JUDGMENT OF THE COURT

21 October 2003 *

In Joined Cases C-317/01 and C-369/01,

REFERENCE to the Court under Article 234 EC by the Bundessozialgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Eran Abatay and Others (C-317/01)

Nadi Sahin (C-369/01)

and

Bundesanstalt für Arbeit,

on the interpretation of Article 41(1) of the Additional Protocol signed at Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (JO 1972 L 293, p. 1) and of Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council set up by the Association Agreement between the European Economic Community and Turkey,

* Language of the case: German.

THE COURT,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen (Rapporteur), F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Abatay and Others, by T. Helbing, Rechtsanwalt,

— Mr Sahin, by R. Gutmann, Rechtsanwalt,

— the German Government, by W.-D. Plessing and R. Stüwe, acting as Agents,

— the French Government, by G. de Bergues and S. Pailler, acting as Agents,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by D. Martin and H. Kreppel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Abatay and Others, of Mr Sahin, of the German Government and of the Commission at the hearing on 14 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 13 May 2003,

gives the following

Judgment

1 By orders of 20 June and 2 August 2001, received at the Court on 13 August and 25 September 2001 respectively, the Bundessozialgericht referred to the Court for a preliminary ruling under Article 234 EC several questions on the interpretation of Article 41(1) of the Additional Protocol signed at Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (JO 1972 L 293, p. 1, 'the Additional Protocol') and of Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association ('Decision No 1/80'). The Association Council was set up by the Agreement establishing an Association

between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1, 'the Association Agreement').

2 Those questions were raised in two sets of proceedings brought by Mr Abatay and Others and Mr Nadi Sahin respectively against the Bundesanstalt für Arbeit (Federal Labour Office) (the 'Bundesanstalt') over the latter's requirement that Turkish drivers must hold a work permit in Germany in order to carry out international road haulage.

Legal background

EEC-Turkey Association

3 The aim of the Association Agreement, under Article 2(1), is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties, including in the labour sector, by progressively securing freedom of movement for workers (Article 12) and by abolishing restrictions on freedom of establishment (Article 13) and on freedom to provide services (Article 14) in order to improve the standard of living of the Turkish people and facilitate the accession of the Republic of Turkey to the Community at a later date (fourth recital in the preamble and Article 28).

4 To that end, the Association Agreement provides for a preparatory stage enabling the Republic of Turkey to strengthen its economy with aid from the Community (Article 3), a transitional stage during which a customs union is progressively to be established and economic policies are to be aligned (Article 4) and a final stage based on the customs union and entailing closer coordination of the economic policies of the Contracting Parties (Article 5).

5 Article 6 of the Association Agreement is worded as follows:

'To ensure the implementation and the progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred upon it by this Agreement.'

6 According to Article 8 of the Association Agreement, which is included under Title II, entitled 'Implementation of the Transitional Stage':

'In order to attain the objectives set out in Article 4, the Council of Association shall, before the beginning of the transitional stage and in accordance with the procedure laid down in Article 1 of the Provisional Protocol, determine the conditions, rules and timetables for the implementation of the provisions relating to the fields covered by the Treaty establishing the Community which must be considered; this shall apply in particular to such of those fields as are mentioned under this Title and to any protective clause which may prove appropriate.'

7 Articles 12, 13, 14, 15 and 16 of the Association Agreement are also included under Title II in Chapter 3, entitled 'Other economic provisions'.

8 Article 12 provides:

'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.'

9 Article 13 provides:

'The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them.'

10 Article 14 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 freedom to provide services between them.'

11 Article 15 provides:

'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.'

12 Article 16 is worded as follows:

'The Contracting Parties recognise that the principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the Treaty establishing the Community must be made applicable in their relations within the Association.'

13 According to Article 22(1) of the Association Agreement:

'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....'

14 The Additional Protocol, which, under the terms of Article 62, is to form an integral part of the Association Agreement, lays down in Article 1 the conditions, arrangements and timetables for implementing the transitional phase referred to in Article 4 of the Agreement.

15 Title II of the Additional Protocol is entitled 'Movement of Persons and Services', Chapter I of which deals with 'Workers' and Chapter II with 'Right of Establishment, Services and Transport'.

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

17 Article 41 of the Additional Protocol, which is in Chapter II of Title II, provides as follows:

'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.'

18 Article 42(1) of the Additional Protocol, which is also part of Chapter II of Title II, provides:

'The Council of Association shall extend to Turkey, in accordance with the 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 measures taken by the Community in applying those provisions in respect of transport by rail, road and inland waterway.'

19 On 19 September 1980, the Association Council, established by the Association Agreement and consisting of members of the Governments of the Member States and members of the Council and of the Commission of the European Communities on the one hand and of members of the Turkish Government on the other ('the Association Council'), adopted Decision No 1/80.

20 Article 6 of that decision is contained in Section 1, concerning 'Questions relating to employment and the free movement of workers', of Chapter II, entitled 'Social provisions'. Article 6(1) and (2) states:

'1. Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:

— shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;

— shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;

— shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.

2. Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.'

21 Article 13 of Decision No 1/80, which is also part of Section 1, reads as follows:

'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.'

22 Under the terms of its Article 30 Decision No 1/80 entered into force on 1 July 1980. However, under Article 16 of that decision, the provisions of Section 1 of Chapter II thereof were applicable as of 1 December 1980.

The national legislation

23 The Additional Protocol was ratified by the Bundestag by law of 19 May 1972 (BGBl. 1972 II, p. 385), and entered into force in Germany on 1 January 1973.

24 Under the Verordnung über die Arbeitserlaubnis für nichtdeutsche Arbeitnehmer (work permit regulation for non-German workers), of 2 March 1971 (BGBl. 1971 I, p. 152, 'the AEVO'), in its version in force on 1 January 1973:

'The following persons shall be exempted from the requirement to obtain work permits...

2. travelling personnel working in the international carriage of passengers and goods... for undertakings with registered offices in the territory within the scope of this regulation.'

25 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 work permit exemption to travelling personnel working in the international carriage of passengers and goods 'for employers with registered offices abroad'.

26 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:

'The following persons shall be exempted from the requirement to obtain work permits...

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;

(b) the vehicle is registered within the territory within the scope of the regulation for scheduled bus services;

...'

27 After 25 September 1998 exemptions from the requirement to obtain a work permit in Germany were covered by Paragraph 9(3) of the Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer (Work Permit Regulation for Foreign Workers), of 17 September 1998 (BGBl. 1998 I, p. 2899, 'the ArGV'), which replaced the AEVO. However, the content of the version of Paragraph 9(2) of the AEVO in force since 10 October 1996, was incorporated in Paragraph 9(3) of the ArGV without amendment.

The main proceedings and the questions referred

Case C-317/01

28 According to the order for reference Mr Abatay and Others are Turkish nationals residing in Turkey and working as drivers engaged mainly in international haulage. They are employed by Baqir Dis Tic. Ve Paz. Ltd St ('Baquir Dis'), established in Mersin, Turkey, which is a subsidiary of Baqir GmbH, a company with its registered office in Stuttgart, Germany. Baqir Dis and Baqir GmbH import fruit and vegetables, mostly self-grown in Turkey, into Germany. The goods are transported from Turkey to Germany in lorries registered in Germany in the name of Baqir GmbH and driven by, among others, Mr Abatay and Others.

29 The Bundesanstalt had issued a work permit valid until 30 September 1996 to each of those drivers. However, after that date, it refused to issue further permits.

30 In proceedings brought by Mr Abatay and Others, the Sozialgericht Nuremberg (Germany) held, by judgments of 27 October 1998, that the plaintiffs did not require work permits.

31 By judgment of 25 July 2000, the Bayerisches Landessozialgericht (Germany) dismissed the appeals brought by the Bundesanstalt against those judgments.

32 According to that Court, the 'standstill' clause in Article 13 of Decision No 1/80 maintained the legal position obtaining when the activity of the Turkish drivers in Germany began and also covered the activity in that Member State of Turkish drivers forming part of the employment market mentioned in that article. The employment of Mr Abatay and Others had originally been legal within the meaning of Article 13 in respect of the German sections of journeys since, under Paragraph 9(2) of the AEVO, in both the original version and that in force as from 1 September 1993, the persons concerned, as travelling personnel engaged in the international carriage of passengers and goods, did not need work permits. The new version of that provision of the AEVO, applicable from 10 October 1996, and the identical provision in Paragraph 9(3a) of the ArGV, applicable with effect from 25 September 1998, placed a significant restriction on access to the employment market in Germany for the Turkish drivers in question, in breach of Article 13 of Decision No 1/80.

33 In support of the appeal on a point of law which it brought against the judgment of the Bayerisches Landessozialgericht, the Bundesanstalt argues that there is no provision laying down a 'standstill' clause comparable to that in Article 41(1) of the Additional Protocol for the benefit of workers. Article 13 of Decision No 1/80 expressly relates only to Turkish workers who are already legally resident in the territory of a Member State and therefore does not apply in the present case. Moreover, the changes in the national legislation in 1993 and 1996, cannot be considered inconsistent with the prohibition on introducing further restrictions between the parties to the Additional Protocol in Article 41 thereof, as it would be at odds with the general spirit of the Association Agreement to allow that 'standstill' clause, which concerns freedom to provide services, to have indirect effects on the right of access to employment.

34 However, Mr Abatay and Others consider that the decisions of the Sozialgericht Nuremberg and the Bayerisches Landessozialgericht are correct. They argue that entitlement to a declaration of work permit exemption follows directly from Article 13 of Decision No 1/80. In the alternative, they refer to Article 6 of that Decision, under which a Turkish worker is entitled, after one year's legal

employment, to the renewal of his permit to work for the same employer. The plaintiffs had already acquired, over a period which began before 1993 and continued until 1996, a national employment-law status which the Bundesanstalt can no longer unilaterally take from them.

35 The Eleventh Chamber of the Bundessozialgericht points out that, under the German legislation, Mr Abatay and Others, as employees of a Turkish employer, are not entitled to work without a work permit in Germany in international haulage using vehicles registered in Germany.

36 However, the work permit exemption sought by Mr Abatay and Others could be inferred from Article 13 of Decision No 1/80 or from Article 41(1) of the Additional Protocol. Indeed, the amendments to the AEVO of 1 September 1993 and/or 10 October 1996 could be seen as new restrictions on the conditions of access to employment within the meaning of Article 13 or new restrictions on the freedom to provide services within the meaning of Article 41(1).

37 In that connection the scope of those two provisions raises several issues.

38 First, the question arises whether Article 13 of Decision No 1/80, like Article 41(1) of the Additional Protocol to the Association Agreement, is to be understood as prohibiting Member States generally from introducing any new national restriction on the conditions of access to employment as from December 1980, in accordance with Article 16(1)) of the section of that decision concerning questions relating to employment and the free movement of workers. However, the wording of Article 13, which differs in certain respects from that of Article 41(1) of the Additional Protocol, suggests, rather, the interpretation that

the prohibition on introducing new restrictions relates only to the time when a worker is first legally resident and employed in the territory of the Member State concerned.

39 Next, the question arises whether Article 13 of Decision No 1/80 is also to be applied to employees who, like Mr Abatay and Others, are employed in Turkey and, as travelling personnel engaged in international haulage, merely pass through a Member State without belonging to the legitimate labour force of that State. The position of Article 13 — which is placed, like Articles 6, 7, 10 and 11 which are aimed at the progressive integration of Turkish workers and members of their families into the labour force of the host Member State, within Section 1 of Chapter II of Decision No 1/80, which deals, as pointed out in paragraph 20 of this judgment, with questions relating to employment and the free movement of workers — supports the view that it applies only to workers who belong to the legitimate labour force of a Member State. However, lorry drivers such as Mr Abatay and Others only ever enter the territory of a Member State for a limited time and then leave it again rapidly to return to Turkey.

40 Finally, there is no clear answer to the question whether an outcome more favourable to Mr Abatay and Others may be derived from Article 41(1) of the Additional Protocol. While the currently applicable legislation, namely Paragraph 9(3a) of the ArGV, could entail a restriction contrary to Article 41(1) of the Additional Protocol, as compared with the position in national law at the time of the entry into force of the Additional Protocol, that provision expressly concerns only freedom of establishment and freedom to provide services and not access to the employment market. The question therefore arises, first, whether the Turkish workers in the present case, who do not intend to become established and, moreover, intend to participate in the provision of services only within their employment relationship, can rely on that provision for the protection of the freedom to provide services as the basis for the rights they claim.

41 If that question is answered in the affirmative, the further question arises as to whether there is also a restriction on the freedom to provide services within the meaning of Article 41(1) of the Additional Protocol even where the introduction of provisions restricting workers' access to the employment market — in this case the abolition of the former work permit exemption for Turkish lorry drivers engaged in international haulage — indirectly impedes the freedom of the undertakings employing those workers to provide services.

42 Taking the view that, in the circumstances, the dispute turned on the interpretation of Community law, the Eleventh Chamber of the Bundessozialgericht decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'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 resident and employed?

2. 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?

3. 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 and, if so, 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

43 According to the order for reference, Mr Sahin, who was originally a Turkish citizen but who acquired German nationality in 1991, runs the transport undertaking Sahin Internationale Transporte, established in Göppingen (Germany). He also runs a subsidiary of that undertaking, Anadolu Dis Ticaret AS ('Anadolu Dis'), which has its registered office in Istanbul (Turkey). Sahin Internationale Transporte owns several lorries which it uses for international haulage between Germany and third countries such as Turkey, Iran and Iraq. All the lorries are registered in Germany. There is an 'agency agreement' between Sahin Internationale Transporte and Anadolu Dis under which Anadolu Dis uses the plaintiff's lorries for international haulage operations.

44 Even before 1 September 1993, Mr Sahin used as drivers of the lorries registered in Germany 17 Turkish nationals who live in Turkey and had concluded their contracts of employment with Anadolu Dis before that date. They were granted a German visa by the appropriate German consulate general on each occasion when they worked in Germany.

45 Originally, in the opinion of the Bundesanstalt, those drivers did not need work permits. However, from the middle of 1995 onwards, it took the view that foreign drivers used to drive vehicles registered in Germany no longer had work permit exemption, even if those drivers were engaged by foreign undertakings.

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

47 By judgment issued on 10 February 1998, the Sozialgericht Ulm held that the 17 drivers in question were exempt from the requirement for a work permit.

48 The appeal brought by the Bundesanstalt was rejected 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 to hold that the legal rules in force on 1 January 1973 remained relevant. That provision prohibited the adoption of new restrictions on the freedom to provide services between the Member States of the Community and Turkey. As at 1 January 1973 no work permit was required for workers such as the lorry drivers at issue.

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

50 Mr Sahin, however, sought the dismissal of the appeal. He argued 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 in respect of the work permit exemption for Turkish workers.

51 In its order for reference, the Seventh Chamber of the Bundessozialgericht pointed out that the decision of the Landessozialgericht Baden-Württemberg regarding the work permit exemption for the drivers may differ according to whether their employer is Sahin Internationale Transporte or Anadolu Dis. However, as the Bundessozialgericht has no jurisdiction to make the necessary findings of fact, the only possibility would be to refer the case back to the Landessozialgericht, which would also make it possible at this stage to join Anadolu Dis or the drivers in the proceedings. However, such referral might prove to be without purpose if commitments under European law already entitle the drivers not to have their rights to work permit exemption curtailed in relation to the legal position in 1970 or 1973. The relevant provision in that respect is either Article 41(1) of the Additional Protocol, in so far as that provision also protects workers in the position of the Turkish drivers concerned in the present case under the relevant national law governing work permits, or Article 13 of Decision No 1/80, or both provisions concurrently. However, in relation to both provisions, the question then arises whether they also cover the specific circumstances of this case before the Bundessozialgericht.

52 That court first raises the question whether the Turkish drivers may also enjoy the protection of Article 41(1) of the Additional Protocol. In this respect, it is relevant whether, in general, measures of the kind at issue in the present case are actually to be regarded as 'restrictions' within the meaning of Article 41(1). The referring

court adds that it could also be relevant in the present case whether, in order to rely on that provision, the workers concerned must be employed by a Turkish employer only or whether another (German) employer may be involved, in whatever form, in the employment relationship. According to that court, a measure cannot be regarded from the outset as a new restriction if it adversely affects, as a businessman, only a German national who is resident in Germany; the present dispute concerns the question whether Mr Sahin, who has been a German citizen since 1991, has the right to use Turkish drivers without work permits in the future.

53 Next, that court considers the relationship between Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80. In circumstances such as those of the case before it, restrictive measures in the law governing work permits could be regarded both as a (new) restriction of the position in terms of the freedom to provide services which is guaranteed for Turkish businessmen and of the position in terms of conditions of access to employment which is guaranteed for Turkish workers, so that it needs to be determined which of the two provisions has to be applied.

54 Finally, it seeks clarification as to whether, in general, measures of the kind at issue in the case before it are to be regarded as 'restrictions' within the meaning of Article 13 of Decision 1/80 since there could be doubt as to whether there is a restriction on 'conditions of access to employment' where the requirement for a work permit is extended or introduced in respect of activities which affect the German labour market only for a short time.

55 Taking the view that the dispute turned on the interpretation of Community law, the Seventh Chamber of the Bundessozialgericht decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

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

(a) that a Turkish worker is entitled to plead a restriction on the freedom to provide services which is contrary to the Additional Protocol and, if so,

(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?

2. 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...?

3. 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?'

56 Given the connection between Cases C-317/01 and C-369/01, the President of the Court decided, by order of 5 November 2001, to join them for the purposes of the written procedure, the oral procedure and judgment, pursuant to Article 43 of the Rules of Procedure of the Court.

The questions referred for a preliminary ruling

57 In order to give a proper reply to the referring court it is necessary, first, to consider whether Article 41(1) of the Additional Protocol and/or Article 13 of Decision No 1/80 are such as to give rise to rights which individuals may rely on before a court of a Member State and, if so, second, to determine the scope of the 'standstill' clauses contained in those provisions.

The direct effect of Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80

58 The direct effect of both Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 is clear from the case-law of the Court of Justice (see, as regards Article 41(1), Joined Cases C-37/98 *Savas* [2000] ECR I-2927, paragraphs 54 and 71, and, as regards Article 13, Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 26). Those provisions lay down, clearly, precisely and unconditionally, unequivocal 'standstill' clauses, which contain an obligation entered into by the contracting parties which amounts in law to a duty not to act (see *Savas*, cited above, paragraphs 46 and 47).

59 It follows that those two provisions may be relied on before the national courts by the Turkish nationals to whom they apply to prevent the application of inconsistent rules of national law.

60 It is, therefore, necessary to establish the scope of those provisions.

The scope of Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80

61 In order to reply fully and properly to the questions referred, the Court must first rule on the meaning of those provisions, in order to determine whether they cover the situation of persons subject to its jurisdiction such as the plaintiffs in the main proceedings and to what extent they entail that the Member State concerned cannot require Turkish drivers engaged in international haulage in its territory to hold a work permit.

The meaning of the 'standstill' clauses in Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80

62 First, as regards Article 41(1) of the Additional Protocol, it is clear from paragraphs 64 and 67 of *Savas* that the 'standstill' clause contained in that provision cannot confer upon a Turkish national either a right of establishment or a right of residence derived directly from Community provisions.

63 On that point the Court based its view on its own settled case-law, according to which, as Community law stands at present, the provisions concerning the Association between the European Economic Community and the Republic of Turkey ('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 who are already lawfully integrated into the host Member State as a result of lawful employment over a certain period, in accordance with the conditions laid down in Article 6 of Decision No 1/80 (see *inter alia* the judgment in *Savas*, paragraph 58).

64 In paragraph 59 of *Savas*, the Court 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.

65 Accordingly, a Turkish national's first admission to the territory of a Member State is, as a rule, governed exclusively by that State's own domestic law, and the person concerned may claim certain rights under Community law in relation to holding paid employment or exercising self-employed activity, and, correlatively, in relation to residence, only in so far as his position in the Member State concerned is regular (see *Savas*, paragraph 65).

66 However, it is clear from paragraph 69 of *Savas* that the 'standstill' clause in Article 41(1) of the Additional Protocol precludes a Member State from adopting any new measure having the object or effect of making the establishment and, as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to the Member State concerned.

67 Given that Article 41(1) applies both to the right of establishment and to the freedom to provide services, the same interpretation must also be valid as regards that latter freedom.

68 Article 41(1) of the Additional Protocol thus appears to be the necessary corollary to Articles 13 and 14 of the Association Agreement, and constitutes the indispensable means of achieving the gradual abolition of national obstacles to the freedom of establishment and the freedom to provide services.

69 Second, as regards Article 13 of Decision No 1/80, it must be observed that its wording is not identical in all respects to that of Article 41(1) of the Additional Protocol.

70 None the less the 'standstill' clauses contained in each of those two provisions must be acknowledged to have the same meaning.

71 As the Court held in paragraph 50 of *Savas* the two provisions at issue are of the same kind.

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

73 No argument has been put forward which would justify giving the 'standstill' clause relating to freedom of movement for workers a narrower scope than that given to the same clause relating to freedom of establishment and freedom to provide services.

74 Consequently, the interpretation by the Court set out in paragraph 69 of *Savas* and in paragraphs 66 to 68 of this judgment regarding Article 41(1) of the Additional Protocol must also be valid for Article 13 of Decision No 1/80, which therefore prevents Member States generally from treating Turkish nationals less favourably than they were treated at the time of the entry into force of the 'standstill' clause, that is to say, 1 December 1980.

75 In that connection, the Court cannot uphold the argument, relied on by the German Government *inter alia*, that Article 13 does not affect the right of the Member States to adopt, even after 1 December 1980, new restrictions on access to employment for Turkish nationals, but merely entails that they are not applicable to those Turkish nationals who are already lawfully employed and thereby have a right of residence in the host Member State when those restrictions are introduced. The German Government infers that interpretation from the wording 'workers and members of their families legally resident and employed in their respective territories' which appears in Article 13 of Decision No 1/80.

76 However, that interpretation disregards the system set up by Decision No 1/80 and would deprive Article 13 thereof of its effect.

77 Thus, in the wake of Decision No 2/76 on the implementation of Article 12 of the Association Agreement, adopted by the Association Council on 20 December 1976, the social provisions of Decision No 1/80 constitute a further stage in

securing freedom of movement for workers on the basis of Articles 48, 49 and 50 of the EEC Treaty, which became Articles 48 and 49 of the EC Treaty (now, after amendment Articles 39 EC and 40 EC) and Article 50 of the EC Treaty (now Article 41 EC) (see *inter alia* Case C-1/97 *Birden* [1998] ECR I-7747, paragraph 52, and Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 40).

78 In particular, Article 6(1) of Decision No 1/80 grants Turkish migrant workers meeting its conditions clear rights as regards taking up employment. Those rights, which are progressively extended in proportion to the duration of lawful paid employment and are intended to consolidate progressively the position of the person concerned in the host Member State, are directly conferred by Community law and the national authorities have no option to attach conditions to or restrict the application of such rights, as they would otherwise undermine the effect of that decision (see Case C-36/96 *Günaydin* [1997] ECR I-5143, paragraphs 37 to 40 and 50).

79 It follows from the foregoing that Article 13 of Decision No 1/80 cannot have as its purpose the protection of the rights of Turkish nationals as regards employment since those rights are already fully covered by Article 6 of that decision.

80 However, as is clear from its wording, Article 13 prohibits national authorities from making more stringent the conditions on access to employment for Turkish nationals through the introduction of fresh measures restricting such access. The rationale for that provision is the fact, noted in paragraphs 63 and 65 of this judgment, that the Member States have retained the power to authorise Turkish nationals to enter their territory to take up employment.

81 Therefore the interpretation mentioned in paragraph 75 of this judgment is paradoxical and liable to deprive Article 13 of Decision No 1/80 of any meaning, since a Turkish national who is already lawfully employed in a Member State no longer needs the protection of a 'standstill' clause as regards access to employment, as such access has already been allowed and the person concerned subsequently enjoys, for the rest of his career in the host Member State, the rights which Article 6 of that decision expressly confers on him. On the other hand, the 'standstill' requirement as regards conditions of access to employment is intended to ensure that the national authorities refrain from taking measures likely to compromise the achievement of the objective of Decision No 1/80, which is to allow freedom of movement for workers, even if, initially, with a view to the gradual introduction of that freedom, existing national restrictions as regards access to employment may be retained (see, for comparison, Case 77/82 *Peskeloglou* [1983] ECR 1085, paragraph 13).

82 Moreover, as is clear from its wording, Article 13 applies not only to Turkish workers but also to members of their families. Decision No 1/80 does not make the access to the territory of a Member State of family members of a Turkish worker already legally present in that state in order to join the rest of the family conditional on the exercise of paid employment.

83 In the light of all the foregoing observations it cannot be maintained that Article 13 of Decision No 1/80 is only applicable to Turkish nationals already integrated into the employment market of a Member State.

84 If the scope of Article 13 of Decision No 1/80 is thus not limited to Turkish nationals already integrated into the employment market of a Member State, that provision none the less refers to workers and members of their families 'legally resident and employed in their respective territories'. It is clear from the use of those terms that the 'standstill' clause can benefit a Turkish national only if he has complied with the rules of the host Member State as to entry, residence and, where appropriate, employment and if, therefore, he is legally resident in the

territory of that State (see, as regards the definition of the related term 'legal employment', used in several Articles in Chapter II, Section 1, of Decision No 1/80, *Birden*, cited above, paragraph 51; Case C-340/97 *Nazli and Others* [2000] ECR I-957, paragraph 31, and *Kurz*, cited above, paragraph 39).

85 The competent national authorities are therefore entitled, even after the entry into force of Decision No 1/80, to introduce more stringent measures to deal with Turkish nationals whose position is not lawful.

The applicability of Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80

86 As a preliminary point it must be observed that, although those two provisions have the same meaning, each of them has been given a very specific scope, with the result that they cannot be applied concurrently.

87 First, as regards Article 13 of Decision No 1/80, it is of course clear from the files sent to the Court of Justice by the referring court that the Turkish nationals at issue in the main proceedings are in a 'lawful' position within the meaning of the settled case-law of the Court in so far as they have complied with the conditions laid down by law and regulation in the host Member State governing entry into its territory and employment and are thus entitled to pursue an occupation in that State (see, as regards Article 6(1) of that Decision, *Birden*, paragraph 51, *Nazli*, paragraph 31, and *Kurz*, paragraph 39).

88 It is common ground that all those conditions are met by the Turkish lorry drivers at issue in the main proceedings, given that they not only held a visa in the proper form for each of their periods of residence in Germany but also were either exempt from the requirement to hold a work permit or held such a permit until the decisions were taken refusing to grant or extend those permits.

89 None the less, as is clear from the description of the facts appearing in the orders for reference, Turkish lorry drivers engaged in international haulage such as those at issue in the main proceedings are present on Germany territory only for very limited periods for the sole purpose of transporting and unloading there goods originating in Turkey or picking up goods there to transport them to destinations such as Turkey, Iran or Iraq. After each assignment they return to Turkey where they live with their families and where the firm which employs and pays them is based. Such Turkish nationals thus have no intention of becoming integrated in the employment market of the Federal Republic of Germany as a host Member State.

90 It is clear from the structure and the purpose of Decision No 1/80 that, at the current stage of the development of freedom of movement for workers under the EEC-Turkey Association and without prejudice to the particular position of family members authorised to join a Turkish worker already legally present in the territory of a Member State, that decision is essentially aimed at the progressive integration of Turkish workers into that territory through the pursuit of lawful employment which should be uninterrupted for one, three or four years, as the case may be, save in the cases of interruption of the employment relationship set out in Article 6(2) of that decision.

91 It follows from the foregoing that Article 13 of Decision No 1/80, which must be read in the context of all the provisions of that decision relating to freedom of movement of workers, is not applicable to a situation such as that at issue in the main proceedings.

92 Second, as regards Article 41(1) of the Additional Protocol, the Netherlands Government essentially argues that the provisions on freedom to provide services in general and Article 41(1) in particular are not applicable in the transport sector which, because of its particular nature, is regulated only by Article 42 of the Additional Protocol. Therefore, under the Treaty, services in the transport sector are excluded from the freedom to provide services and a specific set of rules is applicable to such services.

93 However, that argument cannot be upheld.

94 The Treaty contains a specific Title on the subject of 'Transport'. Pursuant to Article 61(1) of the EC Treaty (now, after amendment, Article 51(1) EC), freedom to provide services in the field of transport is to be governed by the provisions of that Title.

95 However, in the context of the EEC-Turkey Association, the position as regards transport is rather different.

96 It must be emphasised in that connection that, unlike the principles enshrined in the Treaty relating to competition, taxation and the approximation of laws which, under Article 16 of the Association Agreement, must be made applicable as such within the EEC-Turkey Association, it is clear from the wording of Article 15 of that agreement and Article 42 of the Additional Protocol that the Association Council enjoys a considerably wider discretion in the field of transport. Those articles provide that 'the rules and conditions for extension' to the Republic of Turkey of the transport provisions of the Treaty are to be laid down 'with due regard to the geographical situation of Turkey', with the result that, in the context of the Association, the rules to be adopted on transport are not necessarily the same as those applicable under the Treaty.

97 Moreover, as regards the measures taken by the Community pursuant to the Treaty provisions for the various types of transport, it is clear from the use of the verb 'may' in Article 42 of the Additional Protocol that the extension to the Republic of Turkey of the Treaty provisions on transport is merely optional.

98 To date the Association Council has taken no measure to extend to the Republic of Turkey the Community provisions applicable in the field of transport, so that, at the current stage of development of the EEC-Turkey Association, there are no specific rules in that field.

99 In the circumstances, the current legal position as regards international road haulage under the EEC-Turkey Association cannot be compared to the law in force in that sector within the Community, so that, unlike intra-Community transport, transport services in the context of the Association cannot be removed from the ambit of the general rules applicable to the provision of services.

100 Moreover, that conclusion is consistent with the spirit and purpose of the EEC-Turkey Association, which is intended to introduce progressively certain economic freedoms, including the freedom to provide services.

101 It is thus clear that, like the comparable provisions of the Association Agreement applicable to workers (see, as regards Article 12 of the Agreement, Case C-434/93 *Bozkurt* [1995] ECR I-1475, paragraphs 19 and 20) and the self-employed (see Article 13 of the Agreement), Article 14 thereof cannot be interpreted as entailing the application of principles accepted in connection with comparable provisions of Community law to achieve the opposite result to that intended by the EEC-Turkey Association Agreement.

102 It follows from the arguments set out above that the 'standstill' clause in Article 41(1) of the Additional Protocol is applicable *ratione materiae* to situations such as those in the main proceedings.

103 That is so *a fortiori* because those cases do not concern technical rules on the transport of goods but the requirement for a work permit to allow Turkish nationals to provide transport services between Turkey and a Member State.

104 Therefore it is necessary to determine the scope *ratione personae* of Article 41(1) of the Additional Protocol.

105 In that regard, it is clear that that provision may be relied on by an undertaking established in Turkey which lawfully provides services in a Member State.

106 However, for reasons explained more fully by the Advocate General in points 201 to 204 of his Opinion, Turkish lorry drivers like Mr Abatay and Others, who are employed by an undertaking such as that described in the previous paragraph, may also invoke the protection of Article 41(1) (see, to that effect, for comparison, Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraphs 19 to 21). The paid employees of the provider of services are indispensable to enable him to provide his services.

107 However, although it is settled case-law that the right freely to provide services may be relied on by a provider as against the State in which he is established, those services must then be provided for persons established in another Member

State (see Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 30, and Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 30).

108 It follows that a German transport company cannot rely on the protection of Article 41(1) of the Additional Protocol where the recipient of the transported goods is established in Germany.

The effect of the application of Article 41(1) of the Additional Protocol on national legislation such as that at issue in the main proceedings

109 As a preliminary point, it must be observed that, under the national legislation at issue in the main proceedings, since 10 October 1996 Turkish lorry drivers who are employed by undertakings established in Turkey and are engaged in international haulage in Germany, driving lorries registered in that Member State, have had to hold a work permit.

110 In order to determine whether the 'standstill' requirement in Article 41(1) of the Additional Protocol, as interpreted in paragraphs 66 to 68 of this judgment, precludes national legislation such as the AEVO and the ArGV, it must be considered whether it entails a restriction on the freedom to provide services and, if so, whether that restriction must be considered to be a new one.

111 As to the question whether the national legislation entails a restriction on the freedom to provide services, it must be observed that, first, according to settled case-law, national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject

to the issue of an administrative authorisation such as a work permit constitutes a restriction on the fundamental principle enshrined in Article 59 of the EC Treaty (now, after amendment, Article 49 EC) (see Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12; Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 14; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15, and Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 35).

112 Second, it is clear from the wording of Article 14 of the Association Agreement, as well as from the objective of the EEC-Turkey Association, that the principles enshrined in Articles 55 of the EC Treaty (now Article 45 EC) and 56 of the EC Treaty (now, after amendment, Article 46 EC), and in the provisions of the Treaty relating to the freedom to provide services, must be extended, so far as possible, to Turkish nationals to eliminate restrictions on the freedom to provide services between the contracting parties (see, as regards Article 12 of that agreement, *Nazli*, paragraph 55, and *Kurz* paragraph 30).

113 It follows that legislation such as that at issue in the main proceedings constitutes a restriction on the right of natural and legal persons freely to provide services in a Member State.

114 That is so *a fortiori* where, as in the cases in the main proceedings, the issue of a work permit has been consistently refused following the entry into force of the amendment to the AEVO. National legislation applied in that way not only entails costs and additional administrative and economic expenses for the provider of the service, but affects the latter's capacity overall to provide services in the Member State concerned as he cannot use his staff there for that purpose.

115 It must be added that a work permit, which is intended to regulate the access of foreign workers to the national employment market, does not appear to be an appropriate measure for workers employed by an undertaking established in a non-member country who are temporarily sent to a Member State to provide services but do not in any way seek access to the labour market in that second State, as they return to their country of origin or residence after completion of their work (see *Rush Portuguesa*, cited above, paragraph 15 and *Vander Elst*, cited above, paragraph 21).

116 As regards the question whether the legislation at issue in the main proceedings constitutes a new restriction, it is for the national courts, which alone have jurisdiction to interpret national law, to determine whether that legislation has a new aspect in that it results in a worse position for Turkish lorry drivers than their position under the rules applicable to them in Germany on the date of the entry into force of the Additional Protocol for that Member State, that is to say, 1 January 1973.

117 In the light of the foregoing considerations, the answer to be given to the referring court is that Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 must be interpreted as meaning that:

— those two provisions have direct effect in the Member States so that Turkish nationals to whom they apply are entitled to rely on them before the national courts to prevent the application of inconsistent rules of national law;

— Article 41(1) and Article 13 prohibit generally the introduction of new national restrictions on the right of establishment and the freedom to provide services and freedom of movement for workers from the date of the entry into

force in the host Member State of the legal measure of which those articles are part;

— Article 13 of Decision No 1/80 is applicable to Turkish nationals only if their residence in the territory of the host Member State is not only lawful but for a sufficient period to allow them progressively to become integrated there;

— in circumstances such as those in the cases in the main proceedings, Article 41(1) of the Additional Protocol is applicable to international road haulage of goods originating in Turkey, where those services are carried out in the territory of a Member State;

— the protection of Article 41(1) can be relied on not only by an undertaking established in Turkey which performs services in a Member State, but also by the employees of such an undertaking, to preclude a new restriction on the freedom to provide services; however, it may not be relied on to that end by an undertaking established in a Member State where those using the services are established in the same Member State;

— Article 41(1) precludes the introduction into the national legislation of a Member State of a requirement of a work permit in order for an undertaking established in Turkey to provide services in the territory of that State, if such a permit was not already required at the time of the entry into force of the Additional Protocol;

— it is for the national court to determine whether the national legislation applied to Turkish nationals such as the applicants in the main proceedings is less favourable than that applicable at the time of the entry into force of the Additional Protocol.

Costs

118 The costs incurred by the German, French and Netherlands Governments and by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundessozialgericht by orders of 20 June and 2 August 2001, hereby rules:

Article 41(1) of the Additional Protocol, signed at Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, and of Article 13 of

Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council set up by the Association Agreement between the European Economic Community and Turkey, must be interpreted as meaning that:

— those two provisions have direct effect in the Member States so that Turkish nationals to whom they apply are entitled to rely on them before the national courts to prevent the application of inconsistent rules of national law;

— Article 41(1) and Article 13 prohibit generally the introduction of new national restrictions on the right of establishment and the freedom to provide services and freedom of movement for workers from the date of the entry into force in the host Member State of the legal measure of which those articles are part;

— Article 13 of Decision No 1/80 is applicable to Turkish nationals only if their residence in the territory of the host Member State is not only lawful but for a sufficient period to allow them progressively to become integrated there;

— in circumstances such as those in the cases in the main proceedings, Article 41(1) of the Additional Protocol is applicable to international road haulage of goods originating in Turkey, where those services are carried out in the territory of a Member State;

— the protection of Article 41(1) can be relied on not only by an undertaking established in Turkey which performs services in a Member State but also by

the employees of such an undertaking to preclude a new restriction on the freedom to provide services; however, it may not be relied on to that end by an undertaking established in a Member State where those using the services are established in the same Member State;

— Article 41(1) precludes the introduction into the national legislation of a Member State of a requirement of a work permit in order for an undertaking established in Turkey to provide services in the territory of that State, if such a permit was not already required at the time of the entry into force of the Additional Protocol;

— it is for the national court to determine whether the national legislation applied to Turkish nationals such as the applicants in the main proceedings is less favourable than that applicable at the time of the entry into force of the Additional Protocol.

Skouris	Jann	Timmermans
Gulmann	Cunha Rodrigues	Rosas
Edward	La Pergola	Puissochet
Schintgen	Macken	Colneric
	von Bahr	

Delivered in open court in Luxembourg on 21 October 2003.

R. Grass — Registrar

V. Skouris — President