OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 19 May 1987 *

Mr President,
Members of the Court,

1. Holding a visa valid until 9 June 1984, Mrs Meryem Demirel, a Turkish national, entered the Federal Republic of Germany on 17 March 1983 together with her son in order to join her husband (also of Turkish nationality) whom she had married on 24 August 1981. Her husband had entered the Federal Republic of Germany on 13 September 1979 for the purposes of rejoining his family ('reunification'); he is in lawful employment there.

2. Despite the restrictive endorsements on the visa ('Not issued for reunification of families; valid only for the purposes of a visit; paid activities not permitted') and despite the limit imposed on the term of residence and her own formal undertaking on 8 June 1984 to leave German territory on 11 June, Mrs Demirel did not return to Turkey, on the ground that she was pregnant and had no accommodation or financial resources available to her in her country of origin. She was then ordered to leave the country by the Stadt Schwäbisch Gmünd on 28 May 1985, with the threat of expulsion should she not have left German territory by 5 June 1985 at the latest. On 12 June 1985, on the ground that she was once again pregnant, she lodged an objection to the aforementioned order, which was rejected by the competent authority on 9 July 1985. Mrs Demirel therefore brought an action before the Verwaltungsgericht (Administrative Court) Stuttgart seeking essentially the annulment of the order and of the decision rejecting her objection thereto.

3. The Verwaltungsgericht Stuttgart has stated that the contested administrative decisions were in conformity with the national legislation now applying to those circumstances, by virtue of which the German provisions on family reunification could not be applied to Mrs Demirel's case until 12 September 1987. The order making the reference traces the development of the rules at issue. The circulars issued by the Ministry of the Interior of the *Land* Baden-Württemberg on 25 July 1966 and 31 January 1975 allowed family reunification when the foreign worker had lawfully resided in the Federal Republic of Germany for *three years* and when it was probable that he would continue for some time to carry on a trade or profession on German territory. However, in 1982 and 1984 the same ministry issued two new circulars implementing the Federal Ausländergesetz (Aliens Law), as amended at that time, by increasing to *eight years* the requirement of uninterrupted residence on German territory. The rules were therefore tightened. As a result, Mrs Demirel's family cannot claim the right to reunification until 13 September 1987, and this is reflected by

* Translated from the French.

the order contested before the national court, since it is effective only until 12 September 1987.

4. The case is not an isolated one. It is the second occasion on which the Verwaltungsgericht Stuttgart has sought a preliminary ruling, having previously referred a similar case, Case 268/85 *Bozdag* v *Stadt Backnang*, in which the main proceedings were discontinued. That case was concerned with the more stringent conditions regarding the duration of a marriage, to be fulfilled before the wife of a Turkish worker lawfully established in the Federal Republic of Germany could claim the right to join him. It raised the same questions, regarding on the one hand the direct applicability of Article 12 of the Agreement establishing an association between the EEC and Turkey and Article 36 of the Additional Protocol thereto, read in conjunction with Article 7 of the Agreement,[1] and on the other hand the implications of the term 'freedom of movement' used in the Agreement in relation to the rights of the spouse and children of a Turkish worker who has settled in a Member State of the Community.

5. However, a preliminary question was raised during the written procedure, concerning the consequences ensuing from the fact that the Agreement is a 'mixed' agreement. The examination of this point by the national court led it to the conclusion that, having regard to both the case-law of the Court and the rules of the Treaty, that particularity did not affect the Community nature of the Agreement. The national court did not therefore submit a question on that subject. On the other hand, without denying that the Court of Justice may be called upon to interpret any external agreement to which the Community is a party, the German Government and the United Kingdom, in their written observations, took issue with that view. They maintain that it is not for the Court to interpret provisions governing an area — the movement of workers — which falls within the exclusive jurisdiction of the Member States. They argue that, since the case is concerned with commitments under public international law and not with an act of one of the institutions of the Community within the meaning of the Court's judgment in *Haegeman* v *Belgium*,[2] Article 177 has no application. The German Government claims that such an interpretation does not run counter to the aims of the Ankara Agreement, or impede its proper functioning, inasmuch as its implementation is a matter for the Council of Association set up under Article 6 thereof. The United Kingdom further states that a consistent interpretation of the Agreement is ensured by Article 25 thereof, which empowers the Council of Association, if called upon by one of the contracting parties, to settle disputes as to its interpretation or implementation, or to submit the dispute to the Court of Justice. Disagreeing with the two governments, the Commission admits that it would be 'illogical' to refer for review by the Court of Justice provisions over which Member States have exclusive jurisdiction but contends that the subject-matter of the case does indeed fall within an area in which the Community has its own powers to conclude external agreements pursuant to Article 238 of the Treaty.

1 — Known as the 'Ankara Agreement' of 12 September 1963, it entered into force on 1 December 1964 (Official Journal 1973, C 113, p. 1) after confirmation by Decision No 64/732/EEC of the Council of 23 December 1963 (Journal Officiel No 217 of 29.12.1964), supplemented by an Additional Protocol of 23 November 1970, which entered into force on 1 January 1973 (Official Journal 1973, C 113, p. 17)

2 — Judgment of 30 April 1974 in Case 181/73 [1974] ECR 449, paragraphs 3 to 6.

6. During the proceedings the implications of the reply to be given to that preliminary question were treated as negligible by the representatives of the Member States which had raised it. However, confronted with an issue as fundamental as the Court's interpretative jurisdiction, I considered that I could not confine myself to noting the fact but am bound to make the following comments on the matter.

I — Jurisdiction to interpret the Agreement

7. The question of jurisdiction which arises here is not due to the fact that the provisions at issue form part of an agreement concluded with a non-member country but stems from the mixed nature of the Agreement, under which not only the Community but also the Member States have entered into obligations towards the non-member country, with the Community and the Member States acting jointly in the exercise of their respective powers.

8. With the aim of 'establishing an association between the European Economic Community and Turkey', the Ankara Agreement was concluded 'in accordance with Article 238 of the Treaty establishing the European Economic Community'. Article 228, covering all types of external agreement concluded by the Community, therefore applies to it. In a number of the Court's judgments, some relating to mixed agreements, certain principles have been developed which it is appropriate to recall here. However, since the matter is liable to give rise to further developments, it will be necessary to verify whether the answer to the question in this case may be found in previous judgments of the Court or whether it calls for a new step in case-law.

9. In interpreting the Athens Agreement,[3] a mixed agreement, with reference to the importation of Greek wines in the case of *Haegeman* v *Belgium*, the Court held as follows:

'The Athens Agreement was concluded by the Council under Articles 228 and 238 of the Treaty . . .

This Agreement is therefore, in so far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177.

The provisions of the Agreement, from the coming into force thereof, form an integral part of Community law.

Within the framework of this law, the Court accordingly has jurisdiction to give preliminary rulings concerning the interpretation of this Agreement.'

10. In the Opinion which he delivered on the *Bresciani*[4] case concerning the Yaoundé Convention of 1963, which was also a mixed agreement, Mr Advocate General Trabucchi, whilst noting certain 'doubts' arising from the *Haegeman* judgment 'in so far as the preliminary ruling given by the Court on the interpretation of the Convention has been extended further than the cases in which it was given in the course of interpreting or reviewing the validity of a Community act', none the less maintained, with regard to international conventions signed by the Community but also binding upon Member States under Article 228 of the Treaty, that it was necessary 'at the same time to take the Convention into account in order to identify the [Member] State's Community obligation, which is based on the Treaty and is specifically defined in the Convention binding the

3 — Agreement establishing an association between the EEC and Greece, signed on 9 July 1961; Official Journal, English Special Edition, Second Series I (External Relations (I)), p. 4.

4 — Case 87/75 [1976] ECR 129.

Community'. He went on: '... the definition of the scope of a State's Community obligation is always a *question of interpreting Community law*'.[5] In delivering its judgment subsequent to that Opinion the Court, in interpreting certain provisions of the Yaoundé Convention, first observed:

'It was concluded in the name not only of the Member States but also of the Community which, in consequence, are bound by virtue of Article 228.'

It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary 'according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the ... internal legal order of each Member State ... Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their *uniform application* throughout the Community.'[8]

11. The *Kupferberg* judgment admittedly does not deal with a mixed agreement, but reference was made to such an agreement on several occasions during the procedure. After recalling the powers conferred by the EEC Treaty on the institutions for the conclusion of agreements with non-member countries and international organizations and after examining Article 228 (2), under which Member States are bound by such agreements in the same way as the institutions, the Court held:

'The measures needed to implement the provisions of an agreement [of the type in question] ... are to be adopted, *according to the state of Community law for the time being* in the areas affected by the provisions of the agreement, either by the Community institutions or by the Member States ...'.[6]

'In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned *but also and above all in relation to the Community* which has assumed responsibility for the due performance of the agreement ...'.[7]

12. The case-law of the Court is quite plain as regards the Community character of the obligation imposed on Member States to comply with the external agreements concluded by the Community and as regards the role assigned to the Court, within the framework of its jurisdiction, of interpreting their provisions with a view to their uniform application. The case-law does not, however, lay down any criterion for determining jurisdiction, nor does it expressly exclude the possibility that a provision inserted in a mixed agreement might, by reason of its inherent nature or an express reserve contained therein, lie outside the Court's interpretative jurisdiction.

13. Nevertheless, in this instance the settlement of the question of the Court's jurisdiction does not appear to necessitate the elaboration of a general theory on the subject — useful though this would be. The measures in question are by nature consensual. Consequently, the contracting parties could graft onto them some strictly bilateral clauses on subjects lying outside the ambit of Community law, governing dealings between one or more Member

5 — Emphasis added.

6 — Paragraph 12; emphasis added.

7 — Paragraph 13; emphasis added.

8 — Paragraph 14; emphasis added.

States and the non-member country. The progressive changes in the distribution of powers between the Community and the Member States are an additional complication having regard to the mixed form of the Agreement. That form is sometimes criticized but has to be acknowledged as enabling international conventions to be concluded which could otherwise hardly have come into being.

14. In this case it must be noted that the provisions at issue must be seen as part of an an association agreement founded on the desire to 'establish ever closer bonds between the Turkish people and the peoples brought together in the European Economic Community', with a view to the subsequent accession of Turkey to the Community. Those factors alone are enough to enable this Agreement, concluded on the basis of Article 238, to be classed as an act of an institution within the meaning of Article 177 of the EEC Treaty. When such a convention looks towards a further accession, the Community must of necessity hold the most extensive powers to conclude agreements with non-member countries in order to cover all the fields of activity contemplated by the EEC Treaty. Without recourse being needed to the implicit powers which this Court has recognized the Community as having in its judgment in the *AETR* case (Case 22/70, on the European Agreement concerning the work of crews of vehicles engaged in international road transport and in Opinion 1/76 [9]), Article 238 constitutes the basis of an express and specific external power whose exercise must be in keeping with the goal pursued and the interests of the Community. That power is not to be construed restrictively. Both the Interpretative Declaration on the definition of the expression 'Contracting Parties' in Annex I to the Decision of the Council of 23 December 1963 concluding the agreement between the EEC and Turkey, [10] which refers to the Treaty provisions and to the changing distribution of powers between the Community and the Member States, and the case-law of the Court on external powers, indicate that the Community's international competence must be broadly construed in the light of continuing developments. None the less, it must be emphasized that this analysis is limited to agreements concluded with a view to accession. Even when based on Article 238, certain agreements have aroused discussion as to their true nature, with the contracting non-member countries themselves denying that they have the status of associates; [11] it is thus clearly necessary to interpret such agreements with the greatest caution. However, since one of the aims of an agreement concluded with a view to accession is the approximation of the economic and legal systems — and indeed political ones — in order, if the goal is attained, to achieve 'full acceptance' by the associate country of the obligations arising out of the Treaty establishing the Community, [12] it is necessary that all the subjects which are *a priori* to be covered by that acceptance be set out by the agreement in a Community perspective and that it be possible to interpret them with a view to their uniform application. Lying at the heart of the jurisdiction, of course, are the fundamental liberties required for the establishment of a common market, including the

9 — Judgment of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263; Opinion 1/76 of 26 April 1977, ECR 741.

10 — Official Journal 1973, C 113, p. 16.

11 — See C. Flaesch-Mougin's thesis, 'Les accords externes de la CEE: Essai d'une typologie', 1979, at p. 67.

12 — Article 28 of the Ankara Agreement.

free movement of workers. In this case, the provisions at issue are binding on all Member States without distinction. A further reason for bringing them under the jurisdiction of the Community is the fact that they may affect the free movement within the Community of workers who are nationals of the Member States.

15. Thus, in the absence of any reservation of powers in the Agreement, and subject to the various prerogatives as to its implementation, both the nature and the scope of its provisions suggest that, having regard to the principles defined in the case-law, the interpretation of those provisions is within the jurisdiction of this Court, particularly with a view to ensuring their uniform application. It does not seem to me that doubt is cast on that view of the matter by Article 25 of the Agreement, which confers powers on the Council of Association only in cases of conflict between States, in accordance with a procedure expressly laid down for the resolution of disputes which could not be brought before this Court by the non-member country concerned.

II — The questions submitted for a preliminary ruling

16. Whilst the written procedure revealed differences of opinion as to jurisdiction, it reflects what the oral procedure has confirmed, namely a consensus as to the broad outline of the reply to be given to the national court. In essence, it is proposed that the Court should hold that no direct effect attaches to the provisions at issue. I must say at the outset that I am equally convinced of this.

17. Since the judgment in *Pabst and Richarz*[13] there can be no doubt that an association agreement may have direct effect. Giving a preliminary ruling on a question concerning a provision of the Athens Agreement of 1961, the Court had regard in particular to the purpose and nature of that agreement and held that the article in question contained 'a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.

18. More generally, the cases decided by the Court[14] demonstrate that, in order to determine whether an external agreement has direct effect, the Court considers the characteristics of the rule to be applied, as it does when applying Community rules *stricto sensu*. However, whereas under Community law it is automatically assumed that the contracting parties intended to confer rights on individuals by means of the Treaties and the only requirement for direct applicability is that the rules in question be precise and complete, no such intention may be presumed for the application of an international agreement.[15] In such cases the Court begins by ascertaining whether the nature and general scheme of the agreement preclude direct reliance on one of its stipulations. Then, in order to answer the question 'whether such a stipulation is unconditional and sufficiently precise to have direct effect . . . ', the Court considers that it must first be analysed '. . . in the light

13 — Judgment of 29 April 1982 in Case 17/81 [1982] ECR 1331.

14 — See *inter alia* Cases 87/75 *Bresciani* and 104/81 *Kupferberg*, cited above.

15 — See H. N. Tagaras, 'L'Effet direct des accords internationaux de la Communauté', *Cahiers de droit européen*, 1984, Nos 1 and 2, p. 15, especially p. 24 *et seq.*

of both the object and purpose of the Agreement and of its context'. [16]

19. In view of the Court's decision in *Pabst and Richarz* (cited above), it is necessary to consider the combined provisions of the articles referred to in the national court's first question, and to enquire whether, in accordance with the conditions referred to above, they contain a directly applicable standstill obligation. If that is so, it will be necessary to ascertain whether, to quote from the national court's second question, '... the expression "freedom of movement" in the Association Agreement [is] to be understood as giving Turkish workers ... the right to bring children ... and spouses to live with them'.

20. It is appropriate to set out the text of the provisions at issue. In Chapter 3 of Title II ('Implementation of the transitional stage') Article 12 states:

'The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.'

Article 36 of the Additional Protocol (hereinafter referred to as 'Article 36 P') provides:

'Freedom of movement for workers between Member States of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement of Association between the end of the twelfth and the twenty-second year after the entry into force of that Agreement.'

'The Council of Association shall decide on the rules necessary to that end.'

Article 7 of the Agreement, contained under Title I ('Principles'), is worded as follows:

'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.'

21. I shall first examine Article 12 and Article 36 P. Article 12 records the desire to achieve, in stages spread over the transitional phase, the free movement of workers in the spirit of Articles 48 to 50 of the EEC Treaty, the text of which is not recited. That in itself indicates that the rules governing the free movement of workers will not necessarily be identical to those laid down by those articles. The reference to Articles 48 to 50 of the EEC Treaty is therefore merely in the nature of a guideline. Hence Article 12 does not contain any clear, precise and unconditional obligation. It merely outlines a programme and cannot have direct effect.

22. Article 36 P can only bear out that analysis. Its second paragraph confers on the Council of Association exclusive powers to decide on the 'rules necessary' to the progressive implementation of the principles set out in Article 12. That body, however, which is to 'act unanimously', [17] adopted no provision to that end apart from the provisions regarding Turkish workers 'duly registered as belonging to the labour force of a Member State' and 'nationals of the Member States duly registered as belonging to the labour force in Turkey'. [18] It is only

16 — Case 104/81 *Kupferberg*, at paragraphs 22 and 23.

17 — Article 23 of the Agreement.

18 — Decision 1/80 of the Council of Association of 19 September 1960, Articles 6.

measures adopted pursuant to the second paragraph of Article 36 P which would have been capable of giving concrete form to Article 12.

23. Since Article 12 in itself cannot create a right having a precise content, it is not possible even after the expiry date set for the transitional stage — 30 November 1986 — to contend that, in the absence of the requisite decision by the Council of Association, any binding effect relating to the free movement of workers may be inferred from the Agreement. The passage of time — to quote the expression used by the Commission — has no legal implications here. Progressive implementation depends on decisions of the Council of Association. The absence of such decisions in this field, reflecting the difficulties experienced by the contracting parties in reaching a consensus, precludes the application of provisions without a clearly circumscribed content. Any other solution would, indeed, be incompatible with the consensual nature of an international convention and the progressive nature of the implementation of the agreement embodied therein. Those findings show that Article 12 and Article 36 P do not give rise to any rights but simply set out certain aims and the procedures suitable for giving effect to them. Rights cannot arise otherwise than from specific measures adopted in accordance with 'special procedures' within the meaning of Article 238 of the EEC Treaty. Consequently, no direct effect can issue from the abovementioned provisions of the Agreement regarding freedom of movement.

24. One other conclusion may also be drawn. Even if Article 7 of the Agreement did constitute a standstill clause, it is difficult to see how it could produce effects regarding freedom of movement, the scope of which at a specific time could not be circumscribed. The national court attached much importance to it because it believed that the main aim of the Agreement was the realization of freedom of movement. However, the provisions on that topic form part of other, economic, provisions serving to give effect to the aims set out generally in Article 2 of the Agreement and, for the transitional stage, in Article 4 thereof. Having no specific implications, the principle under Article 7 imposes a general obligation on the contracting parties which cannot have effect except in conjunction with further provisions

25. In view of the similarity of Article 7 of the Agreement to Article 5 (2) of the EEC Treaty, noted by both the Commission and the German Government, it is appropriate to refer to the rules defined by this Court for the application of the latter article. The Court has held that specific effects may be ascribed to Article 5 (2) only where there are concrete elements elsewhere serving to define the measures to be considered inviolable, even if in some cases these are 'fragmentary elements of law' or mere proposals or interim measures, provided that they represent 'the point of departure for concerted Community action'.[19] In a case such as the present one, no such finding may be made because no rules governing the free movement of workers under the Ankara Agreement have yet been laid down.

26. A comparison of the provisions on the free movement of workers with those on the freedom of establishment and freedom to

19 — Judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, at paragraphs 23 and 28.

provide services, dealt with respectively by Article 13 and Article 14 of the Agreement, lends support to that view. Under the terms of those two articles, the Contracting Parties 'agree to be guided by' the corresponding articles in the Treaty 'for the purpose of abolishing restrictions ... between them' on the freedoms in question. However, whereas Article 36 P is drafted in the terms recited above, Article 41 (1) of the same Protocol expressly introduces a standstill clause whereby:

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

Of course, *a contrario* reasoning must be treated with caution. For the second paragraph of Article 7 to be regarded as having the effect of a standstill clause, it would have to be applicable to an obligation having well-defined features, and this — as seen above — is not the case with Article 12 and Article 36 P.

27. Thus the second question, on family reunification, does not seem to call for a specific reply. Nevertheless, I propose to devote some time to it in case the Court deems it necessary to give the national court some guidance on the matter. It must be observed that what is at issue here is not freedom of movement for workers as such but the reunification of families which is designed to facilitate it. As was pointed out during the proceedings, the right to reunification on the part of the families of workers who are nationals of a Member State of the Community had to be the subject of an express provision, namely Article 10 of Council Regulation No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.[20] In the absence of any analogous provision either contained in the Ankara Agreement or adopted for its implementation by the Council of Association, such a right cannot be deemed to arise by implication. Even with regard to the requirements of Article 8 of the European Convention on Human Rights, it was pointed out during the proceedings that in the *Abdulaziz*[21] case the European Court of Human Rights in Strasbourg held that, generally speaking, States are not thereby required to allow a spouse who is not a national to settle in their territory. Although family reunification is certainly a necessary element in giving effect to the freedom of movement of workers, it does not become a right until the freedom which it presupposes has taken effect and a special provision on the matter has been adopted. In an agreement in which every step in that direction is gradual and progressive, it is for the court or tribunal having jurisdiction to decide at what moment, and subject to what conditions, that aim must become a reality.

28. The Verwaltungsgericht Stuttgart is clearly uncertain about the possible implications of the fact that, in this case, the applicant in the main proceedings is the wife of a Turkish worker 'lawfully resident' in a Member State of the Community. It is necessary at this point to return to Decision 1/80 of the Council of Association, Article 7 of which refers to the members of the family of a Turkish worker lawfully employed in a Member State 'who have been authorized to join him'. Article 13 of

20 — Official Journal, English Special Edition 1968 (II), p. 475.

21 — Judgment of the European Court of Human Rights of 28 May 1985, 'A' Series, No 95.

Decision 1/80 embodies a standstill clause which provides:

'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.'

That clause concerns access to employment and not to family reunification. It makes the residence of members of the family conditional upon authorization from the competent authorities of the Contracting States. It cannot therefore be construed as covering a right to family reunification such as the right under Regulation No 1612/68.

III — Conclusion

29. I therefore propose that the Court should rule as follows:

'As the implementing measures thereto now stand, the combined provisions of Article 12 of the Agreement of 12 September 1963 establishing an association between the European Economic Community and Turkey and Article 36 of the Additional Protocol of 23 November 1970, read in conjunction with Article 7 of the aforesaid Agreement, do not impose on Member States any prohibition directly applicable in their internal legal order on the introduction of new restrictions on the reunification of families of Turkish workers lawfully employed there.'