Notes on the Opinion of AG Cruz Villalón of 14 April 2013 in the case Demirkan C-221/11

The three main problematic elements of the opinion are:

(a) Recipients of services were from the very beginning covered by Community law and not only after the Court's judgment in *Luisi and Carbone* in 1984.
(b) Accepting that Turkish recipients of services are covered by Article 14 of the Association Agreement with Turkey and Article 41 of the Additional Protocol does not imply, as repeatedly suggested in the Opinion, that Turkish citizens will get full free movement rights or become quasi Union citizens.
(c) The 1970 Additional Protocol must not be interpreted primarily on the basis of the current immigration policy concerns of some of the parties to Association Agreement or on the basis of later international treaties that EU Member States have concluded among themselves or with third States.

These three elements are illustrated below in thirteen comments on specific points of the Opinion.

1. Article 1(1)(b) of Directive 64/220/EEC read: "Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of […] (b) nationals of other Member States wishing to go to another Member State as recipients of services." The same provision returned in Article 1(1)(b) of Directive 73/148/EEC that replaced the Directive 64/220/EEC. These Directives reflect the understanding of the EEC Treaty's provision on the freedom of services which they serve to implement. Surprisingly, Directive 64/220/EEC is referred to for the first time in point 56 of the Opinion. The Court's judgment in *Luisi and Carbone* did not introduce a new reading of the personal scope of the freedom to provide services in Community law, it rather confirmed a construction of this provision that had been in force since 1964.

2. In point 43 the AG rightly states: "the obligation on a Member State to allow entry without a visa in the context of the standstill clause does not conflict with that division of competence [between the Union and its Member States]. It conflicts merely with the Visa Regulation (EC) No 539/2001." He could have added that the Members States with the adoption of Article 77 TFEU – which provide the legal basis for the Visa Regulation and which is also discussed in that point of the Opinion – could in any case not unilaterally amend the meaning or the scope of Article 41 of the Protocol without breaching their international obligations (see Article 27 of the Vienna Convention on the Law of Treaties).

3. It is not clear to me why the conclusion in the last sentence of point 47 is relevant for the meaning of Article 41 of the Protocol. The idea of three forms of service provision, especially the first form, was developed in EU/EC law long after the adoption of the Protocol in 1970. This also applies to the reference to WTO law in footnote 22. Be that as it may, the concept of

trade in services as defined in the services agreement of the WTO, the GATS, does include the movement of natural person across borders in order to consume a service provided abroad (see Article I:2 GATS). The mere fact that the approach to the liberalization of services on the global level today is more incremental than it was in early association agreements concluded by the EEC can hardly demonstrate that it is economically viable and consistent to divide services into active and passive. The essence of services is the same in all four modes of service provision recognized in the GATS: (a) the service moves without any human movement; (b) human beings go to receive the service provided elsewhere; (c) a service provider establishes an economic presence in the recipient state (establishment in Union law terms); and (d) the human being moves to provide the service.

4. The idea expressed in point 50 that, since everyone potentially can be a recipient of services there would no longer be a difference with the free movement of persons is not correct. Article 41 of the Protocol does not exempt Turkish recipients of services from the control at the external border of the EU or of the Schengen area. At the border he can be asked about the aim of his visit, whether he has sufficient means, and to provide evidence on both points. It is not allowed to put such questions to Union citizens when crossing the external border. Moreover, according to the Schengen Border Code his passport has to be stamped each time he enters or leaves the Schengen area. In case a Turkish service recipient would overstay the three months of his visa-free residence or in case he would commit another serious offense against the national or Union immigration rules, he can be registered in the Schengen Information System. The consequences of that registration are that he will be refused entry if he arrives again at the external border and that his chances of receiving a residence permit in a Member State in years to come will be near nil. This illustrates some of the essential differences with free movement of persons. It also demonstrates some of the many remaining differences between the position and rights of Union citizens and those of Turkish nationals.

5. In point 67 it is argued that the aim and structure of the Association and those of the EU/EC Treaties are different. The latter intend to merge the national markets into a single market. “However, a true internal market can only develop if citizens are acknowledged and protected also in spheres outside their economic activities. […] Placing the Union citizen at the heart of EU law connects the EU with its objectives going far beyond the economic dimension.” But the opinion does not explain why accepting that the standstill clause in the Protocol covers both providers and recipients of services, would make Turkish nationals into quasi Union citizens with freedom of movement and all the other rights that go beyond the rights of economic market participants. The relevant Turkish nationals may well be required to prove at the external EU border that they are effective and genuine recipients of services, that their entry and short stay in the Union has an economically relevant purpose and that the services they are going to receive are not only marginal and ancillary (see *Levin* with respect to the concept of worker).

6. I am not convinced that it is compatible with the international law of treaties to use an agreement signed between the EU and Switzerland in 1999 as a relevant source for the interpretation of a Protocol the EEC and its Member States concluded with Turkey 30 years

earlier (see point 57). The Vienna Convention on the Law of Treaties refers to "subsequent agreements *between the parties*" (emphasis added) as evidence for the interpretation of a particular treaty (Article 31(3)(a) VCLT). Accordingly, and differently of what the Opinion actually does, referring to the subsequent treaty practice of only *some* of the parties (here: the EU/EC and its Member States) is not a recognized means of interpretation.

7. In point 59 of the Opinion it is argued that Article 59 of the Protocol provides an argument for a limited scope of the standstill clause. But Article 59 may just as well be used to support the opposite conclusion. Article 59 was necessary to set a clear limit to the potentially far reaching effects of the standstill clause and other rights granted to Turkish nationals in the Protocol.

8. In point 61 the AG makes reference to the case law of the Court in *Abatay and Others* that "the principles enshrined … in the provisions of the Treaty relating to the freedom to provide services, must be extended, *so far as possible*, to Turkish nationals" (emphasis added by the AG). But the words "as far as possible" do not imply that the EU and its Member States are free to unilaterally restrict the personal scope of the provisions of the freedom to provide services in Article 14 of the Association Agreement and Article 41 of the Protocol.

9. In point 65, reference is made to the Opinion of AG Bot in *Ziebell* that the Association Agreement with Turkey "has an exclusively economic purpose" and that the Court adopted that approach. But the Opinion fails to mentioned that when the German government relied on the approach of AG Bot in a later case, the Court did not accept the argument that the association with Turkey has an exclusively economic aim, see the judgment of 19 July 2012 in case C-451/11 (*Dülger*), para. 43ff.

10. In point 67 the AG implicitly proposes the Court to amend its constant jurisprudence since 1995 in *Ahmet Bozkurt* that the principles and concepts in the Articles 12 to 14 of the Association relating to the three freedoms must be extended, so far as possible, to Turkish nationals. There are indeed certain political rights of Union citizens which the Association Agreement does not aim to extent to citizens of Turkey, such as the right to vote and to stand as candidates in elections to the European Parliament. Precisely the opposite is true for the non-political right to freely receive services provided in the EU.11. In point 69 it is suggested again that accepting that the standstill clause in Article 41(1) also applies to service recipients would imply full free movement of the Turkish nationals concerned. Surprisingly, at this point the Opinion does not mention that in 1970, when the Protocol was signed, Turkish nationals effectively had full freedom to travel up to three months without a visa to all EEC Member States. In fact Turkish nationals were free to stay without a visa in each of Member States separately. Thus, they enjoyed far more freedom to travel than the three months visa free circulation (within six months) in the total Schengen area that is allowed under current Union law. At this point it becomes obvious that the AG projects the current concerns of Member States with immigration control back into the minds of those who signed the Protocol in 1970 without taking into proper account the relevant immigration rules in force in the Member States at that time.

12. In the last sentence of point 71 the Opinion uncritically subscribes to the reciprocity argument raised by the German government: Turkey requires Belgian and Dutch nationals to have a visa. But the Opinion ignores the clear differences between the practice of Turkey and those of Belgium and the Netherlands. Belgian and Dutch nationals can buy the visa stamp at the Turkish border for € 15. This activity requires rarely more than a few minutes. However, Turkish nationals have to fill in detailed application forms, present a lot of paper evidence, travel to a Belgian or Dutch consulate and pay far more. The total costs and time they are forced to spend by far exceeds the small fee for the Turkish visa stamp which is acquired at the border within minutes. In any case, non-performance of one party to an international treaty cannot serve as a means of interpretation for determining the scope of the obligations laid down in that treaty.

13. If the Court would give an interpretation of the right to receive services in the Association Agreement with Turkey which is different form its constant jurisprudence for the same concept in the EC/EU Treaty, this would be a clear negative signal to Turkey, the other party to the agreement, a debasement of the value of EU agreements with other third countries and it would diminish the authority of the Court which will have chosen the political over the legally correct.

Kees Groenendijk, Nijmegen, 26 May 2013