

**IN THE MATTER OF THE UK'S FAILURE TO
PROTECT THE RIGHTS OF TURKISH NATIONALS
UNDER THE ANKARA AGREEMENT**


JOINT ADVICE

I. INTRODUCTION

1. We have been instructed by Aaron H. Bergel, Director of the Turkish Association to Protect the Rights of Industrial And Commercial Businesspersons in the UK under the ECAA (“TAPRICB” or “the Association”), to advise the Association on recent correspondence with the European Ombudsman’s service and the European Commission, including a detailed complaint concerning the treatment of Turkish Businesspersons by the United Kingdom Government in recent years.

2. At its core, we are asked to advise on the merits of challenges to the alteration of treatment of Turkish businesspersons by the UK authorities, in the sense that the conditions for their establishment in the UK have become more strict and exacting, in comparison to the previous regime applicable and to the position of EU nationals, and certain of their legal remedies have been removed¹. This has to be put in the wider context of the Home Office’s approach recorded in our instructions, which has been to create a hostile or at least sceptically negative environment by using immigration techniques to hinder or avoid recognition of the status to which the Ankara Agreement granted rights of establishment to Turkish citizens.

3. In preparing this Joint Advice, we have been given detailed materials which examine the legal and factual background of the dispute, including:
 - 3.1. Instructions (2-pages), with a detailed 7-page annex identifying factual and legal errors in the European Commission’s analysis of the issues TAPRICB has identified and further instructions including the four questions below.

¹ In particular, amendments to the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) by s.15 of the Immigration Act 2014 removed the statutory right of appeal in s.82 of the 2002 Act except for a very limited category of cases.

- 3.2. Correspondence with the European Commission (hereafter “**the Commission**”) arising from a complaint against the UK by TAPRICB dated 13 July 2020. This correspondence includes the Commission’s most recent letter dated 17 December 2020;
 - 3.3. Correspondence between TAPRICB and the European Ombudsman Service regarding the Commission’s failure to address the complaint;
 - 3.4. A letter dated 25 June 2020 by Dr. Catherine Taroni of Richmond Chambers to the Home Office identifying issues arising for Turkish nationals due to UK’s COVID-19 policies and the impact on their status and rights to remain in or return to the UK.
4. We have also examined the key authorities referred to in our instructions and the correspondence identified above, including:
- 4.1. A judgment of the Outer House of the Court of Session, BA, MA, CA, HA(AP) v SSHD [2017] CSOH 27 (“**BA(Turkey)**”);
 - 4.2. The decision of the Upper Tribunal in R (oao Aydogdu v SSHD [2017] UKUT 00167 (IAC) (“**Aydogdu**”); and
 - 4.3. The *Akturk* litigation (the decision of the High Court: R (on the application of Akturk) v SSHD [2017] EWHC 297 (Admin); [2017] 4 WLR 62 (“**Akturk (HC)**”); and the judgment of the Court of Appeal: SSHD v. CA (Turkey) [2019] 1 W.L.R. 2689 (“**Akturk (CA)**”); and
 - 4.4. A recent judgment of the English Court of Appeal in R(Alliance of Turkish Business People Limited) v SSHD [2020] EWCA Civ 553 (“**AoTBPL**”), which we have identified in our research.
5. In the first instance, we have been asked to respond to four specific questions:
- 5.1. Q1: This question is in two parts:
 - a. Does Article 41(1) of the Additional Protocol encompass procedural as well as substantive conditions? In other words, does Article 41(1) of the

Additional Protocol also cover remedies? We are invited to consider these issues in the context of the right of appeal for Turkish nationals.

- b. Notwithstanding the answer to 1.a above relating to Article 41(1) of the standstill clause, does a separate procedure for Turkish nationals comprising an administrative review and potential judicial review compared to a direct right of appeal for EU nationals contravene Article 9? If it does, why? If it does not, why?
- 5.2. Q2: Whether the UK has breached obligations under Article 9 (non-discrimination provision) of the Ankara Agreement where under its national legislation in the UK it grants EU nationals the right to apply for pre-settlement and settlement (introduced prior to the Withdrawal Agreement) but continues to require Turkish nationals to fulfil the more burdensome route to extension described above? If Article 9 (non-discrimination provisions) apply, then why? If not, then why?
- 5.3. Q3: This is in three parts:
- a. Whether the settlement of migrant Turkish nationals and their family falls within the scope of the “stand-still clause” in Article 41(1) of the Ankara Agreement (ECAA) Additional Protocol?
 - b. Is settlement necessary for the exercise of freedom of establishment under Article 13 of the Ankara Agreement. (Context: Aydogdu, Upper Tribunal Decision).
 - c. Whether the UK has breached obligations under Article 9 (non-discrimination provision) of the Ankara Agreement where under its national legislation in the UK it grants EU nationals the right to apply for pre-settlement and settlement (introduced prior to the Withdrawal Agreement) but continues to require Turkish nationals to fulfil the more burdensome route to extension described above? If Article 9 (non-discrimination provisions) apply, then why? If not, then why?
- 5.4. Q4: Finally, this question has two parts:
- a. Does the foregoing still hold true where a Member State actively contrives to breach EU law and the Commission just doesn't do anything about it? Wouldn't that fall within the ECJ's Article 263 TFEU review?
 - b. Under these circumstances, what tools or routes are available through the ECJ where the Commission either reasonably or unreasonably (based on policy considerations in the latter cases) refuses to enforce a particular area of EU law and has failed in its role for decades? Can Article 340 TFEU be used to claim damages by some members of my group if we can establish that the Commission's failures are of direct and individual concern to them?

II. BACKGROUND

The Ankara Agreement and UK withdrawal from the EU

6. By Article 238 of the Treaty establishing the European Economic Community (now Article 217 of the Treaty of the Functioning of the EU (“TFEU”)), the EEC (as it then was) was empowered to enter into ‘association agreements’ with third states creating reciprocal rights and obligations. Article 216 TFEU now makes explicit that which was previously implicit in the Treaties, namely that such agreements are binding on the institutions of the European Union and the Member States.
7. The agreement establishing an association between the EEC and Turkey was signed at Ankara on 12 September 1963² (the “**Ankara Agreement**”). The Ankara Agreement was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJEC 1973 C113, p.1)
8. The Additional Protocol to the Ankara Agreement (“**the Additional Protocol**”) was signed at Brussels on 23 November 1970³. It was concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJEC 1973 C113, p.17).
9. The key provisions at issue in this Joint Advice are as follows:
 - 9.1. Article 7 of the Ankara Agreement provides that: “*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement. They shall refrain from any measures liable to jeopardize the attainment of the objectives of this Agreement*”;
 - 9.2. Article 9 of the Ankara Agreement provides that “*The Contracting Parties recognize that within the scope of this Agreement -and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community*”;

² OJEC L217, 29.12.1964, p.3687.

³ OJEC L293, 29.12.1972, pp. 3-56.

- 9.3. Article 13 recorded that *“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”*.
- 9.4. Article 41(1) of the Additional Protocol provides that *“The contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services”* (this is commonly known as the **“standstill clause”**); and
- 9.5. Article 59 of the Additional Protocol provides that *“In the fields covered by this Protocol, Turkey shall not receive more favourable treatment than that which member states grant to one another pursuant to the Treaty establishing the Community.”*

The Ankara Agreement and UK law

10. The ECAA and the Additional Protocol was incorporated into UK law as part of EU law by the European Communities Act 1972 (**“the ECA 1972”**), following the UK joining the European Economic Community, thereby becoming a Member State, in 1973.
11. Insofar as the withdrawal of the UK from the EU is concerned, the position was succinctly stated by the Court of Appeal in R. (on the application of Simonis) v Arts Council England [2020] EWCA Civ 374; [2020] 3 C.M.L.R. 22, p.796 at [10] per Green LJ:

“The position is governed by the relevant parts of the Withdrawal Agreement. The obligations in the Withdrawal Agreement were given effect to by the European Union (Withdrawal) Act 2018 (“EUWA”) as amended by the European Union (Withdrawal Agreement) Act 2020 (“WAA”) which received Royal Assent on 23rd January 2020 [FN2: See generally ss.1, 1A and 1B and 7A EUWA. The European Communities Act 1972 is maintained in force until the end of the IP]. After exit day “Union law” (as defined in the Withdrawal Agreement [FN3: art.2(a)]) continues to have the same effect as it did prior to exit, until 11pm on 31st December 2020, which is the end of the Implementation Period or “IP” [FN4: arts. 4 and 126-127]. The expression “Union law” includes: the Treaty on the Functioning of the European Union (“TFEU”), the Charter on Fundamental Rights (“the Charter”), the general principles of EU law, and the acts of the institution which therefore covers regulations and directives.”
12. However, EU law, including the international agreements to which the EU is a party, ceased to have effect following the end of the implementation period.

Immigration Rules for Turkish Businesspersons

13. The detailed rules applicable to Turkish Businesspersons upon the entry into force of the Additional Protocol as well as recent changes introduced by the UK are set out in the correspondence of TAPRICB with the Commission dated 13 July 2020 and are summarised at paragraphs [4]-[11] of the judgment of the Court of Appeal in AoTBPL and so not restated here.

III. ANALYSIS

14. We examine each of the questions posed to us in turn.

Q1. Removal of the statutory right of appeal in the UK

15. The first question asks us to comment on the fact that amendments to the 2002 Act removed the statutory right of appeal to the First-Tier Tribunal in immigration matters, which had been in place for some time (and existed at the time of the entry into force of the standstill clause).
16. As to the first aspect of this question (Q1(a)), there is no express authority decided by the EU Courts of which we are aware on the applicability of Article 41(1) to national rules concerning remedies. It is correct that the jurisprudence of the Court of Justice of the European Union (“CJEU”) has examined the application of Article 41(1) to procedural requirements applied to the recognition or exercise of the right of establishment, as accepted by the Court of Appeal in Akturk (CA) (p.2696F-G at [17] per Newey LJ):

“article 41(1) of the Additional Protocol can apply to procedural requirements [...] article 41(1) has been held to cover the need for an administrative authorisation such as a work permit (*Abatay v Bundesanstalt für Arbeit* (Joined Cases C-317/01 and 369/01) [2003] ECR I-12301), a rule requiring pre-arrival entry clearance (*R (Tum) v Secretary of State for the Home Department* (Case C-16/05) [2008] 1 WLR 94), a visa requirement (*Soysal v Germany* (Case C-228/06) [2009] ECR I-1031) and charges for residence permits: *Minister voor Vreemdelingenzaken en Integratie v Sahin* (Case C-242/06) [2009] ECR I-8465.”

17. An illustrative example is Case C-92/07 Commission v. Netherlands [2010] ECR I-3683 (ECLI:EU:C:2010:228) which concerned the imposition of charges for applications to obtain or to extend resident permits on Turkish nationals which were substantially

higher than the analogous charges applied to nationals of EU or EEA States. The Court was clear that Article 41(1) “[...] prohibits the introduction, as from the date of entry into force of the legal act of which that provision forms part in the host Member State, of any new restrictions on the exercise of freedom of establishment or freedom to provide services, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that Member State of Turkish nationals intending to make use of those economic freedoms.” (at [47])

18. The general approach taken by EU law, insofar as domestic law is concerned, is to differentiate between substantive and procedural rules – the latter being left to the competences of the Member States in accordance with the principle of conferral (Article 5(2) TFEU). At present – and indeed *a fortiori* at the time of the signing of the Ankara Agreement – the EU Treaties did not confer any competence on the EU institutions to adopt EU legislative acts in relation to procedural matters⁴.

19. As such, the ordinary principle is that of “national procedural autonomy”, i.e.:

“[...] in accordance with the Court’s settled case-law, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State, in accordance with the principle of procedural autonomy, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States having none the less responsibility for ensuring that those rights are effectively protected in each case” (Case C-425/16, Raimund, ECLI:EU:C:2017:776 at [40])

20. Moreover, it is not a breach of EU law for there to be separate procedures which apply to EU nationals and domestic nationals, so long as the two remedies are *equivalent* and *similarly effective*. In Case C-591/10 Littlewoods Retail and Others (ECLI:EU:C:2012:478), at [31], the Court reiterated that “[...] the principle of equivalence cannot be interpreted as requiring a Member State to extend its most favourable rules to all actions brought in a certain area of law. In order to ensure compliance with that principle, it is for the national court, which alone has direct knowledge of the procedural rules

⁴ Exceptionally, reliance has been placed on the harmonisation provision in Article 114 TFEU (ex-Art. 95 TEC), e.g. in relation to Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts; and certain other sector-specific provisions expressly confer the power to introduce, e.g. rules for judicial cooperation in civil and commercial matters.

governing restitution actions against the State, to determine whether the procedural rules intended to ensure that the rights derived by individuals from EU law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions [...]".

21. Ultimately, the Court has emphasised that "[...] *it is for the national court, which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics*" (Case C-93/12 ET Agrokonsulting-04-Velko Stoyanov (ECLI:EU:C:2013:432) at [39]).
22. Ordinarily, the forum of challenge to an administrative decision would therefore be a matter for national law, subject to the principles of effectiveness and equivalence.
23. The provisions of the Ankara Agreement must be read consistently with those principles. There are no grounds for taking a different approach in relation to those businesspersons falling within the scope of the Ankara Agreement and its Additional Protocol.
24. Moreover, in our view, there are strong grounds for criticising the approach of the Court of Appeal in Akturk (CA), which would justify the Commission investigating the compatibility of that Court's conclusions - and hence UK law - with the language and spirit of the Ankara Agreement.
25. First, in relation to the language of Article 41, the Court of Appeal concluded that in the *absence* of specific reference to remedies or redress in Article 41, the provision could not be read to extend to such topics (p.2702C-H at [33]-[35] per Newey LJ; p.2703E and H at [40] and [43] per Irwin LJ).
26. In our view, this is a very restrictive approach to the words of the provision, which do not introduce any distinction between substantive and procedural measures, they simply refer to: "*new restrictions on the freedom of establishment and the freedom to provide services*". The issue was not examined in any detail by the High Court, in part because the UK government appears to have drawn a distinction of nature (rather than language) between appeal rights and procedural rules "*up to the point of first decision-*

making” (see [74]), which Holman J was comfortable fell within the scope of Article 41(1) (see [81]).

27. There is no express basis in the case law of the CJEU for the distinction drawn by the Court of Appeal between procedural conditions for the exercise of the right to establishment and means of redress (or as the Court put it “*legal remedies available to someone alleging breach of his rights*”).
28. This distinction may reflect a traditional view of the difference between procedural and substantive rules. For example, Professor Michael Dougan has distinguished between modalities of exercise of Treaty rights (including “*limitation periods, evidential restrictions, heads of recoverable damages, the payment of interest*”), which were accepted to be within the “*procedural autonomy*” of Member States (and therefore within national competences) and “*the conditions governing the very existence and nature of a right under Community law*” which are said to be substantive (see *National Remedies Before the Court of Justice, Modern Studies in European Law*, Hart Publishing 2004, p.19). This reflects the approach of Advocate-General Léger in Case C-453/00 *Kühne & Heitz* [2004] ECR I-00837 (ECLI:EU:C:2003:350) at [70]). Although these are older sources, they remain relevant and applicable to the principle of national procedural autonomy today.
29. However, in our view there are strong arguments for treating this as an artificial distinction which ignores the reality of the enforcement of rights by affected individuals. This latter feature is a fundamental aspect of the relevant jurisprudence (as illustrated by C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland [2010] ECR I-13849 (ECLI:EU:C:2010:811)⁵). This is the significance of Case C-136/03 Dörr and Ünal v Sicherheitsdirektion für das Bundesland Karnten [2005] ECR I-4759; (EU:C:2005:340), in which the CJEU concluded that it was essential to grant Turkish workers “*the same procedural guarantees as those granted by Community law to nationals of member states*” (at [67]).
30. The Court of Appeal in Akturk (CA) distinguished that authority on the basis that (i) it turned on the ‘further’ integration of Turkish workers operated by Decision 1/80 and

⁵ See also *EU Procedural law*, A. Biondi & R. Mehta, Blackwell’s Companion to EU law, Dennis Patterson & Anna Södersten (eds.), May 2016, Wiley-Blackwell, pp.155-165 at §3.3.

- (ii) it concerned a directly effective individual right, which was not present in Akturk (pp.2699H-2700B at [24] per Newey LJ). We find this distinction deeply unpersuasive.
31. We note that the objective and requirements of the Ankara Agreement set out in Articles 2 and 7 envisage progressive integration between the EU and Turkey – the addition of a specific decision in Dörr is an additional but not determinative factor in that regard – and in addition it is well-established that Article 41(1) is directly effective (Case C-37/98 R v Secretary of State for the Home Department, Ex p Savas [2000] 1 WLR 1828; [2000] ECR I-2927 (EU:C:2000:224) (“Savas”) at [48]-[50]). This was also the *obiter* approach of Sullivan J in R (oao Parmak) v SSHD [2006] EWHC 244 (Admin); [2006] 2 CMLR 56 at [27].
32. The Court of Appeal might have argued, but did not, that specific provisions of secondary legislation relevant in Dörr required equivalent procedural guarantees to be afforded to non-nationals as nationals of the host State (articles 8 and 9 of Council Directive 64/221/EEC). No equivalent provision exists in relation to the freedom of establishment.
33. In any event, in our view, the argument that the language of Article 41(1) includes the type of restriction such as the exclusion of a statutory right of appeal encompassing full merits review, which would otherwise be available to EU nationals.
34. Second, in relation to the object and a purposive construction of Article 41(1), the Court of Appeal considered that extension of the standstill to remedies would contradict the principle of national procedural autonomy (p. 2703A-B at [36] per Newey LJ) and would create potential inconsistencies between EU Member States as well as a “*ratchet*” effect (p.2704A-B at [44] per Irwin LJ).
35. However, there are a strong arguments to prefer the analysis of the High Court to those of the Court of Appeal, in particular Holman J’s conclusion (at [83]) that “[...] *the effect of article 41 is to require, subject to article 59 , that the appeal or review procedure available to the claimant should not be less favourable now than it was in 1973.*”
36. That is consistent with the analysis of Article 41(1) by the CJEU in Savas: “*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” and “[i]t is therefore for the national court, which alone has jurisdiction to interpret its own domestic law, to determine whether the domestic rules applied to Mr Savas by the competent authorities have the effect of worsening his position in comparison with the rules which were applicable in the United Kingdom on the date on which the Additional Protocol entered into force in relation to that Member State” (at [69]-[70]).

37. Similarly, in Case C-16/05 R (Tum) v Secretary of State for the Home Department [2007] ECR I-7415; [2008] 1 WLR 94 (EU:C:2007:530) at [69] the CJEU held that “*article 41(1) of the Additional Protocol is to be interpreted as prohibiting the introduction, as from the entry into force of that Protocol with regard to the member state concerned, of any new restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that state, of Turkish nationals intending to establish themselves in business there on their own account*”.
38. This approach does not unduly restrict the ability of Member States to determine their own procedural rules so long as the mechanisms relied upon are as effective, accessible and practical as those in place at the time the standstill was introduced. As to the alleged “*ratchet*”, in our view this could be said to be the precise intention of the standstill clause, in order further to encourage integration between the EU and Turkey, and is a direct result of the national procedural autonomy – and hence procedural variation – which is recognised by EU law.
39. Finally, in relation to the underlying complaint about the comparison between the administrative review mechanism and the previous right of statutory appeal, the High Court in Akturk (HC) was persuaded that “*the appeal or review procedure available to the claimant*” is “[...]markedly less favourable. The limitations and shortcomings of administrative review, relative to a judicial appeal, are very obvious and were indeed well illustrated by the history of this case” at [83] per Holman J. The High Court emphasised the fact that the administrative review procedure was a poor cousin of the pre-existing statutory right of appeal: “[t]he appeal was to an independent judicial body with a further avenue of appeal. Administrative review is performed by an official within the Home Office. On an appeal, oral evidence for and on behalf the applicant could be, and routinely was, heard. The tribunal could

substitute its own discretion for that of the Secretary of State, whereas administrative review is limited to considering whether the original decision was incorrect” (at [71]).

40. In our view, there is an immense difference between a mere administrative review of the form of an adverse decision, checking on whether the applicable procedural rules had been applied, and a thorough rigorous judicial examination of the merits in fact and in law of the measure in its full context. It is regrettably the case that Home Office policy has in the very recent past been to create a climate inimical to the enjoyment of the individual’s rights. It would appear that the triviality of the grounds invoked to reject an application by Turkish workers is sometimes almost embarrassing. The entire administrative structure is arguably oriented and calibrated to issue negative decisions as opposed to well-balanced assessments of all factors. In those circumstances, an administrative ‘check’ on whether deadlines were observed, and other such formal procedural questions, is not equivalent to the neutral and thorough examination of the whole case which a judge can deploy. This is borne out by the statistics of the administrative review, which suggest that the process is perfunctory and formalist and it is correspondingly difficult to doubt the reduction in the rights to which Turkish persons and their families are entitled (Akturk (HC) at [72]).
41. Certainly, the Commission does not appear properly to have analysed the evidence which is available about the very different rates of success between the previous statutory appeal procedure and the administrative review process, or to have considered the very different grounds on which challenges may be brought under the two procedures. Similar features of the regime in Dörr and Ünal led the Court to conclude that it did not comply with the requirements of the relevant Directive (at [47]).
42. In light of these factors, there are powerful arguments for preferring the approach of the High Court to that of the Court of Appeal, albeit that domestic courts would be likely to defer to some extent to the national legal system – and EU Courts may do the same unless it is clear that the quality of the alternative remedy proposed is substantially inferior to its comparator, and that it no longer satisfies the effectiveness test. The critical question would be the relative effectiveness of the new procedure when compared to the previous procedure protected by the standstill clause. We observe that the reality of the processing of applications and challenges to adverse decisions suggests that some

refusals are based on grounds which appear manifestly absurd (that a Professor lacks practical experience of the discipline being taught, or that the CEO of a company has not been employed in the relevant sector). Yet the appellate procedures instituted seem to take no notice of such bizarre elements: the review process is a trivial formality. If this pattern is systematic (and we have heard suggestions that it is) then a proper appellate process is all the more necessary, and the shortcomings of the administrative process identified above are all the more telling.

43. As to the second aspect of this question (Q(1)(b)), this concerns the separate effect (if any) of the non-discrimination provision contained in Article 9 of the Ankara Agreement. Reference has been made in our instructions to some of the jurisprudence on this provision.
44. Ultimately, there are two ways of looking at this issue, since there is no specific authority on this point which is dispositive.
45. On the one hand, it may be argued that Article 9 has no separate effect on the removal of a statutory right of appeal. That position would be based on the fact that Article 9 refers expressly to the principle of non-discrimination applying only "*within the scope of this Agreement*". Unlike the free movement of Turkish workers, guaranteed by Article 12 of the Ankara Agreement and given effect by secondary legislation such as Decision 1/80 of the Association Council of 19 September 1980 on the development of the Association, no specific provision is made for the right of establishment other than Article 41(1).
46. If Article 41(1) of the Additional Protocol, properly construed, covers procedural as well as substantive matters including remedies for breach of the right of establishment, then Article 9 would add nothing to the analysis. If Article 41(1) did not extend to remedies, however, then it could be said that Article 9 is not engaged at all, since no rule "*within the scope of this Agreement*" is at issue.
47. It is worth noting that the High Court of England & Wales has held that Article 9 (including read together with Article 41(1)) does not in itself contain a substantive right to equal treatment: Alacakanat v General Medical Council [2013] EWHC 1866 (Admin);

[2014] 1 C.M.L.R. 5, p.115 at [20] per Edwards-Stuart J. We add that we entertain doubts as to the correctness of that analysis as a matter of EU law.

48. On the other hand, however, it may be said that if Article 41(1), properly construed, is to be read more restrictively, it is still perfectly proper and legitimate to look at Article 9 of the Ankara Agreement and ask whether it can be prayed in aid of affected persons. The issues of concern to TAPRICB concern the exercise of the right of establishment and therefore would fall within the scope of the Ankara Agreement. This approach explains the difference between the judgments of the CJEU in Taflan-Met⁶ (detailed rules needed but did not exist, so Taflan-Met lost) and Sürül⁷ (nothing needed beyond the basic rule against discrimination in Article 9, so Sürül won).
49. For our present purposes, it is not necessary to resolve finally whether Article 9 has a separate effect, but it is sufficient to note that there are good grounds for asserting that the removal of a statutory right of appeal for Turkish nationals in circumstances where EU nationals would have such a right is a breach of Article 9 of the Ankara Agreement.

Q2. Pre-settlement and settlement rights for Turkish nationals

50. In our view, there is limited merit in this ground of objection to the UK's behaviour, for the reasons set out in the Commission's letter of 30 September 2020. In essence, the critical feature of the introduction of pre-settled and settled status is that it is an optional arrangement permitted (though not required) by the Withdrawal Agreement, taking effect only after the UK's membership of the European Union came to an end and arising from the bilateral treaty between the UK and the EU.
51. This raises the related issue in question 3, as to whether a right of residence (and if so to what 'settled' status) must necessarily be implied into a right of establishment (which the UK courts have held does not extend to fully settled status, or 'indefinite leave to remain' in the context of the Ankara Agreement). If such a right were a necessary feature of the rights guaranteed by the Ankara Agreement it might be argued that the UK was obliged to make some provision for the rights of residence of Turkish nationals during

⁶ Case C-277/94 Taflan-Met and Others [1996] ECR I-04085 (ECLI:EU:C:1996:315).

⁷ Case C-262/96 Sürül v Bundesanstalt für Arbeit [1999] ECR I-02685 (ECLI:EU:C:1999:228).

(though not after) the transitional period, which did not occur. However, for the reasons in relation to question 3, we do not think this argument is likely to be successful.

Q3. Rights of residence and of establishment

52. The third question arises from case-law before the UK Courts which drew a distinction between the right of establishment, which is clearly within the scope of Article 41 of the Additional Protocol, and a right of residence in the UK. As the Court of Appeal of England & Wales explained in its recent judgment in AoTBPL (at [7]-[8]), the Scottish and English courts have held that settlement is not necessarily a corollary of the right of establishment (BA (Turkey) at [50] per Lord Armstrong; Aydogdu at [34] per McCluskey J) on the basis that the primary focus of the Ankara Agreement is *economic* integration, rather than social cohesion. So far as we are aware, the correctness of this analysis has not thus far been tested before the CJEU. Depending on the nature of a particular business, it may well be the case that economically the pursuit of the proposed activity is only possible by virtue of fully settled status. It seems obvious that a businessperson threatened with deportation will be a less effective trade partner than one with a secure right of establishment.
53. Similarly, the interests of Turkish businesspersons in reunifying with their families in a stable and fully integrated way in the host State cannot be readily discounted, and may support any challenge to the approach of the UK Courts.
54. In any event, the effect of these decisions is not to remove the issue of settlement entirely from the scope of the standstill clause, but to conclude that ultimate “*settled*” status (i.e. indefinite leave to remain) in the UK is not a necessary corollary of the right to establishment. Instead, both courts recognised that a limited right of settlement, linked to the scope and duration of the right to work/of establishment was a necessary and sufficient corollary of the right protected by the Ankara Agreement.
55. As such, the answer to Question 3 is not an ‘all or nothing’. The decision of McCluskey J in Aydogdu recognises and examines the authorities which have emphasised the importance of settlement and family reunification to the effective integration of Turkish nationals exercising the right to the free movement of workers or the right of establishment. It is therefore possible to confirm that settlement is an aspect of the right

guaranteed by Article 41(1). However, such settlement is only protected to the extent that it is necessary to and an essential corollary of the effective exercise of the right of establishment.

56. In a related fashion, the answer to Question 3(c) is that Article 9 of the Ankara Agreement would only be relevant to this analysis insofar as the right of settlement is within the scope of the Agreement itself. As such, it is only to the extent that the right of settlement is necessary to and an essential corollary of the effective exercise of the right of establishment that any complaint of non-discrimination might be brought.
57. As to that complaint, the comparison which has been drawn in our instructions relates to the possibility for EU nationals to acquire pre-settled or settled status. We do not think that is a relevant comparison for the reasons set out above in relation to Question 2. The position of Turkish nationals is not analogous to those of EU nationals, following the end of the implementation period of the Withdrawal Agreement. Accordingly, we do not think that there is substantial merit to a complaint based on Article 9 about the difference between pre-settled/settled status for EU nationals and the separate regime with which Turkish nationals must comply.
58. We note that these alterations and new features of the regime applicable to Turkish businesspersons were the subject of the (unsuccessful) challenge in the AoTBPL case, albeit not on this ground.

Q4. The Commission's failure to act

59. This question in essence asks us to comment on the curious fact that very few references to the CJEU have been made from UK courts and on the equally curious fact that the European Commission has elected not to challenge the practices of the UK regarding the exercise by Turkish citizens of the rights to establish themselves in the UK. Our instructions have rightly emphasised that the Commission is tasked with acting as the “*guardian of the Treaties*” (as is enshrined in Article 17(1) of the Treaty on the European Union (“TEU”), which provides that the Commission “[...] *shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them* [...]”).
60. It is indeed strange that an institution which is rule-driven and rule-bound should appear to grant institutional toleration to infringements by the Member States of parts

of the Treaties and other legislative measures which bind the Union. Any judge in a court of a Member State confronted by a case whose resolution depends on a question of European Union law is empowered to refer the matter to the CJEU for a ruling on that question before deciding the case before him or her. And if there is no appeal against the judge's ruling and the matter is not '*acte claire*', such a reference must in principle be made⁸.

61. In actual practice, however, the European Commission enjoys a very wide discretion as to whether or not to pursue an infringement proceeding against a Member State. Sometimes, as was the case in the 1990's and 1980's, there were literally dozens of infringement actions against Italy for straightforward non-implementation of Directives in due time. Following the establishment of the principle that a Member State could, in certain circumstances, be held liable for financial losses directly attributable to a failure to implement a Directive in the celebrated Francovich⁹ case (and the decision in Dillenkofer¹⁰ that straightforward non-transposition within the prescribed period will automatically satisfy the 'Francovich criteria'), infringements of that obvious self-evident nature decreased dramatically. (The Court had previously and separately determined that a party could invoke the unimplemented directive in the national proceedings¹¹).
62. However, although over the years the Commission must have been confronted with more and less flagrant breaches of the rules by Member States, there is not a single occasion when its *failure* to initiate proceedings against a Member State has been condemned. There have been a succession of cases when the Commission's rejection of a complaint about, for example, the competition rules has been challenged and on occasion condemned on procedural grounds (inadequate reasoning or failure to give notice of an accusation for example). But the Court has always upheld the Commission's right to choose whether or not to open proceedings in a particular case. Automec¹² and Lord Bethell¹³ are two examples of the phenomenon: the most that the

⁸ In accordance with the jurisprudence arising from Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 03415 (ECLI:EU:C:1982:335).

⁹ Joined cases C-6/90 and C-9/90 Francovich and Bonifaci and others v Italian Republic [1991] ECR I-05357 (ECLI:EU:C:1991:428).

¹⁰ Case C-178/94 Dillenkofer [1996] ECR I-4845 (ECLI:EU:C:1996:375).

¹¹ Case 148/78 Criminal proceedings against Tullio Ratti [1979] ECR 01629; (ECLI:EU:C:1979:110).

¹² Case T-24/90 Automec v Commission [1992] ECR II-02223 (ECLI:EU:T:1992:97).

¹³ Case 246/81 Lord Bethell v Commission of the European Communities [1982] ECR 02277 (ECLI:EU:C:1982:224).

complainant can insist upon is a well-reasoned refusal with no guarantee that such reasoning is developed or substantial.

63. The position is even clearer in the case of complaints against a Member State. The Commission receives many complaints about alleged infringements and has what might be called a soft law duty to handle them fairly; but it is not the case that a private party can compel the opening of proceedings against a Member State.
64. There is a comparable degree of strangeness associated with references to the CJEU. It is correct that Member States' courts vary greatly in the frequency with which they make references to the CJEU. Latvian courts have made far more references to 'the Luxembourg court' in the fifteen years of Latvia's membership than Scottish courts have done in the nearly fifty years of UK membership, though Latvia and Scotland are of comparable size. Our instructions have drawn to our attention the fact that English courts considering Turkish matters have been very reluctant to refer genuine uncertainties to the CJEU. The statistics are indeed striking. Some judges and some courts are very hesitant to make references and some are very ready to do so. The national judge may feel that it is better to decide without delaying matters, or may think that the facts are not yet clear enough, or may feel that the alleged uncertainty is actually not that uncertain. Sometimes a judge may choose to make a reference in order that the CJEU will be responsible for an unpopular outcome. Sometimes the judge may feel that the argument being made is too clever, too hypothetical to merit a reference.
65. In very rare cases, the Commission has challenged the fact that a supreme court (that is, a court subject to the duty to refer laid down in Article 267(3) TEFU) has failed to make a reference in a case where it was plainly required (against France) or that there appeared to be a structural deficiency hindering the making of references (against Sweden). A complaint was made to the Commission against the UK in connection with the London lorry ban and the refusal of the House of Lords to make a reference, but the complaint received no response. We are aware of no example of the Court condemning the Commission's inaction in the face of such a failure to refer. We do not say that this state of affairs is satisfactory, and in our professional lives at the Bar we have been involved in many cases where the Commission was a crucial interlocutor in an attempt to persuade a Member State authority to change its policy. However, it was always on

the basis that if the Commission chose not to pursue the matter that choice was not challengeable. We see no prospect of the CJEU electing to alter its policy in this respect. *A fortiori*, we do not think that an attempt to seek damages against the Commission for non-contractual liability for its failure to instigate such proceedings (under Articles 268 and 340 TFEU) would stand the slightest chance of success.

IV. CONCLUSION & NEXT STEPS

66. We would be happy to address any further issues which arise from this Joint Advice.

67. Subject to any further instructions, we would propose to respond to the Commission in fairly short form, concentrating on the principal areas of complaint for which we have concluded that the merits are stronger. Our initial draft reflects this approach.

29 JANUARY 2021

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