regard to freedom of movement. The significance of the system of graduated standstill clauses in the EEC Treaty, including not just clauses drafted in absolute terms, but also clauses merely implying a non-binding obligation and areas in regard to which no such clauses exist, would be disregarded if a general standstill obligation was deduced from Article 5 of the EEC Treaty. Those considerations apply *a fortiori* to the Agreement. Freedom of movement for workers is a sensitive area by reason of its human and political implications, a factor which might make necessary certain restrictions or adaptations, and a standstill obligation must be formally stipulated.

In order to be recognized, the right to reunification of families must constitute a direct part of freedom of movement not only under EEC rules but also in the Agreement. Under EEC rules, that right rests on subordinate Community law, and in particular on Regulation No 1612/68. There is however a principle of reunification of families based on the general principles of law and on a constitutional tradition common to the Member States. In accordance with the Court's case-law concerning the freedoms of the common market from the point of view of human rights, the concept of freedom of movement in Community law cannot have a lower status than that provided for in Article 8 of the European Convention on Human Rights. The European Court of Human Rights has recognized that States have a broad discretion in the definition of the concept of respect for private and family life embodied in Article 8. In particular, States are not required to respect a married couple's choice as to their matrimonial residence and to permit foreign spouses to settle in their territory, except if the couple is unable to lead a family life in their country of origin (*Abdulaziz*, cited above). The administrative provisions adopted by *Land* Baden-Württemberg, which are at issue in the main proceedings, conform to the standard laid down in Article 8. Even if it could be accepted that the Community's standard concerning the right to reunifi-

cation of families is higher than that contained in Article 8 in the sense that such a right is guaranteed in principle, it would still be possible to modulate it having regard to the overriding public interests at stake.

Since the rules on freedom of movement under the Agreement are modelled on those existing within the Community, a minimum standard must be guaranteed in regard to reunification of families. However, the German rules extending the waiting period for reunification of families in respect of second-generation foreigners originating in non-member countries does not jeopardize that minimum standard. It takes account both of the interests of the couple themselves, called upon to establish their marital home in their country of origin and of the public interest in checking an influx of members of the families of migrant workers which cannot be absorbed, and remains within the limits of the political room for manoeuvre left to the Member States.

Those considerations, applicable to the final stage of the association, are *a fortiori* valid during the transitional stage.

Since they are not sufficiently precise and unconditional, Article 12 of the Agreement and Article 36 of the Protocol can only be regarded as having direct effect if it is possible to deduce from them a clear standstill obligation. However, the obligations concerning reunification of families are not sufficiently precise for it to be possible to deduce from them a prohibition preventing the Community and, therefore, the Member States, from introducing restrictions before the end of the transitional stage.

The Commission therefore proposes that the following reply be given:

'Article 36 of the Additional Protocol of 23 November 1970 combined with Articles 7 and 12 of the Association Agreement between the EEC and Turkey of 12 September 1963 do not lay down a prohibition that is directly applicable under the Community legal order on the introduction of new restrictions on members of the families of Turkish workers lawfully resident in a Member State of the Community who wish to come to live with those workers.'

Since that reply relates to the decisive date for the purposes of the main proceedings, the word 'already' in the first question has not been included in the reply. Since the reply is sufficient to resolve the case at hand, a separate reply to the second question is not required.

III — Oral Procedure

In response to an invitation to state its views on the question of the Court's jurisdiction to interpret the Association Agreement, the Government of the Federal Republic of Germany explained that its written observations should be understood as meaning that it was uncertain whether the provisions of the Association Agreement relating to the freedom of movement for workers were adopted by the Community alone or whether in fact they were adopted by the Member States. It was not questioning jurisdiction of the Court to answer that question, whatever the answer might be. The United Kingdom stated that it did not deny that the Court had jurisdiction to consider the Agreement as a whole in order to determine (to use the words of the Court

in the *Kupferberg* judgment, cited above) whether the Community had assumed responsibility for the performance of the Agreement. Inasmuch as the Community had assumed that responsibility, the Member States were under an obligation to the Community to respect its commitments as well as their own. In that regard it was irrelevant that the Association Agreement was a 'mixed' agreement.

F. Schockweiler
Judge-Rapporteur