OPINION OF ADVOCATE GENERAL MISCHO
delivered on 13 May 2003 [1]

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1. The Seventh and Eleventh Chambers of the Bundessozialgericht (Federal Social Court, Germany) have referred questions to the Court for a preliminary ruling on the interpretation of Article 41(1) of the Additional Protocol of 23 November 1970 to the Agreement establishing an Association between the European Economic Community and Turkey of 1963, [2] and of Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council established by the abovementioned Agreement. [3]

I — Legal background

A — *The EEC-Turkey Association*

2. The Agreement establishing an Association between the European Economic Community and the Republic of Turkey (hereinafter 'the Agreement') was signed on 12 September 1963 in Ankara by the Republic of Turkey, of the one part, and by the Member States of the European Economic Community and the Commu-

2 — The Additional Protocol was concluded, approved and confirmed by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1972 L 293, p. 1).

3 — The decision came into force on 1 July 1980. It was not published in the Official Journal, but may be consulted in a publication by the Office for the Official Publications of the European Communities: *Association Agreement and Protocols between the European Economic Community and Turkey and other basic texts*, Brussels, 1992.

nity, of the other part, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 on the conclusion of the Agreement establishing an Association between the European Economic Community and Turkey. [4]

3. Article 2(1) of the Agreement provides that its aim is to promote the continuous and balanced strengthening of trade and economic relations between the contracting parties, including relations in the employment sector, by progressively securing freedom of movement for workers (Article 12), as well as by the abolition of restrictions on the freedom of establishment (Article 13) and the freedom to provide services (Article 14).

4. Article 6 of the Agreement provides for the creation of an Association Council which is to act within the powers conferred upon it by the Agreement.

5. Article 12 of the Agreement states:

'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.'

4 — OJ 1973 C 113, p. 1.

6. Article 14 of the Agreement provides:

'The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on the freedom to provide services between them.'

7. In terms of Article 22(1) of the Agreement:

'1. In order to attain the objectives of this Agreement the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken....'

8. The Additional Protocol includes a Title II, headed 'Movement of persons and services', Chapter I of which relates to '[w]orkers' and Chapter II of which to '[r]ight of establishment, services and transport'. Article 36, which forms part of Chapter I, lays down timescales for securing freedom of movement for workers between the Member States of the Community and the Republic of Turkey by progressive stages in accordance with the principles laid down by Article 12 of the Agreement, and states in its second paragraph that the Association Council is to decide on the rules necessary to that end.

9. In terms of Article 41 of the Additional Protocol, which forms part of Title II of Chapter II of the Protocol:

'1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association, determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services.

The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade.'

10. On 19 September 1980, the Association Council adopted Decision No 1/80.

11. Article 6 of Decision No 1/80 establishes, for the benefit of Turkish workers, a system of progressive access to employment which enables them, after one year's legal employment, to obtain the renewal of their permit to work for the same employer, after three years and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment for the same occupation and, after four years, to enjoy free access to any paid employment. Paragraph 3 states that the procedures for applying the article are to be established under national rules.

12. Article 8(1) provides that, 'should it not be possible in the Community to meet an offer of employment by calling on the labour available on the employment market of the Member States and should the Member States, within the framework of their provisions laid down by law, regulation or administrative action, decide to authorise a call on workers who are not nationals of a Member State of the Community in order to meet the offer of employment, they shall endeavour in so doing to accord priority to Turkish nationals'.

13. Article 13 of Decision No 1/80, which forms part of Chapter II, headed 'Social provisions', Section 1, headed 'Questions

relating to employment and the free movement of workers', states that:

'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

B — *National legislation*

14. Under Paragraph 9 of the Verordnung über die Arbeitserlaubnis für nichtdeutsche Arbeitnehmer (Work Permit Regulation for Non-German Workers, hereinafter the 'AEVO') of 2 March 1971 (BGBl. I, p. 152), in the version in force on 1 January 1973:

'There shall be exempted from the requirement to obtain work permits...

2. Travelling personnel in the international carriage of passengers and goods... for employers with registered offices in the territory of application of this regulation.'

15. The 10th regulation amending the AEVO, which was adopted and came into force on 1 September 1993 (BGBl. I, p. 1527), amended Paragraph 9(2) by restricting the right to a dispensation from work permits to travelling personnel working in the international carriage of passengers and goods 'for employers with registered offices abroad'.

16. On 30 September 1996 (BGBl. I, p. 1491), a further amendment was made to Paragraph 9(2) of the AEVO. The version in force from 10 October 1996 reads as follows:

'2. Travelling personnel working in the international carriage of passengers and goods for employers with registered offices abroad, where

(a) the vehicle is registered in the State of the employer's registered office;

...'

17. Paragraph 9(3) of the Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer (Work Permit Regulation for Foreign Workers, hereinafter 'the ArGV') of 17 September 1998 (BGBl. I, p. 2899),

which replaced the AEVO, adopted the text of Paragraph 9(2) of the AEVO without amendment.

II — Facts and main proceedings

A — *Case C-317/01*

18. Messrs Eran Abatay, Abdulgam Balikci, Ismail Birer and Refik Günes (hereinafter 'Mr Abatay and Others') are Turkish nationals residing in Turkey and work mainly as drivers engaged in international haulage of goods. They are employed and paid by Baqir Dis Tic. Ve Paz. Ltd, which has its registered office in Mersin, Turkey (hereinafter 'Baqir Ltd'), which is a subsidiary of Baqir GmbH, which has its registered office in Stuttgart, Germany. Baqir Ltd and Baqir GmbH import fruit and vegetables, mostly self-grown, into Germany. The goods are transported from Turkey to Germany by means of lorries registered in Germany in the name of Baqir GmbH and driven by (among others) Mr Abatay and Others.

19. After the coming into force of the new regulation, the Bundesanstalt für Arbeit (Federal Labour Office, Germany) continued to issue, on a temporary basis, a work permit to the drivers valid until 30 September 1996. However, after that date, it refused to issue further permits.

20. In proceedings brought by Mr Abatay and Others, the Sozialgericht, Nürnberg (Social Court, Nuremberg, Germany), found that the claimants did not require work permits. This judgment was confirmed on appeal by the Bayerisches Landessozialgericht (Higher Social Court, Bavaria, Germany). Those courts held, in essence, that the restriction imposed by the new German provisions, requiring Mr Abatay and Others to be the holders of such permits, amounted to a restriction contrary to the 'standstill' clause of Article 13 of Decision No 1/80.

21. The Bundesanstalt für Arbeit brought an appeal on a point of law, challenging the interpretation given by the appeal court of Article 13 of Decision No 1/80.

22. Proceedings having been raised before it, the Eleventh Chamber of the Bundessozialgericht asks in its order for reference whether the claimants have a valid claim to be exempt from the requirement to obtain a work permit, based on Article 13 of Decision No 1/80 or Article 41(1) of the Additional Protocol. The amendments to the AEVO brought into force on 1 September 1993 and 10 October 1996 could be construed as amounting to new

restrictions on the conditions of access to employment within the meaning of Article 13 of Decision No 1/80 or new restrictions on the freedom to provide services within the meaning of Article 41(1) of the Additional Protocol.

23. There is no doubt in this regard that these provisions are directly applicable in Member States, but their scope raises a number of problems.

24. I shall set out below the questions referred for a preliminary ruling put by the Eleventh Chamber in this regard, as well as the substance of the commentary which accompanies them.

B — *Case C-369/01*

25. Mr Nadi Sahin, a former Turkish national who has been a German national since 1991, runs the transport undertaking 'Sahin Internationale Transporte' in Göppingen, Germany. He is also the proprietor of a subsidiary of the latter, called Anadolu Dis Ticaret AS (hereinafter 'Anadolu AS'), which has its registered office in Istanbul, Turkey. The Göppingen undertaking owns several lorries, which it uses for international haulage, operating between Germany, Turkey, Iran and Iraq. All the lorries are registered in Germany. According to the national court, there is an 'agency agreement' between Mr Sahin's German firm and its Turkish subsidiary, under which Anadolu AS uses Mr Sahin's lorries for international haulage operations.

26. However, the document called 'Agency Agreement' ('Agenturvertrag') which is to be found in the file transmitted by the national court merely provides that the Turkish subsidiary is authorised 'to load and unload our vehicles as well as those of transport undertakings used by us, and to carry out the customs formalities and other administrative formalities associated with that' ('ist berechtigt, unsere Fahrzeuge sowie die Fahrzeuge der von uns eingesetzten Transportunternehmer zu ent- und beladen, die damit im Zusammenhang stehenden zollamtlichen und behördlichen Tätigkeiten vorzunehmen').

27. The national court also indicates that even before 1 September 1993 Mr Sahin had used some 17 employees as drivers of the lorries registered in Germany. Those employees are Turkish nationals, live in Turkey and had concluded their contracts of employment with Anadolu AS before that date. For each journey to Germany, a German visa was issued to them by the appropriate consulate general. The Seventh Chamber adds however that the necessary findings of fact which would enable a conclusion to be reached as to who the drivers' employer is have so far been lacking.

28. By application of 29 May 1996, Mr Sahin sought a declaration that the workers in question did not require work permits for their activities. He obtained an interim order from the Sozialgericht Ulm (Germany), on 9 December 1996, that required the Bundesanstalt für Arbeit to issue work permits to the drivers pending a final decision on the substance of the case.

29. However, in a final judgment delivered on 10 February 1998, the Sozialgericht Ulm held that the 17 drivers in question did not need to obtain a work permit.

30. The appeal raised by the Bundesanstalt für Arbeit was dismissed by decision of 27 July 2000 of the Landessozialgericht, Baden-Württemberg (Germany), which based its reasoning in essence on Article 41(1) of the Additional Protocol, holding that the legal rules in force on 1 January 1973 remained relevant.

31. The Bundesanstalt für Arbeit brought an appeal on a point of law against that judgment, claiming in particular that there had been a breach of Paragraph 9(2) of the AEVO.

32. In seeking to have the appeal dismissed, Mr Sahin argues that both Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 contain a 'standstill' clause which prohibits the creation of new restrictions relating to work permits for Turkish workers.

33. The Seventh Chamber of the Bundessozialgericht has raised questions on the scope of Article 41 of the Additional Protocol, on the relationship between this article and Article 13 of Decision No 1/80 and on the scope of the latter provision. That court has referred several questions for a preliminary ruling to the Court in order to resolve these issues.

III — Consideration of the questions referred for a preliminary ruling

34. While recognising that the way in which the Commission has regrouped and reformulated the different questions is useful, my preference is to retain their original wording.

A — *The first question referred for a preliminary ruling in Case C-317/01*

35. This question is worded as follows:

'(1) Is Article 13 of Decision No 1/80... to be interpreted as prohibiting a Member

State of the Community from introducing national provisions which, in comparison with the position under national law on 1 December 1980, lay down new restrictions on access to the employment market for Turkish workers generally, or does the prohibition on introducing new restrictions under Article 13 of Decision No 1/80 relate only to the time when a worker is first legally employed?'

1. Opinion of the national court and arguments raised before the Court

36. The *national court* observes that the wording of Article 13 suggests that the prohibition on the introduction of new restrictions under Article 13 should be interpreted as meaning that it applies only to the time from which the worker's residence and employment in the territory of the State concerned first became lawful, and not the time from which the provision first became applicable. However, that interpretation of Article 13 is not mandatory.

37. *Mr Abatay and Others* construe the first question in Case C-317/01 as meaning that the national court asks whether Article 13 of Decision No 1/80 prohibits, in the abstract, the adoption of any provision by which access to employment is made subject to a new restriction or whether the intention of the provision is to set the point of departure by reference in each actual case to the date of first residence and first legal employment of the worker.

38. They argue that Article 13 of Decision No 1/80 prohibits the introduction of new national legislation relating to access to employment which is more restrictive than is that applying on the date on which that article came into force. They claim that the requirement under this provision that Turkish nationals be legally resident and employed in the territory of the host Member State means only that persons living or working illegally in a Member State cannot make use of rights arising under the article.

39. Mr Abatay and Others also challenge the relevance of this question to the result of the case where the claimants in the main proceedings were already legally resident in the Member State in question or were legally employed there at the date on which the new national legislation came into force. Employment and residence in the Member State are lawful as soon as they comply with the legal and regulatory requirements in force in that State. [5] The employment of the claimants in the main proceedings was accordingly lawful before the amendment of the AEVO which came into force on 10 October 1996 and came within the scope of protection of Article 13. The first question does not therefore require to be answered.

5 — Case C-1/97 *Birden* [1998] ECR I-7747.

40. Mr Abatay and Others rely in the alternative on Article 6 of Decision No 1/80, which gives a Turkish worker duly registered as belonging to the labour force of a Member State the right of free access in that Member State to any paid employment of his choice after four years of legal employment.

41. According to *Mr Sahin*, the proprietor of an international haulage business and claimant in the main proceedings in Case C-369/01, the 'standstill' applied from the date of the coming into force, on 20 December 1976, of Decision No 2/76, which preceded Decision No 1/80. Article 7 of the earlier decision contained a provision relating to workers that was similar to Article 13 of the later decision. To interpret these articles as meaning that the prohibition on introducing new restrictions on access to employment refers to the date of first legal residence and employment of the workers concerned (as the Bundesanstalt für Arbeit and the Member States do) would be illogical, in that a person who already formed part of the labour market of a Member State would no longer have any need to benefit from a rule prohibiting further restrictions on access to employment.

42. For Mr Sahin, the interpretation he proposes is supported by the wording of Article 13. The family members whom this article seeks to benefit plainly could not be in employment, as otherwise they would already benefit from the rights available to workers. This legislation therefore also favours employment seekers who have not yet been taken on. A person who is working has no need for access to the labour force, because he is already part of it. The provision in question is intended to assist access to the market, and it follows that, as far as the application of the clause is concerned, the time when legal employment is first taken up is of no relevance. Nor is the critical factor the date of first legal residence, as there is one point behind the provision in question, namely that illegal residence can never form a basis for access to employment rights. [6]

43. The *German Government* considers that the prohibition on introducing new restrictions contained in Article 13 of Decision No 1/80 only applies from the date of first legal residence and first legal employment of the workers concerned in the host Member State. It takes the view that this analysis is supported by a comparison with Article 41(1) of the Additional Protocol. While that provision is of general application, the terms of Article 13 of Decision No 1/80 are more limited in scope, and relate only to workers and members of their families who are legally resident.

44. For the German Government, this conclusion is also consistent with the objective of Article 13 of Decision No 1/80. It does not seek to regulate the free movement of workers between Turkey and the Member States on a long-term basis, but aims only

6 — See Case C-192/89 *Sevince* [1990] ECR I-3461.

to ensure the progressive consolidation of the position of Turkish workers who have regularly formed part of the labour force in a Member State. Every worker is entitled to be certain that his rights existing at the time of his entry to the territory could not be adversely affected. That consolidating objective of Decision No 1/80 does not however affect the power of national authorities to control the entry of Turkish nationals into the territory of the Member State concerned and their first employment in that State. The same logic underlies Article 6 of Decision No 1/80.

45. The *French Government* largely adopts the point of view of the German Government. For the French Government, Article 13 of Decision No 1/80 does not seek to regulate the free movement of workers between Turkey and the Member States on a long-term basis, but aims only to ensure the progressive consolidation of the position of Turkish workers who have regularly formed part of the labour force in a Member State. That consolidating objective of Decision No 1/80 does not however affect the power of national authorities to control the entry of Turkish nationals into the territory of the Member State concerned and their first employment in that State. The same logic underlies Article 6 of Decision No 1/80.

46. The *Netherlands Government* argues that the wording itself of Article 13 of Decision No 1/80 shows that the prohibition which it contains relates solely to 'legal' workers who are already in employment. The 'standstill' obligation applies only to workers who already form part of the labour force. The provision does not however regulate the conditions applying to entry of these workers to the labour force. The Member States have therefore retained the power to adopt new restrictions as regards entry to the labour force, but they cannot introduce restrictions which would affect workers who already form part of it.

47. This also follows if one reads Article 13 consistently with other parts of the same decision. Thus, Articles 6, 7, 8, 9, 10 and 11 of Decision No 1/80 each refer to 'duly registered as belonging to the labour force' and 'legal employment', but nowhere refer to entry to the labour force itself.

48. That interpretation is also confirmed by settled case-law (see *inter alia* the judgments in *Tetik*,[7] at paragraph 21, and *Savas*,[8] at paragraph 58), according to

7 — Case C-171/95 [1997] ECR I-329.
8 — Case C-37/98 [2000] ECR I-2927.

which Member States retain the competence to regulate entry to the labourforce.

49. The *Commission* notes that 'Decision No 1/80 confers... no right of freedom of movement to Turkish workers. In the current state of the law governing the EEC-Turkey Association, the establishment of conditions governing entry to the territory of a member of the European Union remains within the exclusive competence of that State. Workers enjoy no rights under Decision No 1/80 until they have entered the labour market in a Member State'.

2. Assessment

50. The Commission's observations are plainly correct, as are the corresponding views of the Governments of the Member States.

51. In its judgment in the *Savas* case, cited above, the Court moreover held that:

'58 ... the provisions concerning the EEC-Turkey Association do not encroach upon the competence retained by the Member States to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment, but merely regulate the situation of Turkish workers *already lawfully integrated*[9] into the labour force of Member States (see, in particular, Case C-171/95 *Tetik* v *Land Berlin* [1997] ECR I-329, paragraph 21).

59 Next, the Court has repeatedly held that, unlike nationals of Member States, Turkish workers are not entitled to move freely within the Community but benefit only from certain rights in the host Member State whose territory they have lawfully entered and where they have been in legal employment for a specific period (see, in particular, *Tetik,* paragraph 29).'

52. The *Savas* judgment refers generally 'to the provisions of the EEC-Turkey Association Agreement'.

53. It would thus be incorrect to interpret Article 13 of Decision No 1/80 in a different sense, for example by retaining only the first part ('The Member States of the Community and Turkey may not intro-

9 — Author's emphasis.

duce new restrictions on the conditions of access to employment applicable to workers and members of their families'), while leaving aside the second part ('legally resident and employed in their respective territories').

54. It is also wrong to maintain, as the claimants in the main proceedings do, that no new restrictions could be introduced after 1 December 1980 that might affect Turkish workers who were not on the territory of a Member State on that date, but that such restrictions could only be effective if they related to Turkish workers who were there unlawfully.

55. I therefore suggest to the Court that it should hold that even after 1 December 1980 Member States could introduce new restrictions relating to the entry into their territory of Turkish workers who wished to take up paid employment there.

56. However, by reason of Article 13, such restrictions cannot affect workers who have already obtained legal employment and a right of residency in the Member State in question at a time which preceded the introduction of these new restrictions.

57. Those persons will continue to benefit fully from the rights given to them by Article 6 (or, for members of their family, Article 7). [10]

58. The judgment in the *Kurz* case [11] set out what should be understood by the expressions 'worker' and 'registration as duly belonging to the labour force of a Member State'.

59. The words 'conditions of access to employment' which appear in Article 13 simply refer to rights arising by virtue of Article 6.

60. It should be noted that an employee is given the right, after one year's legal employment, to obtain the renewal of his permit to work for the same employer, if the latter has a job available, the right, after three years, to move to another employer in the same occupation, and, after four years of legal employment, the right to enjoy any paid employment of his choice.

10 — Subject always to the safeguards laid down by Article 12 of Decision No 1/80, which reads as follows:
'Where a Member State of the Community or Turkey experiences or is threatened with disturbances on its employment market which might seriously jeopardise the standard of living or level of employment in a particular region, branch of activity or occupation, the State concerned may refrain from automatically applying Articles 6 and 7. The State concerned shall inform the Association Council of any such temporary restriction.'

11 — Case C-188/00 [2002] ECR I-10691 paragraph 68.

61. As the German, French and Netherlands Governments have pointed out, the sole purpose of Article 13 is therefore to strengthen the position of Turkish workers (under Articles 6 and 7) who have already taken up legal employment.

62. The objection might be raised that in those conditions Article 13 is superfluous, because under the principle *pacta sunt servanda*, the Member States are already prohibited from interfering with rights acquired by the workers under Articles 6 and 7. [12]

63. I consider none the less that this provision serves a useful purpose in that it confirms the right of workers in a lawful situation not to be affected by new restrictions which, moreover, the Member States are always in a position to impose.

64. To seek to confer a wider effectiveness on Article 13 would be contrary to its wording and the interpretation given by the Court in the *Savas* judgment of 'the provisions of the EEC-Turkey Association Agreement'.

12 — *Kurz* judgment, cited above in footnote 10, paragraph 68.

65. I therefore suggest that the first question raised in Case C-317/01 be answered as follows:

'Article 13 of Decision No 1/80... must be interpreted as meaning that where, at any time after 1 December 1980, a Member State of the Community introduces new restrictions on access to the employment market for Turkish workers, those restrictions will not apply to Turkish workers who, at the time when the restrictions come into force, are already on the territory of and legally resident and employed in that Member State.'

B — *The second question referred for a preliminary ruling in Case C-317/01 and the third question referred for a preliminary ruling in Case C-369/01*

66. The wording of these questions, which refer to the particular situation of Turkish drivers engaged in international haulage, is almost identical. They fall to be analysed and answered in the same way. They are respectively worded as follows:

Case C-317/01:

'Is Article 13 of Decision No 1/80... also to be applied to workers employed in Turkey,

who, as long-distance lorry drivers engaged in international haulage, regularly pass through a Member State of the Community without belonging to the legitimate labour force of that Member State?'

Case C-369/01:

'Is Article 13 of Decision No 1/80... also to be applied to Turkish employees of an employer with its seat in Turkey who, as long-distance lorry drivers engaged in international haulage, regularly pass through a Member State of the Community without belonging to the (legitimate) labour force of that Member State?'

1. Opinion of the national court and arguments raised before the Court

67. It appears appropriate as regards these questions to mention the analysis of the Eleventh Chamber of the Bundessozialgericht (the national court in the case of Abatay and Others), to which the Seventh Chamber refers.

68. The Eleventh Chamber states as follows:

'... it is doubtful whether Article 13 of Decision No 1/80 must also be applied to workers such as the claimants, who are employed in Turkey and who all, as travelling personnel, merely pass through a Member State such as Germany in the course of international haulage operations without belonging to the legitimate labour force in Germany (Question 2).

In order to ascertain whether a worker belongs to the legitimate labour force, it must be determined whether the legal relationship of employment can be located within the territory of the Member State or retains a sufficiently close connection with that territory, taking account in particular of the place where the Turkish national was hired, the territory on or from which the paid employment is pursued and the applicable national legislation in the field of employment and social security law (operative part of the judgment in Case C-434/93 *Bozkurt* [1995] ECR I-1475; Case C-36/96 *Günaydin* [1997] ECR I-5143; Case C-98/96 *Ertanir* [1997] ECR I-5179, SozR 3-6935 Allg. No 3). According to those criteria, workers such as the claimants, who are employed as long-distance lorry drivers in Turkey, *do not belong*

to the legitimate labour force in Germany,[13] at any event, if, as must be assumed in the present case, they are paid in Turkey and are subject to Turkish employment and social legislation.

The position of Article 13 within Section 1 of Chapter II of Decision No 1/80 ("Questions relating to employment and the free movement of workers") and of other provisions of that section (in particular Articles 6, 7, 10 and 11) supports the view that Article 13 of Decision No 1/80 applies only to workers who belong to the legitimate labour force of a Member State... . The fact that the activity engaged in by foreign long-distance lorry drivers, which affects German territory to only a limited extent, is not covered by the provisions of Section 1 of Chapter II of Decision No 1/80, and thus not by Article 13, could stem, *inter alia*, from the fact that the provisions of that section are aimed at the progressive integration of Turkish workers and members of their families into the labour force. The right to take up further employment and, therefore, the right of residence in the territory of the State concerned (see *Sevince*, cited above, and Case C-237/91 *Kus* [1992] ECR I-6781) are greater the longer and more continuously legal employment has been engaged in beforehand. It is questionable whether such rights can properly be conferred on long-distance lorry drivers who regularly enter the territory of a State only for a limited time and then always leave it again. Thus, for example, the fact of their continuing employment by a foreign employer — a necessary condition for work permit exemption under German law — clearly shows that long-distance lorry drivers such as the claimants do not aspire to any such progressively strengthened integration into the German labour force, for which reason, moreover, the claimants may likewise not rely on Article 6 of Decision No 1/80 (free access to any employment after legal employment).

The limitation of the scope of Article 13 of Decision No 1/80 to workers belonging to the legitimate labour force is nevertheless not the only possibility, as the view taken by the Landessozialgericht shows. However, the Chamber does not share the Landessozialgericht's reasoning that the protection contemplated by Article 13 of Decision No 1/80 must also extend to Turkish workers employed in international transport on the ground that in circumstances such as those of the present case the domestic employment market is only marginally affected and therefore a restrictive interpretation of the standstill clause is not appropriate. That line of reasoning would needlessly restrict the Member States and Turkey in their scope for taking effective action against abuses in their employment and economic markets. Moreover, it is doubtful whether, in circumstances of the present kind, the German employment market is only marginally affected if, as submitted by the defendant before the courts deciding on the facts in the present case, the employment of drivers from low-wage countries using vehicles registered in Germany has the effect that unemployed drivers resident in Germany are not recruited.'

13 — Author's emphasis.

69. For their part, Mr Abatay and Others argue that employment and residence in a Member State are lawful as soon as they comply with the legal and regulatory requirements in force in that State. [14] Seen from that point of view, the employment of the claimants was lawful before the German legislation was amended.

70. The fact that the centre of gravity of the claimants' activities is not located on the territory of a Member State does not harm their case. On the contrary, according to Article 13, protection is given to a job as such, without regard to the question of whether it is international or otherwise.

71. The claimants also dispute the argument that only activities that are subject to the employment law and social law of a Member State (that is to say those that are undertaken in the 'legal' employment market) are protected.

72. The German Government for its part considers that Article 13 of Decision No 1/80 does not apply to lorry drivers who are employed in Turkey and who are engaged, from that country, in international haulage operations, because they do not form part of the 'legitimate employment market' of the Member State in question.

14 — See the judgment in the *Birden* case, cited above.

73. The position of Article 13 within the body of Section 1 of Chapter II 'Questions relating to employment and free movement of workers', its interrelationship with other provisions of that section, in particular Articles 6, 7, 10 and 11, together with the objective of progressive integration of Turkish workers and members of their families into the labour market, support this point of view.

74. None of the connections specified in the judgment in the *Bozkurt* case, cited above, are present in this case.

75. For the Commission, the 'standstill' provision in Article 13 of Decision No 1/80 does not prevent the adoption of national legislation abolishing the exemption from the requirement to obtain a work permit previously available to drivers working for an employer having its registered office in Turkey and engaged in the international haulage of goods using lorries registered in the Member State concerned. Such workers do not display a sufficiently close connection with the territory of that Member State.

2. Assessment

76. It follows from the wording of both of these questions as well as from the obser-

vations made by the national courts that the latter have already formed the view that the Turkish workers in question did not belong to the legitimate labour force in Germany, as they did not meet the requirement of a sufficiently close connection set out in the *Bozkurt* judgment. [15]

77. The two questions under consideration thus ask in effect whether persons whose working relationships do not involve a close connection with the territory of a Member State may, none the less, rely on Article 13.

78. To answer this question in the affirmative would presuppose, first of all, that the concept of a 'worker... legally resident and employed' which appears in Article 13 of Decision No 1/80 has a different meaning than that of a 'worker... duly registered as belonging to the labour force of a Member State' used in the first subparagraph of Article 6(1) of that decision, or that of 'legal employment' which is used in each of the three indents of Article 6(1).

79. I am of the view that it is not possible to give a different meaning to these more or less identical concepts depending on whether they appear in the one or the other article of the same section of the decision.

80. It should also be emphasised that in the *Bozkurt* judgment the Court used the expressions 'existence of legal employment' (paragraph 25), 'legality of employment' (paragraphs 26, 27 and 29), 'Turkish nationals who are already duly integrated into the labour force' (paragraph 30) and 'existence of legal employment' (paragraph 31) interchangeably.

81. It plainly considered, therefore, that the expressions used in Article 6 and Article 13 were synonymous.

82. The *Bozkurt* judgment should be referred to for another reason. At paragraph 31 of the judgment, the Court held that in the case of a Turkish worker who was not required under the relevant national legislation to hold a work permit or a residence permit issued by the authorities of the host State in order to carry out his work, the existence of legal employment 'can be established'. It follows from the context that what the Court had in mind was 'by other means'.

83. But as regards the evidence by which the existence of legal employment is to be established, the judgment only refers to the three points already referred to, namely the place of employment, the territory from which the paid activities are carried out and the legislation governing employment and social security law.

15 — Cited above at point 68. In fact, the application of the rules set out in the *Bozkurt* judgment leads to the conclusion that these drivers belonged to the legitimate labour force in Turkey.

84. The national courts clearly state that 'according to those criteria, workers such as the claimants, who are employed as long-distance lorry drivers in Turkey, do not in any event belong to the legitimate labour force in Germany if, as must be assumed in the present case, they are paid in Turkey and are subject to Turkish employment and social legislation'.

85. It therefore follows from paragraph 31 of the *Bozkurt* judgment that the fact that legislation in force in a Member State does not require the possession of a work permit does not mean that workers are automatically to be treated as legally employed within the meaning of Article 13, as the claimants in the main proceedings suggest.

86. It might however be tempting to disregard entirely the textual arguments set out above, as well as the Court's case-law requiring that sufficiently close connections be in place, in order to find an *ad hoc* solution to the problem of the Turkish drivers in question, based on the following considerations:

— the drivers carried out their activities in compliance with German legislation until the introduction of the new, more restrictive, legislation;

— they were, for a time, issued with work permits and the Member State thus recognised them as forming part of its labour force;

— the lorries they drive are registered in Germany;

— they are in any event in an unusual position, as their activities 'affect Germany to only a limited extent' and they 'do not aspire in any way to a progressively strengthened integration into the German labour force' (according to the expressions used by the national courts).

87. I am of the view, however, that such an approach is incorrect.

88. The fact that the drivers in question drive lorries registered in Germany should immediately be disregarded.

89. The *Bozkurt* case cited above also involved a Turkish driver who drove a lorry registered in the Netherlands, but that did not prevent the Court from setting

other criteria. [16] It is true that in the *Lopes da Veiga* [17] judgment the Court mentioned the fact that the claimant, a Portuguese national, worked on board a vessel registered in the Netherlands, but it indicated five other 'circumstances' to the national court to be taken into account when deciding whether the employment relationship of the applicant had a sufficiently close connection with the territory of the Netherlands to justify the grant of a work permit, namely the fact that the applicant worked for a shipping company whose registered office was in the Netherlands, that he had been hired in the Netherlands, that the employment relationship between him and his employer was subject to Netherlands law, that he was insured under the social security system of the Netherlands and that he paid income tax there.

90. Nor, in my opinion, does the fact that the activities of the Turkish drivers had previously been in compliance with German legislation justify an *ad hoc* solution.

91. They benefited from the special regime granted by the Federal Republic of Germany to all drivers in international haulage and not just to drivers of Turkish nationality.

92. As regards work permits, these were only issued on a temporary basis to allow the undertaking to adapt to the new legislation.

93. For all these reasons, I suggest to the Court that the second question raised in Case C-317/01 and the third question raised in Case C-369/01 be answered as follows:

'Article 13 of Decision No 1/80 does not apply to Turkish workers employed by an employer with its seat in Turkey and who, as long-distance lorry drivers engaged in international haulage, regularly pass through a Member State of the Community without belonging to the legitimate labour force of that Member State.'

C — *Part (b) of the third question referred for a preliminary ruling in Case C-317/01 and of the first question referred in Case C-369/01*

94. The wording of these questions is almost identical. They fall to be analysed and answered in the same way. They are respectively worded as follows:

16 — Paragraph 3 of the judgment mentions that in the intervals between his journeys and during his periods of leave, that driver lived in the Netherlands.

17 — Case 9/88 [1989] ECR 2989, paragraph 17.

Case C-317/01:

'Is Article 41(1) of the Additional Protocol... to be interpreted as meaning that:

...

(b) a new restriction on the freedom to provide services also exists where a Member State of the Community, from the entry into force of the Additional Protocol, restricts the access of Turkish workers to the employment market and thereby impedes the freedom to provide services of businessmen employing the workers?'

Case C-369/01:

'Is Article 41(1) of the Additional Protocol... to be interpreted as meaning:

...

(b) that there is also a restriction on the freedom to provide services where a Member State of the Community abolishes an existing work permit exemption for Turkish drivers engaged in international haulage who are employed by a (Turkish) employer with its seat in Turkey?'

1. Opinion of the national courts and arguments raised before the Court

95. The *Eleventh Chamber* of the Bundessozialgericht considers that it is uncertain whether there is a restriction on the freedom to provide services within the meaning of Article 41(1), even if the introduction of provisions such as those in question indirectly impedes the freedom of undertakings employing those workers to provide services.

96. The *Seventh Chamber* of the Bundessozialgericht asks whether measures of the kind at issue in the case are generally to be regarded as 'restrictions' within the meaning of Article 41. It adds that it could also be relevant in the present case to know whether the inability of the workers to rely on Article 41 presupposes that the workers concerned are employees of a Turkish employer only or whether another (German) employer may also be involved, in whatever form, in the employment relationship. It takes the view that a measure cannot automatically be regarded as a new

restriction if it affects, as a businessman, only a German national who is resident in Germany. The question in the case is whether Mr Sahin, who has been a German citizen since 1991, has the right to take on Turkish drivers who no longer have work permits.

97. The *Turkish long-distance lorry drivers,* who are the claimants in Case C-317/01, take the view that the imposition of a requirement for a work permit for an activity that had previously been exempted restricts the freedom of Turkish haulage undertakings to provide services in the territory of a Member State.

98. For his part, *Mr Sahin* considers that the freedom to provide services must include the possibility for an undertaking to assign personnel to carry out its activities and that the introduction into national legislation of more restrictive measures such as those in issue in the present case is capable of imposing an obstacle to the provision of services, in breach of Article 41(1) of the Protocol. Mr Sahin claims that the activity of an undertaking, seen from an international perspective, does not consist only in the intervention of the provider of services in person, but also in the carrying-out of an activity by employees.

99. Mr Sahin goes on to analyse the particular characteristics of the market in the international haulage of goods sector, in particular to the Middle East. He maintains that long-distance international goods haulage inevitably involves the carrying-out of activities in a market that is split between undertakings subject to different legal regimes and which, accordingly, provide their employees with different income and social benefits depending on the legal rules and factual conditions applying in the State they come under. Undertakings in third countries may rely on having lower salary overheads, but can more easily find a workforce in the labour markets to which they have access which, in light of national economic difficulties, is ready to accept being separated from family members during lengthy periods and which has the knowledge of languages necessary for journeys going as far as Turkey, or even to countries such as Iran, Jordan or Egypt.

100. For its part, the *German Government* considers that Article 41(1) of the Protocol does not preclude amending legislation of the kind in issue in the main proceedings, the provisions governing the freedom to provide services under the EEC-Turkey Association having a narrower scope than the rules applying in this respect in the European Union.

101. The *French Government* considers that the provisions relating to the freedom to provide services in Article 41(1) do not apply in a situation where a Turkish haul-

age undertaking which is a subsidiary of a company registered in Germany uses vehicles registered in Germany in its parent's name to provide haulage services between Turkey and Germany. As the Turkish undertaking used vehicles registered in Germany, the authorities of that Member State were entitled to take the view that the international haulage in question had in reality been provided by the German parent company and that, as a result, the Turkish long-distance lorry drivers were required to have a work permit in Germany. Article 41(1) of the Protocol does not apply to such a situation. Moreover, any other interpretation would, in the French Government's opinion, allow German haulage companies to avoid German employment law by allowing their Turkish subsidiaries to use the parent's vehicles to provide haulage to Germany.

102. The *Netherlands Government* considers that Article 41 of the Additional Protocol is not the right reference point for the present case, which relates to transport services. In the EC Treaty, these services are expressly excluded from the freedom to provide services and are subject to a separate regime. The Court has recognised that the provisions on services do not apply to transport services.[18] Article 42 of the Additional Protocol, which states that '[t]he Council of Association shall extend to Turkey... the transport provisions of the Treaty...', confirms that the general regime relating to the provision of services does not apply to transport.

103. Even if Article 41 were to apply to the present cases, the Netherlands Government takes the view that Article 41(1) must be interpreted so as not to render illusory the powers of Member States in the field of the free movement of workers. Member States have reserved all powers to regulate the access of Turkish nationals both to their territory and to their labour market, so as to protect the stability of their labour markets. These powers would become illusory if measures that Member States can take in the context of the free movement of workers were to be prohibited in the context of the freedom to provide services.

104. For the *Commission*, on the other hand, the standstill clause under Article 41 of the Protocol precludes the adoption of national legislation which abolishes an exemption from the requirement to obtain work permits previously enjoyed by Turkish drivers engaged in international goods haulage using lorries registered in the Member State concerned. The requirement to obtain a work permit for each driver, and, *a fortiori* the refusal of such a permit, would hinder the freedom to provide services.

18 — See Case C-49/89 *Corsica Ferries France* [1989] ECR 4441.

105. The Commission also does not accept that the present case involves transport services.

2. Assessment

106. I shall first consider the argument put forward by the Netherlands Government and shall then turn to the other arguments discussed during the proceedings before the Court.

(a) Does Article 41(1) apply to transport services? Is this sector covered by these measures?

107. As mentioned above, the Netherlands Government considers that Article 41(1) of the Additional Protocol is not the right reference point for the present case, given that the legislation in question relates to the transport sector. In the EC Treaty, those activities are expressly excluded from the freedom to provide services. Article 61(1) of the EC Treaty (now, after amendment, Article 51(1) EC) states that:

'Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.'

108. Even as regards relations between Member States it is not possible purely and simply to apply the provisions of the Treaty relating to the freedom to provide services to the transport sector.

109. As regards relations with the Turkish Republic, the relevant texts are Articles 14 and 15 of the Association Agreement and Article 42 of the Additional Protocol.

110. In terms of Article 14, '[t]he Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on the freedom to provide services between them'.

111. Article 61 of the Treaty thus appears among the provisions by which the Contracting Parties are to be guided. It follows that an analogy should not be drawn that does not also take this article into account.

112. Article 15 of the Association Agreement states that:

'The rules and conditions for extension to Turkey of the transport provisions contained in the Treaty establishing the Community, and measures adopted in implementation of those provisions shall be laid down with due regard to the geographical situation of Turkey.'

113. Lastly, Article 42(1) of the Additional Protocol reads as follows:

'The Council of Association shall extend to Turkey, in accordance with rules which it shall determine, the transport provisions of the Treaty establishing the Community with due regard to the geographical situation of Turkey. In the same way it may extend to Turkey the measures taken by the Community in applying those provisions in respect of transport by rail, road and inland waterway.'

114. No measure of which I am aware has been adopted by the Association Council on the basis of these provisions.

115. Faced with this situation, it would be possible to object that, even if the abolition of restrictions on the freedom to provide services in the transport sector must be carried out by way of an extension of the common transport policy to Turkey, the 'standstill' clause nevertheless applies to this sector.

116. However, that is not the case. This clearly follows from the judgment in the *Corsica Ferries France* case, [19] to which the Netherlands Government has drawn attention.

117. That case involved a tax levied on passengers disembarking and embarking and passengers in transit at Corsican ports. The ferry company was liable for payment of the tax. Ships plying between Corsica and ports in continental France were required to pay the tax only when leaving the Corsican port, whereas ships plying between Corsica and ports situated in another State were liable to the tax both on arrival at and departure from the Corsican port.

118. At paragraphs 14 and 15 of the judgment, the Court stated that:

'14 ... in 1981 and 1982, the period at issue in the main proceedings, freedom to

19 — Cited above in footnote 18.

provide services in maritime transport had not yet been implemented and... consequently the Member States were entitled to apply provisions such as those at issue in the main proceedings.

15 That conclusion is not weakened by the fact that those rules were *reintroduced* into the French code des ports maritimes... *after having been repealed* in 1969. In light of the existence of Article 61(1) of the Treaty, Article 62, which *prohibits* the Member States from introducing *any new restrictions* on the freedom to provide services which had in fact been attained at the date of entry into force of the Treaty, *does not apply*.' [20]

119. It can therefore likewise be concluded that the 'standstill' clause in Article 41(1) of the Additional Protocol has no application to the transport sector.

120. It remains to be discussed whether the provision in dispute falls within that sector.

121. The Commission objects that the German legislation in dispute has no connection with the transport sector given that, in reality, what is involved is the making available of drivers or the hiring of lorries. The connection with the transport sector is no more direct than it would be in the case of the purchase of a lorry.

122. In my opinion, however, there are serious objections to this argument.

123. It should be noted first of all that if, in the *Corsica Ferries France* case, cited above, the Court was able to hold that a tax fell within the transport sector which was not levied on passengers disembarking in Corsica from continental France, while it was levied on all other disembarkations and embarkations, the same should *a fortiori* apply to a rule concerning 'travelling personnel in the international carriage of passengers and goods'.

124. There is no doubt that the exemption from the requirement to obtain a work permit under the German regulation of 1971, by way of exception to the rules normally applying to nationals of third countries, arose because of the particular features of international transport and in particular because non-German 'travelling personnel' only spend a limited time in

20 — Author's emphasis.

Germany and do not aspire to be integrated into the local labour market. [21]

125. In other words, the people in question only benefited from those particular rules because they were directly involved in a transport activity.

126. Secondly, the matter which gave rise to the problem for the claimants in the main proceedings was the fact that, from 1996, the exemption from the requirement to have a work permit was no longer granted where the *lorry* used was not registered in the State in which the employer was established, but in Germany. A rule which depends on the place where lorries are registered relates, in my opinion, to the transport sector.

127. Thirdly, there require to be taken into account the implications of Regulation (EC) No 484/2002 of the European Parliament and of the Council of 1 March 2002 amending Council Regulations (EEC) No 881/92 and (EEC) No 3118/93 for the purposes of establishing a driver attestation. [22]

128. Council Regulation (EEC) No 881/92 of 26 March 1992 concerns access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States. [23]

129. This regulation, and Regulation No 484/2002 are both based on Article 75 of the EC Treaty (now, after amendment, Article 71 EC) which appears in the title relating to transport (Title IV, now Title V).

130. As amended by Regulation No 484/2002, Regulation No 881/92 provides, in summary, at Article 3(1) that international carriage is to be carried out subject to Community authorisation in conjunction with a driver attestation if the driver is a national of a non-member country.

131. Article 3(3) of Regulation No 881/92, inserted by Regulation No 484/2002, states that:

21 — In the Netherlands as well, international lorry drivers were not covered by the general policy on aliens. See the *Bozkurt* judgment, cited above, paragraphs 4 and 5.

22 — OJ 2002 L 76, p. 1.

23 — OJ 1992 L 95, p. 1.

'3. A driver attestation shall be issued by a Member State... to any haulier who:

— is the holder of a Community authorisation,

— in that Member State lawfully *employs* drivers who are nationals of non-member countries or lawfully uses drivers who are nationals of non-member countries *put at his disposal* in accordance with the conditions of employment and of vocational training laid down in that same Member State: [24]

— by laws, regulations or administrative provisions, and, as appropriate,

— by collective agreements, in accordance with the rules applicable in that Member State.'

132. This regulation not only creates an attestation (which will only become compulsory from 19 March 2003), but also lays down the principle that drivers who are nationals of third countries put at the disposal of a haulier in a Member State must be used lawfully, that is to say by observing the conditions of employment laid down by the same Member State for drivers of its own nationality or residing in its territory. I shall return to this point below.

133. I should emphasise that this regulation was adopted on the basis of Article 71 EC. It follows that legislation such as that at issue in the present case also comes within the transport sector.

134. I therefore suggest that the Court makes as its primary finding that Article 41(1) of the Additional Protocol does not apply to national legislation covering the transport sector, of the kind in issue in the main proceedings.

135. It is only in the alternative that I shall consider the other arguments raised in debate and which are based on the opposite hypothesis.

24 — Author's emphasis.

(b) Concerning the existence of a new restriction on the freedom to provide services

136. It should first of all be noted what the principle of the freedom to provide services represents. According to Article 60 of the EC Treaty (now Article 50 EC), 'the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals'.

137. Considered in conjunction with the 'standstill' clause, this principle means, in the first place, that the Turkish Republic may not impose new restrictions on temporary activities that German undertakings wish to carry out in Turkey. However, this issue does not arise in the present cases.

138. For its part, the Federal Republic of Germany cannot create new impediments to activities that Turkish road haulage undertakings wish to carry out in Germany.

139. It is not however clear whether, in the main proceedings, the international haulage services are provided in the name and under the responsibility of Turkish undertakings that are subsidiaries of German companies or under the responsibility of the German companies themselves. I therefore need to consider both possibilities.

(i) Carriage is provided in the name and under the responsibility of a Turkish undertaking

140. Two possibilities may be distinguished.

— The Turkish undertaking provides carriage using its own lorries and its own drivers

141. This is a typical example of the provision of cross-border haulage services.

142. The Federal Republic of Germany does not impose any obstacles to this as it grants an exemption from the requirement to have a work permit to 'travelling personnel working in... international carriage... for employers with registered offices

abroad, where the vehicle is registered in the State of the employer's registered office'. [25]

143. It should however be noted that a Turkish undertaking providing carriage using its own lorries may be faced with a limit on the number of journeys it may make each year. The bilateral treaties usually provide that limits are to be calculated on an annual basis. Limits such as these also applied between Member States until the entry into force of Regulation No 881/92.

144. Since then, however, owners of lorries registered in a Member State may obtain licences authorising them to undertake an unlimited number of journeys each year. That may explain the attraction of these lorries for Turkish undertakings.

— The Turkish undertaking provides carriage using its own drivers but with lorries which belong to a German undertaking and which are registered in Germany

145. This corresponds to one of the two possible situations which, according to the Commission, may arise in the present case, namely that of a hiring of the lorries by the German undertaking to the Turkish undertaking.

146. In that case, according to the German legislation in question, drivers who are nationals of third countries are no longer entitled to an exemption from the requirement to have a work permit in Germany, because the lorry is not registered in the State in which the employer has its registered office.

147. At the hearing, the German Government emphasised that from a time well before the entry into force of the Additional Protocol undertakings established in third countries had not been granted authorisation to provide haulage services on German territory if their lorries were not registered in the country in which they were established. The Federal Republic of Germany had therefore not introduced any *new* restriction as regards rights relating to Turkish undertakings, but was instead better able subsequently to enforce, through the medium of work permits, an old rule that had often been disregarded in the past.

148. If the Court does not share my primary conclusion, it would be a matter for the national courts to reach a finding in fact in relation to this question, which is clearly a decisive one.

25 — Paragraph 9(2) of the AEVO, as amended, cited above at point 16.

149. In the same context, it should be pointed out that if a German undertaking were to put its lorry at the disposal of a Turkish undertaking together with the corresponding licence, it would be in breach of Community law.

150. In its recent judgment in *Bourrasse and Perchicot*,[26] the Court confirmed that, even inside the Community, the free movement of a lorry hired by an undertaking in a Member State to an undertaking established in another Member State is permitted only under certain conditions. The same must apply *a fortiori* where the hiring is made to a transport undertaking established in a non-member country.

151. In that judgment, the Court stated as follows:

'34 As regards carriage authorisations, according to the combined provisions of Articles 1(1) and 3(1) of Regulation No 881/92, a Community authorisation is required to carry out the international carriage of goods by road for hire or reward within the territory of the Community and, pursuant to Article 5(1) and (2) of the same regulation, that authorisation is to be issued by the authorities of the Member State in which the transport undertaking is established, which will issue the holder with the original and the number of certified true copies of the authorisation corresponding to the number of vehicles at the disposal of the holder, including those held under hire contracts. Consequently, it is for the lessee not the lessor to obtain a Community authorisation for the hired vehicles from the authorities of the Member State in which he is established.

35 Furthermore, under Article 5(4) of Regulation No 881/92, the Community authorisation is to be made out in the haulier's name and he may not transfer it to any third party. It follows that where vehicles originally used by a road haulier holding a Community authorisation are then hired out to another road haulier, the lessor is not entitled to transfer the benefit of his own Community authorisation to the lessee.'

152. In its further reasoning in that judgment, the Court went on to state that under Article 2(1) of Council Directive 84/647/EEC of 19 December 1984 on the use of vehicles hired without drivers for the

26 — Joined Cases C-228/01 and C-289/01 [2002] ECR I-10213.

carriage of goods by road, [27] as amended by Council Directive 90/398/EEC of 24 July 1990, [28] 'each Member State is to allow the use within its territory of vehicles hired by undertakings established on the territory of another Member State provided that, *inter alia*, the vehicles are registered or put into circulation in compliance with the laws in the Member State in which the haulier lessee is established' (paragraph 40 of the judgment).

153. The French Government has pointed out also that the agreements entered into between the Community and third countries such as the Republic of Hungary [29] also provide that a transport company established in Hungary which provides transport services between Hungary and the Community must use motor vehicles that are registered in Hungary.

154. It therefore appears that if the legal relationship in the main proceedings involved the hiring of lorries by a German undertaking to a Turkish undertaking — which is a matter for the national courts to determine — the use of these lorries by the Turkish undertaking on German territory would amount to an illegal practice.

27 — OJ 1984 L 335, p. 72.

28 — OJ 1990 L 202, p. 46.

29 — That was also the interpretation of that regulation adopted by Advocate General Van Gerven in his Opinion in *Corsica Ferries Italia* (Case C-18/93 [1994] ECR I-1783, point 25).

155. The principle of the freedom to provide services may not be relied upon in support of illegal activities and the fact that Turkish workers driving those lorries would be required to obtain a German work permit could not amount to a restriction on the freedom to provide services. Article 41(1) of the Additional Protocol would quite simply not apply.

(ii) Carriage is provided in the name and under the responsibility of a German undertaking

156. In that case, the status of the drivers may be covered by two possible situations.

— The Turkish drivers are taken on by the German undertaking directly

157. It appears from the second question raised in Case C-317/01 and the third question raised in Case C-369/01 that the national courts are of the view that the Turkish workers do not belong to the legitimate labour force in Germany.

158. In its statement of grounds, the Seventh Chamber of the Bundessozialgericht states however that 'the necessary

findings of fact which would enable a conclusion to be reached as to who the drivers' employer is have so far been lacking'. It goes on to ask whether it is relevant 'whether the workers concerned are employees of a Turkish employer only or whether another (German) employer may be involved, in whatever form, in the employment relationship'.

159. I should point out in that regard that according to the Court's settled case-law the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. [30]

160. In the present case, it may be assumed that the true position is that the drivers are principally given their instructions by German undertakings, but it has not been suggested that they are also paid by them.

161. It is therefore unlikely that they may be considered to be employees of German undertakings. However, as there is a doubt, it is necessary to consider the situation that would arise if the Turkish drivers were in fact employees of the German undertaking.

162. The question therefore is whether the fact that the German authorities require the Turkish drivers to have a work permit amounts to a restriction on the freedom to provide services *to the prejudice of the German haulage undertaking* if the latter is the employer of the drivers.

163. I am of the view that this question falls to be answered in the negative.

164. It should be noted in this regard that, to the extent that the requirement to have a work permit, imposed by the German authorities, affects German haulage undertakings, that can, seen from the perspective of the freedom to provide services, amount at its highest to an obstacle to the *exporting* of services by those undertakings.

165. An obstacle to the freedom to export services was in issue in the *Corsica Ferries France* case, cited above. Before addressing the question dealt with above of the application of the provisions relating to the freedom to provide services to the transport sector, the Court held that '... the French legislation at issue in the main proceedings may constitute a restriction on freedom to provide services within the Community within the meaning of the first

30 — See, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 32; Case C-337/97 *Meeusen* [1999] ECR I-3289; and *Kurz*, cited above.

paragraph of Article 59 of the EEC Treaty in so far as it *discriminates* between persons providing transport services between a port situated in national territory and a port situated in another Member State of the Community and persons providing transport services between two ports situated in national territory'. [31]

166. In the present case, the German legislation is not discriminatory. The requirement to have a work permit affects haulage operations in the same way, whether the German undertaking is providing transport within Germany, to another Member State or to Turkey.

167. A measure of this kind, adopted by a Member State, which affects without distinction the provision by its own nationals of services within the Member State, on the one hand, and the export by the same nationals of the same services to another Member State or, as in the present case, to Turkey, on the other hand, does not constitute an obstacle to the freedom to provide services.

168. I am of the view that it is appropriate to apply by analogy the case-law of the Court relating to the free movement of goods.

169. As regards Article 30 of the EC Treaty (now, after amendment, Article 28 EC), which relates to restrictions on imports, the Court held at paragraph 5 of the *Dassonville* [32] judgment that '[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'. The same broad definition of the concept of restrictions applies to the freedom to provide services, including imports of services, as is shown *inter alia* by paragraph 29 of the *De Coster* [33] judgment, which states that 'Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14)'.

170. On the other hand, as regards Article 34 of the EC Treaty (now, after amendment, Article 29 EC), which deals with restrictions on exports, the Court held in the *Groenveld* [34] judgment that '[t]hat

31 — Paragraph 7 of the judgment, cited in footnote 18; author's emphasis.

32 — Case 8/74 [1974] ECR 837.

33 — Case C-17/00 [2001] ECR I-9445.

34 — Case 15/79 [1979] ECR 3409, paragraph 7.

provision concerns national measures which have as their specific object or effect the *restriction of patterns of exports* and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States...'. [35]

171. Similarly, it is wrong in my opinion to treat national legislation as imposing an obstacle to the freedom to provide services unless it affects the import of services in a different way from that in which it affects the provision of services within the Member State.

172. Any other interpretation would have the result that the smallest obligation imposed by a Member State on its own nationals who are involved in the provision of services would amount to an obstacle to the freedom to provide services, as every one of those nationals would be a potential exporter of services. Such an argument would leave no place for situations confined to the territory of a single Member State, whereas it is settled case-law that '... the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State...'. [36]

173. It follows from all the above that the fact that the German authorities require that Turkish drivers obtain a work permit cannot amount to an obstacle to the provision of cross-border services by German carriers who employ the drivers in question. Article 41(1) of the Additional Protocol does not apply in the circumstances considered above.

— The Turkish drivers are taken on and paid by a Turkish undertaking

174. Since we are proceeding on the assumption of haulage operations for which the German undertaking is responsible, now dealing with another form of the provision of services, which may be termed the making available of drivers. This is the second possible situation which the Commission suggests may arise in the main proceedings in this case.

35 — Author's emphasis. See also *inter alia* Case 237/82 *Jongeneel Kaas and Others* [1984] ECR 483, paragraph 22; Case C-47/90 *Delhaize and Le Lion* [1992] ECR I-3669, paragraph 12; and Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 21.

36 — Case 52/79 *Debauve and Others* [1980] ECR 833, paragraph 9. See also Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37, and Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 38.

175. The Turkish undertaking would act, so to speak, as an employment agency. I say 'so to speak' intentionally, as it became clear at the hearing that there are, in fact, neither contracts for the provision of drivers nor contracts for the hiring of lorries. According to the claimants in the main proceedings, the actual circumstances may simply be analysed from either point of view.

176. The question is therefore whether the exemption from the requirement to obtain a work permit, coupled with a systematic refusal to grant one, creates a new restriction on the freedom to provide services, which consist in the provision of drivers of Turkish nationality by a Turkish undertaking to a German haulage company.

177. In this regard, the German Government stated at the hearing that until 1972 there was in Germany a prohibition on making workers available ('Leiharbeit') to an undertaking. This prohibition was subsequently removed, subject to certain conditions as far as German workers and workers from other Member States were concerned. It was retained for workers from third countries, including Turkish workers.

178. According to the German Government, it follows that as the making available of Turkish workers by a Turkish undertaking to a German undertaking was prohibited before the entry into force of the Additional Protocol, no *new* restriction was introduced by the abolition of the exemption of the requirement to obtain a work permit and a systematic refusal to grant one. Even when a work permit was not required, the making available of Turkish workers was not lawful.

179. If that were indeed the case, and it will be a matter for the national court to verify the point, if relevant, the question whether the requirement to obtain a work permit constitutes a restriction does not arise. I do not see in what way the requirement to have a work permit could constitute a restriction if the activity has always been prohibited and remains prohibited.

180. In the alternative, and supposing that the making available of drivers were, nevertheless, allowable in principle, the question still arises as to whether, in fact, the circumstances involve the provision of services within the meaning of Article 50 EC.

181. It is necessary to ask whether the making available of drivers was really carried out 'temporarily' (following the expression used in Article 50 EC). It will be for the national courts to carry out the necessary factual analysis.

182. They could refer in this regard to the *Gebhard*[37] judgment, where the Court stated that 'the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity'.

183. The Court's case-law also allows Member States to prevent the pseudo-provision of services. Thus, '... a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him were he established in that State...'.[38]

184. Reference should also be made to the judgment in the *Rush Portuguesa*[39] case. This states:

'It should be stated that, since the concept of the provision of services as defined by Article 60 of the Treaty covers very different activities, the same conclusions are not necessarily appropriate in all cases. In particular, it must be acknowledged, as the French Government has argued, that an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host State. In such a case, Article 216 of the Act of Accession would preclude the making available of workers from Portugal by an undertaking providing services.'

185. In the present case, the Turkish undertaking admittedly does not seek to gain access for the workers to the German labour market in the sense of integrating them into that market, but the situation is quite close to this, as German lorries are being driven under instructions given by a German undertaking. As the Netherlands Government pointed out, Article 41(1) needs to be interpreted so as not to render illusory the powers retained by Member States to regulate access by Turkish nationals both to their territory and to their labour market.

186. Lastly, in this context, the Court's case-law should not be overlooked, according to which '... Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no

37 — Case C-55/94 [1995] ECR I-4165, paragraph 27.

38 — Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 13. See also Case 130/88 *Van de Bijl* [1989] ECR 3039, paragraph 26; Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraph 12; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 12; and Case C-23/93 *TV 10* [1994] ECR I-4795, paragraph 20.

39 — Case C-113/89 [1990] ECR I-1417, paragraph 16.

matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means' (Joined Cases 62/81 and 63/81 *Seco and Desquenne* [1982] ECR 223).[40]

187. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services[41] provides for its part that where workers are posted from one Member State to another, and whatever the law applicable to the employment relationship, there shall be applied to those workers the terms and conditions of employment, including the national minimum rates of pay, which, in the Member States where the work is carried out, are laid down:

— by law, regulation or administrative action, and/or

— by collective agreements.

Article 1(4) of that directive states, moreover, that '[u]ndertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State'.

188. Although those rules did not become binding until 16 December 1999, there was nothing to prevent a Member State from applying them voluntarily before that date. As is stated in the *Rush Portuguesa* judgment, the terms of which are repeated word for word in the 12th recital of that directive, 'Community law does not preclude Member States from applying their legislation'.

189. Reference should finally be made once again to Regulation No 484/2002, which expressly applies the same principles to road transport operations.

190. It follows that, to the extent that the requirement to obtain a work permit represents a method of verification of compliance with national legislation in the field of employment law and social law, compliance which Member States are entitled to demand under the case-law and legislation referred to above, this requirement is in my view equally justified by an overriding reason relating to the public interest.

191. I should point out again, however, that the foregoing line of reasoning has been provided in the alternative. I propose

40 — Judgment in the *Rush Portuguesa* case, cited above in footnote 39.

41 — OJ 1997 L 18, p. 1.

therefore to reply to part (b) of the third question raised in Case C-317/01 and to the first question raised in Case C-369/01 to the effect that Article 41(1) of the Additional Protocol must be interpreted as meaning that it does not apply to national legislation in the field of road transport operations of the kind in issue in the main proceedings.

D — *Part (a) of the third question referred for a preliminary ruling in Case C-317/01 and part (a) of the first question referred for a preliminary ruling in Case C-369/01*

192. These questions are identical and fall to be answered in the same way. The wording is as follows:

'Is Article 41(1) of the Additional Protocol... to be interpreted as meaning that

(a) a Turkish worker is entitled to plead a restriction on the freedom to provide services which is contrary to the Additional Protocol

...?'

193. The Turkish drivers take the view that they may rely on Article 41(1) of the Additional Protocol, on the basis that the measure restricts the freedom of Turkish transport undertakings to provide services in the territory of a Member State and to that extent also affects the legal situation of the employees of those undertakings.

194. For the German Government and for the Commission, Article 41(1) of the Protocol cannot be relied on by the workers. In the Commission's opinion, only an employer established in Turkey may raise a breach of this provision of the EEC-Turkey Agreement before a national court. Such a right is not available to Turkish workers whose employer is established in Turkey nor to an undertaking established in the Member State concerned and which is connected to the Turkish employer through a contract for services.

195. The Netherlands Government considers for its part that it follows by analogy with the judgment in the *Clean Car Autoservice* case [42] that a measure having direct effect, such as Article 41 of the Protocol, may be relied on not only by the direct beneficiaries of rights under it (in the present case, as far as the freedom to provide services is concerned, the employers), but also by others, and in particular by workers employed by those employers.

42 — Case C-350/96 [1998] ECR I-2521.

196. The French Government doubts that the Court's reasoning in the *Clean Car Autoservice* case [43] may be applied in these cases, and that a worker who is employed in Turkey is entitled to rely on the 'standstill' clause relating to the freedom to provide services appearing in the Additional Protocol to the Agreement. Firstly, Community law does not regulate the terms and conditions on which Turkish workers are taken on by employers in that country. Secondly, the taking-on of the workers in question by Turkish employers is not necessarily connected to the right the latter have to provide services to the Community. As it is of the view that Article 41(1) of the Additional Protocol only applies to freedom of establishment and the freedom to provide services, and not to access to employment, the French Government considers that the provision applies primarily to undertakings and not to their employees.

197. I mentioned above that in my opinion Article 41(1) did not apply to circumstances such as those arising in the main proceedings.

198. It is therefore only in the alternative that I shall consider this question.

199. It follows from the Court's judgment in the *Savas* case [44] that 'Article 41(1) has direct effect in Member States'. Were it to apply in circumstances such as those arising in the main proceedings, it could therefore be relied upon by Turkish undertakings which make drivers available to German undertakings.

200. I am of the view that it may also be relied upon by those drivers.

201. In the *Clean Car Autoservice* judgment, the Court held that an employer who wishes to take on as a manager a person previously residing in another Member State could rely on the principle of equal treatment in the field of the freedom of movement for workers, laid down under Article 48 of the EC Treaty (now, after amendment, Article 39 EC) equally as much as the manager himself.

202. The Court stated in this regard that:

'20 ... in order to be truly effective, the right of workers to be engaged and employed without discrimination *necessarily* entails *as a corollary* the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers.

43 — Cited above in footnote 42.
44 — Cited above in footnote 8.

21 Those rules could easily be rendered nugatory if Member States could circumvent the prohibitions which they contain merely by imposing on employers requirements to be met by any worker whom they wish to employ which, if imposed directly on the worker, would constitute restrictions on the exercise of the right to freedom of movement to which that worker is entitled under Article 48 of the Treaty.'

203. I consider that an analogous reasoning, which might be termed 'mirror' reasoning, may apply where a person providing services is unable to undertake a cross-border activity by reason of obstacles imposed in relation to the workers he may employ.

204. To paraphrase the *Clean Car Autoservice* judgment, one might say that in order to be truly effective, the right of undertakings to provide services without discrimination necessarily entails as a corollary the workers' entitlement to carry out the duties entrusted to them in the field of service provision. The rules relating to the freedom to provide services could easily be rendered nugatory if Member States could circumvent the prohibitions which they contain merely by imposing on workers requirements to be met in order to carry out their duties as employees which, if imposed directly on the undertakings which employed them, would constitute restrictions on the exercise of the right to the freedom to provide services to which they are entitled.

205. In the circumstances, however, no intra-Community dimension is involved. The freedom to provide services is not exercised between the Community and the Republic of Turkey. It follows that Turkish workers may not rely on their employer's entitlement not to have imposed on them a *new* restriction on the provision of cross-border services they might wish to offer.

206. I therefore propose that the Court should answer the question raised by finding that to the extent that Article 41(1) of the Additional Protocol applies in circumstances such as those arising in the main proceedings, it must be interpreted as meaning that a Turkish worker is entitled to plead a new restriction on the freedom to provide services which his employer wishes to make available.

E — *The second question referred for a preliminary ruling in Case C-369/01*

207. This question reads as follows:

'Does such a restriction concern exclusively the freedom to provide services or does it also or solely concern conditions of access

to employment within the meaning of Article 13 of Decision No 1/80...?'

208. It follows from the reasoning set out above that neither Article 41(1) of the Additional Protocol nor Article 13 of Decision No 1/80 may be relied on in the present case. It is therefore unnecessary to answer this question.

209. I would add by way of *obiter dictum* that there is a solution that would avoid the Turkish drivers becoming unemployed and German undertakings having to take on drivers who are familiar neither with the Turkish language nor with local customs. It would consist in giving those drivers a work permit limited to the situation where they were employed by German undertakings under German employment and social security law.

IV — Conclusion

210. For the foregoing reasons, I propose that the Court should reply as follows to the questions referred by the Seventh and the Eleventh Chambers of the Bundessozialgericht:

(1) Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council established by the EEC-Turkey Association Agreement of 1963, signed on 23 November 1970, must be interpreted as meaning that where, at any time after 1 December 1980, a Member State of the Community introduces new restrictions on access to the employment market for Turkish workers, those restrictions will not apply to Turkish workers who, at the time when the restrictions come

into force, are already on the territory of and legally resident and employed in that Member State.

(2) Article 13 of Decision No 1/80 of the Association Council does not apply to Turkish workers employed by an employer with its seat in Turkey and who, as long-distance lorry drivers engaged in international haulage, regularly pass through a Member State of the Community without belonging to the legitimate labour force of that Member State.

(3) Article 41(1) of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey must be interpreted as meaning that it does not apply to national legislation in the field of road transport operations of the kind in issue in the main proceedings.

(4) To the extent that Article 41(1) of the Additional Protocol applies in circumstances such as those arising in the main proceedings, it must be interpreted as meaning that a Turkish worker is entitled to plead a new restriction on the freedom to provide services which his employer wishes to make available.