



Enjoyable Rights of Turks who Live in Bulgaria or Returned to Turkey in EU Social Security Law¹

Kamuran REÇBER* - Barış ÖZDAL**

Abstract

Transfer of rights, which were gained by Turks who live in Bulgaria or returned to Turkey in the social security context, has been a problem between Turkey and Bulgaria for years. In this sense, while Turkey aims to solve the problem with bilateral agreement; Bulgaria doesn't show a positive approach. Acquis communautaire became directly binding for Bulgaria due to the full membership of EU by 1 January 2007 (with the exceptions reserved). In this case, Turks who live in Bulgaria or returned to Turkey would enjoy from the social security law, which forms a part of acquis communautaire.

Keywords: European Union, EU Social Security Law, Turks who owns Bulgarian and Turkish Citizenship, jurisdiction in EU.

INTRODUCTION

The European Community (EC), which forms a pillar of the European Union (EU), contains provisions about the social security and the law of social security in the Treaty Establishing the European Community. In this matter, provisions set forth as secondary norms² must be taken into consideration as well as those established by the primary law. After Bulgaria and Romania became full members of the EU as of 1 January 2007 with the fifth (or the sixth, as some may consider it) enlargement of the EU, Turks³ who live in Bulgaria or who own Bulgarian citizenship although living outside Bulgaria may be concerned to benefit the rights and to meet the obligations, both deriving from the EU Law, and thus the Community Law.

In this study, we will first present the EU's primary law and the secondary law about

* Assistant Professor, Uludağ University, Faculty of Economics and Administration, International Relations Department, Chair of International Law.

** Lecturer, Uludağ University, Faculty of Economics and Administration, International Relations Department, Chair of Political History.

¹ This study was presented as a paper in the panel discussion titled as 'The Social Security Problems of the People Immigrated from Bulgaria' on 19 November 2006 in Bursa Barış Manço Culture Centre by The Culture and Provident Society of Immigrants from Balkans (Balkan Göçmenleri Kültür ve Dayanışma Derneği) see: <http://www.balgoc.org.tr/2006/sgpanel/sgpanel.html>. This paper has been updated later on.

² On this subject, see: Ayşe Işıl Karakaş, *Avrupa Topluluğu Hukuk Düzeni ve Ulus Devlet Egemenliği*, (İstanbul: Der Yayınları, 1993) pp. 34-90.

³ On this subject, see: Hüseyin Saduleşrafi, 'Türk Soyulu Yabancıların Türkiye'de Sosyal Güvenlik Hakkı', <http://www.sbe.deu.edu.tr/Yayinlar/dergi/dergi01/sadulesrafi.htm>

the social security in a general perspective, and then we will determine the conditions under which the Turks who own Bulgarian citizenship may benefit from these provisions. Then, we will explain the types of lawsuits, which the people aforementioned may bring within the framework of the Community Law if they are unable to enjoy these rights for various reasons (such as unfair acts or transactions). We adopt the point that the Turks who own Bulgarian citizenship (these persons may have double–or multi–citizenship) may benefit from the social rights with reservation of derogations, restrictions or shortly exceptions within the framework of Community Law, as the main thesis of our study. Another factor, which must be evaluated or taken into consideration as being related to the subject, is the condition of natural persons who owned Bulgarian citizenship but who transferred to the Turkish citizenship after returning to Turkey and losing their Bulgarian citizenship. The reason for taking this factor into consideration is that the problem of whether the people in this last category may transfer their social security rights entitled in Bulgaria to Turkey or not has gained importance. We will also evaluate this factor briefly in our study.

THE SCOPE OF TRANSACTIONS ON THE SUBJECT OF SOCIAL SECURITY

It will be useful to explain briefly the related provisions in the Treaty Establishing the European Community and the secondary norms based on these arrangements on the subject of social security in the EU in order to clarify the topic and to establish a healthy analysis.

Primary Law about Social Security in the EU

There are a lot of provisions concerning social policies and social security in the Treaty Establishing the European Community starting from its preamble. It will be appropriate to present some of these arrangements, which are deemed important⁴. In this sense, according to the Article 42 of the Treaty Establishing the European Community, the Council of Ministers adopts necessary measures in the field of social security for

⁴ Some of the arrangements concerning the social policy and social security in the Treaty Establishing the European Community are as follows: 2nd subparagraph of the preamble, Article 2, Article 3 (especially subparagraphs i, j, k and s of Article 3), 2nd paragraph of Article 7, Article 16, 3rd paragraph of Article 18, Article 42, subparagraph a of the 2nd paragraph of Article 87, Article 130, 2nd subparagraph of 6th paragraph of Article 133, Articles 136–148, Articles 158–162, last subparagraph of 3rd paragraph of Article 174, 2nd subparagraph of 1st paragraph of Article 177, 2nd and 3rd subparagraphs of Article 182, Articles 257–262, etc. Some of the arrangements concerning the social policy and social security in the Treaty on the European Union are as follows: 4th and 8th subparagraphs of the preamble, Article 2, subparagraph e of 1st paragraph of Article 43, etc. On this subject, see: Şükrü Kızılot, Cem Kılıç, Okan Müderrisoğlu; *AB Yolunda Mali Dünyamız*, (Ankara: Türkiye İşveren Sendikaları Konfederasyonu Yayınları No 273, 2006); Berrin Ceylan-Ataman, 'İşsizlik Sorunu ve Türkiye'nin AB İstihdam Stratejisine Uyum'u', *İşveren Dergisi*, http://www.tisk.org.tr/isveren_sayfa.asp?yazi_id=809&id=48; İKV, *AB Müktesebatının Uygulanışının Türk İş Dünyasına Etkileri Projesi: Seminer Bilgi Notları*, (İstanbul: İKV Yay. No. 182, 2005).

the purpose of providing free movement of workers and, to this end, it makes regulations to secure for migrant workers and their dependants the aggregation of all periods taken into account under the laws of the several countries with the aim of acquiring and retaining the right to benefit and of calculating the amount of benefit and also makes regulations to secure the payment of benefits to persons resident in the territories of Member States⁵.

The most important provisions concerning social matters in the Treaty Establishing the European Community are presented in the Articles 136–145. Within this context, Article 136 contains the following provision:

“The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Community and the Member States shall implement measures, which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.”

When taking this arrangement into consideration, we reach the conclusion that by referring to the European Social Charter (which has been revised on 3 May 1996) and the Community Charter of the Fundamental Social Rights of Workers (Employees), the EC shows its desire for the Member States to become parties to these international law texts⁶. Bulgaria, which has become a full member of the EU on 1 January 2007, is a party of these international law texts. Bulgaria became party to the European Social Charter on 7 June 2000 and Turkey⁷ on 24 November 1989, both with some reservations.

⁵ Taking a decision on this subject, the Council of Ministers of the EU acts unanimously in accordance with the procedure adopted in Article 251 of the Treaty Establishing the European Community. On this subject, see: Lars Johan Lonnback, ‘Ortak Bir Avrupa İltica Ve Göç Politikasına Doğru’, İdil Işık Gül ve Lami Bertan Tokuzlu (çev. & Yay. Haz.), *Avrupa Birliği Hukuku*, (İstanbul: İsveç Başkonsolosluğu, 2002), pp. 29-30; Barış Özdal, *21. Yüzyıla Doğru Almanya’daki Türkler ve Türkiye-Almanya İlişkilerine Etkileri*, (İstanbul: İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Uluslararası İlişkiler Bölümü, Yayımlanmamış Yüksek Lisans Tezi, 2000), pp. 5-24 .

⁶ Also, see: 4th subparagraph of the preamble, the Treaty on the European Union.

⁷ Turkey approved the Protocol revising the European Social Charter and introducing new rights to the Charter on 05 May 1998 and the Protocol reordering the control mechanism on 06 October 2004. However Turkey did not approve the Protocol No. 3. (see: http://www.coe.int/t/f/droits_de_l%27homme/cse/5_situation_par_pays/Turquie_Fiche_2006.pdf).

While Bulgaria signed the European Social Charter with the reservations on 2nd and 4th paragraphs of Article 12, Turkey accepted the article as a whole. Article 12 bearing the title “the right to social security” contains the following provisions:

“With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake:

- 1. to establish or maintain a system of social security;*
- 2. to maintain the social security system at a satisfactory level at least equal to that required for ratification of European Social Security Code;*
- 3. to endeavour to raise progressively the system of social security to the highest level;*
- 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure*
 - a. equal treatment with their own nationals and the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties;*
 - b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties”⁸.*

Bulgaria made reservation on the 2nd and 4th paragraphs of this Article and did not adopt these arrangements. In such a case, it seems very hard for Turkey, who accepted the article, to force Bulgaria to carry out its obligations related to this Charter fully, as we will present below.

Article 137 of the Treaty Establishing the European Community also contains important provisions on the social policy and the social security. This Article undertakes to support and complement the activities of the Member States in the following

⁸ Article 13 of the European Social Charter contains the following arrangements on the right to social and medical assistance: *“With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:*

- 1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;*
- 2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;*
- 3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;*
- 4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953”.* Bulgaria has adopted the first three paragraphs of this article, whereas Turkey accepted the article entirely.

fields: improvement in particular of the working environment to protect workers' health and safety, working conditions, social security and protection of workers, protection of workers in case of a termination of employment contract, informing and consulting with the workers, collective advocating and representation of employers and employees' interests including common management⁹, employment conditions of third-country nationals who reside regularly within the Community territory, integration of persons excluded from the labour market, equality between men and women with regard to labour market opportunities and treatment at work, combating with the social exclusion, modernisation of social protection system. That's why, the Council of Ministers may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, promoting exchanges of information and best practices, providing innovative approaches and benefit from experiences, except harmonisation of the laws and regulations of the Member States. On this field, the Council of Ministers may adopt gradually applicable minimum measures by directives with regard to the conditions and technical rules of each Member States. Such directives shall avoid imposing administrative, financial and legal constraints, as well as they will not hold back the formation and development of small and medium-sized enterprises. However, we can say that the 4th paragraph of Article 137 is drawn up in order to enable the Member States to hold their sovereign powers in a general and abstract way. In this sense, the arrangements adopted in Article 137 of the Treaty Establishing the European Community have been rested on the principles that the provisions adopted pursuant to this article must not affect the right of Member States to define the fundamental principles of their social security systems, must not significantly affect the financial equilibrium thereof, and must not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.

Still considering the Treaty Establishing the European Community, other arrangements about the social policy and the social security, which are deemed as important, are concluded in the Articles 138, 139, 140, 141, 142, 143, 144 and 145. For example, according to Article 140, the Commission encourages cooperation between the Member States and facilitates the coordination of their action in matters relating to employment, labour law and working conditions, basic and advanced vocational training, social security, prevention of occupational accidents and diseases, occupational health, the right of association and collective bargaining between employers and workers. That's why; the Commission tries to act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations.

Article 144 of the Treaty Establishing the European Community gives power to the Council of Ministers, after consulting with the European Parliament, to establish a "*Social Protection Committee*" which undertakes the duty to promote cooperation on social protection policies between the Member States and the Commission with advisory sta-

⁹ On this subject, see: Christophe Vigneau, 'Partenaires sociaux européens et nouveaux modes communautaires de régulation : la fin des privilèges?', *Droit social*, No: 9-10, 2004, pp.. 883-890.

tus. The tasks of the Social Committee are as follows: to monitor the social situation and the development of social protection policies in the Member States and the Community, to promote exchanges of information, of experience and of good practice between Member States and with the Commission, without prejudice to Article 207, to prepare reports, formulate opinions or undertake other works within its competency, at the request of either the Council or the Commission or on its own initiative. Each Member State and the Commission appoint two members to the Social Committee.

SECONDARY LAW RELATED TO THE SOCIAL SECURITY IN THE EU

In the field of social security, two regulations are presently in force: Council Regulation (EEC) No 1408/71 of 14 June 1971¹⁰ which has been amended at different times and Council Regulation (EEC) No 574/72 of 21 March 1972¹¹ laying down the procedure for implementing Regulation (EEC) No 1408/71 which has been again amended at different times. These amendments have been done mostly in a way that they will include both the social security and social benefits. Moreover, it is necessary to notice a Council Regulation (EEC) No 3427/89 of 30 October 1989 on family benefits and amending Regulation (EEC) No 1408/71¹². On the other hand, Council Regulation¹³ 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families is another secondary legislation which must be evaluated within the context of social security.¹⁴

Many cases have been brought before the judicial bodies of the European Communities (Court of Justice of the European Communities and Court of First Instance of the European Communities which was established under this Court of Justice) in accordance with the provisions of the regulations, which we have mentioned above¹⁵. However, the fact that the EU adopts the principle of equal treatment in the

¹⁰ The name of this Regulation is 'Regulation on the Application of Social Security Schemes to Employed Persons, to Self-Employed Persons and to Members of Their Families Moving within the Community'. On this subject, see: http://www.cleiss.fr/pdf/rgt_1408-71.pdf; Celal Polat, 'AB Tüzüklerinin Düzenlenme Alanlarına Bir Örnek: 1408/71 Sayılı Sosyal Güvenlik Tüzüğü': <http://dergi.ceis.org.tr/dergiDocs/makale223.pdf>; Şadi Ekdemir, *Avrupa Topluluğu Sosyal Güvenlik Tüzükleri Yaygınlaştırma Uygulaması*, Çalışma ve Sosyal Güvenlik Bakanlığı Avrupa Birliği Koordinasyon Dairesi Başkanlığı Yayını, Ankara, 2004, *passim*.

¹¹ On this subject, see: http://europa.eu.int/eur-lex/fr/consleg/pdf/1972/fr_1972R0574_do_001.pdf; <http://www.cleiss.fr/docs/textes/574-72/index.html>.

¹² On this subject, see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R3427:FR:HTML>.

¹³ On this subject, see: Enver Bozkurt vd., *Avrupa Birliği Hukuku*, (Ankara: Nobel Yayın Dağıtım, 2001), p. 210-246.

¹⁴ Since the major objective of this study is not to analyse the primary and secondary legislation on the social policy and the social security within the EU and thus within the Community law, the primary and secondary legislation of the Community law about this subject is handled in a general and abstract way (For a detailed information on primary and secondary law within the EU law, see: <http://www.tisk.org.tr/images/yayinlar/yayin257/yay257-3.doc>).

¹⁵ For some examples of these cases, see: <http://www.cleiss.fr/docs/jurisprudence/index.html>; <http://www.tisk.org.tr/images/yayinlar/yayin257/yay257-3.doc>.

social security and the social benefits dominant as the basic principle in the Union is also worth mentioning.

We also need to mention the fact that the arrangements which aim to enable the coordination of national legislation on the social security in the EU law and thus in the Community law have a dual function. These arrangements aim on the one hand to provide the social security of the employed, self-employed persons and their dependents in the Member States and on the other hand to make the Member States to obey the non-discrimination principle, which is stated in Article 12 of the Treaty Establishing the European Community. Taken both the primary legislation and secondary legislation in the EU law and thus in the Community law into consideration within the context of the aims aforementioned, it will be appropriate to explain the scope of the social security and make findings in a general and abstract way.

The Concept of Social Security Benefits

The social security benefits have been determined in a general and abstract way in the primary legislation of the Community law. They have been formulated in a more comprehensive way in the secondary legislation (especially through directives). There are explanatory notes and definitions in the primary legislation and in the secondary legislation about the people who may benefit from the social security benefits (such as employees, retired persons, their wives and children, etc.) and about the natural or legal persons who have obligations in this subject both.

The Persons Having the Social Security

Starting with the adoption of the Council Regulation (EEC) No 1408/71 of 14 June 1971 not only to the employed persons but also to the self-employed persons, the number of persons, regarded as having the social security, has been increased. These persons include employed persons (workers) or self-employed persons who are the citizens of the Member States and their dependants, refugees or stateless persons who work as employed or self-employed persons in the Member States and their dependants.

Furthermore, the students have been also considered within this scope. The inheritors of these people who are regarded as having the social security and those who are regarded as having the same qualifications by the national legislation on the civil servant are also the beneficiaries¹⁶.

¹⁶ Article 1 of the Council Regulation (EEC) No 1408/71 of 14 June 1971 lists those people who can benefit from the social security rights in the said subjects in a very detailed way. (see: <http://www.cleiss.fr/docs/textes/1408-71/t1.html>; http://www.cleiss.fr/docs/textes/rgt_presentation1b.html). Council Regulation (EC) No 859/2003 extending the provisions of Regulation (EEC) No 1408/71 (which aims to accumulate the social security rights of the citizens of the Member States within the framework of the principle of free movement and to protect these rights) to nationals of third countries who work and reside in the Member States was signed on 14 May 2003 after a lengthy process and entered into force on 1 June 2003. This amendment to the Regulation enables our citizens who have worked in the EU Member States as covered employees to accumulate their social security rights originating from their labour in these states and to protect these rights. On the other hand, the aforementioned Regulation states that the issues of working and residing in the Member States are kept uncovered and that the Member States continues to apply their national legislation on these issues (for a detailed information on this subject, see: http://www.legislation.cnv.fr/textes/reg/cee/TLR-REG_CEE_8592003_14052003.htm).

Benefits

Under the Council Regulation (EEC) No 1408/71, some of the social security benefits, which are deemed appropriate in accordance with procedure laid down, may be requested as Community Contributions from the Members States. These benefits include sickness and maternity benefits, invalidity benefits, including those intended for the maintenance or improvement of earning capacity, old-age or survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment and family benefits, orphans' benefits, benefits for dependant children of beneficiaries of social security insurance etc.

Applicable Legislation

The legislation applicable to the social security within the EU is the primary and the secondary legislations of the Community law and the national legislations of the Members States, which are not contrary to these legislations.

Employed or self-employed persons are subject to the legislation of the state in which they work, even if they reside in another Member State or headquarters of their work is in another State. According to Article 10 of the Council Regulation (EEC) No 1408/71, (save as otherwise provided in the Regulation), invalidity, some of the social security benefits (old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants) acquired under the legislation of one or more Member States is not subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated¹⁷.

Calculating the Periods of Social Security Jointly

Regulation (EEC) No 574/72 of the Council fixes, in a very detailed way, the principle of taking into account of all periods spent as covered employee or self-employer under the laws of the Member States which was provided by Article 42 of the Treaty Establishing the European Community¹⁸. In accordance with this Regulation, the competent authorities of the Member States will consider the periods, which have been spent as covered employee or self-employer in another Member State, as the periods which have been spent as covered employee or self-employer according to their national legislation when calculating the benefits for sickness and maternity, for invalidity, old age or death, and for unemployment.

¹⁷ 1st subparagraph of 1st paragraph of Article 10 of the Council Regulation (EEC) No 1408/71 (see: <http://www.cleiss.fr/docs/textes/1408-71/t1.html>).

¹⁸ See: <http://eur-lex.europa.eu/LexUriServ/site/fr/consleg/1972/R/01972R0574-20050505-fr.pdf>.

THE TURKS WHO OWN BULGARIAN CITIZENSHIP AND THE TURKS WHO OWNED BULGARIAN CITIZENSHIP BUT THEN TRANSFERRED TO TURKISH CITIZENSHIP

After becoming a full member state of the EU, Bulgaria is now fully subject to the EU law and thus the Community law, with the exceptions reserved. For this reason, the persons who currently own Bulgarians citizenship must naturally enjoy the rights derived from the primary legislation and the secondary legislation of the Community law aforementioned. According to this, it is also natural for the Turks who own Bulgarian citizenship to enjoy these rights. However, it will be appropriate to emphasize the matters, which have to be questioned, in three groups regarding Bulgaria.

Turkish Natural Persons Who Own Bulgarian Citizenship

Turkish natural persons who own Bulgarian citizenship enjoy all the rights, stipulated in the Community law for the social security, as other Bulgarian citizens. The Accession Treaty signed on 25 April 2005 made Bulgaria and Romania to become full members of the EU as of 1 January 2007. The most important factor concerning us with regard to our subject is the fact that the transition periods or restrictions regarding the certain chapters of the EU *acquis communautaire* have been put forth for these two states in accordance with Article 23 of the Act Concerning the Accession of the Bulgaria and Romania. Turks who own Bulgarian citizenship will naturally be subject to these transition periods or restrictions.

Annex VI of the Accession Treaty provides a detailed explanation about these transitional measures and restrictions. For example, the 2nd paragraph of this Annex states the following provisions:

“By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Bulgarian nationals. The present Member States may continue to apply such measures until the end of the five-year period following the date of accession. Bulgarian nationals regularly working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures. Bulgarian nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights. The Bulgarian nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present Member State...”

Taking this arrangement into consideration, it is inevitable both for the Turks who own Bulgarian citizenship and for the persons who own both Bulgarian and Turkish citizenship to be subject to the aforementioned transitional measures and restrictions.

Juridical Means Which the Persons in This Category May Resort Against Bulgaria

It will be mentioned to bear in mind that the social security rights which Turks owning Bulgarian citizenship is valid, in principle, in the territory of the EU Member States, with regard to the Community law. Thus, if Turks who own Bulgarian citizenship reside in Turkey for a certain period of time or work under the Law No 2527 Facilitating Foreigners of Turkish Ancestry to Perform their Occupations and Crafts Freely in Turkey and Their Employment in Public and Private Establishments or Business, dated 25 September 1981, the transfer of the social security rights gained in Bulgaria before (insurance, bonuses, etc.) to Turkey will be, to a large extent, subject to the permission of Bulgaria. There is no clear arrangement whether in the primary legislation or in the secondary legislation of the Community law. For this matter, it is possible for Turkey to make an attempt in this subject by applying to Bulgaria and to make Bulgaria to transfer the social security rights of those people in this category to Turkey within the context of an agreement in conformity with the international law.

The European Social Charter contains a provision on this matter in the subparagraph b of 4th paragraph of the Article 12. This provision presents an obligation for the contracting parties to undertake measures in order to ensure the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties. However, we need to remember that Bulgaria has not accepted this provision. In such a case, it seems impossible to compel Bulgaria legally to perform this obligation. Moreover, Turks in this category neither work in an EU Member State, nor reside in an EU Member State, or do not have a residence licence in an EU Member State. If these persons worked in an EU Member State and if Bulgaria did not enable them to enjoy the rights provided by the Community Law, they might have the right to file a complaint against Bulgaria before the EU Commission and the European Ombudsman with regard to the Community law. And in such a case, subject to be regarded as justifiable complaint; this might result in an action for infringement against Bulgaria in accordance with the procedure laid down in Articles 226–228 of the Treaty Establishing the European Union. But it seems very difficult for the Commission to warn Bulgaria or to be brought an action for an infringement before the Court of Justice of the European Communities, since these persons in this category resides in Turkey, even if they have the right to file a complaint. However this way should be tried out.

Turkish Natural Persons Who Own both Bulgarian and Turkish Citizenship (Who Own the Dual–Citizenship)

The persons in this category can also enjoy the rights of social policy and of social security provided by the Community law on the grounds that they own Bulgarian citizenship as we have explained above. The aforementioned persons may enjoy these rights, save for the exceptions, which we have again explained above, since they also own Bulgarian citizenship, even if they own Turkish nationality.

Judicial Means Which the People in This Category May Resort Against Bulgaria

Even though the principle of one citizenship for each individual is a generally adopted rule in the international private law, the dual–or multiple–citizenship, which is a contradiction to this rule, is frequently seen. Therefore, in case of the natural persons who

own both Bulgarian and Turkish citizenship to reside in Turkey or to have residence licence in Turkey, the transfer of the social security rights which they had been deserved to get in Bulgaria to Turkey will be possible, to a large extent, through the favourable position which Bulgaria will take. The reason for this is that the points which we have tried to explain for the case of Turks owning only the Bulgarian citizenship stands also the same for the case of the persons owning the dual-citizenship. From the legal point of view, these persons always have the right to file a complaint to the Commission of the EU or the Ombudsman by claiming that Bulgaria has been infringed the Community law. But it seems very hard to get a favourable result by resorting this way, as we have stated above.

The attempt of Turkey to convince Bulgaria in order to transfer the social security rights of these people, who own whether Turkish or Bulgarian citizenship but who settled down in Turkey, to Turkey is the classical way which is needed to adopt. "Agreement Between the Republic of Turkey and the Republic of Bulgaria on Paying Pensions Entitled in Bulgaria to be Paid in Turkey" which was signed on 04 October 1998 and which laid down in the first of half of 1999 is the best example for such a way. New international law acts of this kind must be concluded in a broad way, which will cover the other factors of the social security. Based on the aforementioned agreement, Bulgaria undertook the liability to pay Turkey the invalidity pensions originating from the employment period, old age, invalidity, accidents at work or occupational diseases and also the death pensions from the said circumstances according to the Bulgarian retirement legislation for those persons who migrated to Turkey as of 1 May 1989¹⁹. According to Bulgarian Retirement Act, the pensions can be granted for those people, who were entitled to get pension after 1 May 1989 but who have not get their pensions, if they presents the bilingual form-petition and the original copies of all the Bulgarian documents necessary for the pension²⁰.

Natural Persons Who Owned Bulgarian Citizenship But Then Passed to Turkish Citizenship

It is impossible for the persons in this category to enjoy the provisions of the Community law, which we have tried to explain above briefly. However, it is possible for these people to enjoy the rights provided by the association regulations which was built up by the Ankara Agreement between Turkey and the EC and by the measures such as then Additional Protocol and Decision No 1/95 of the Customs Union, due to the fact that these persons are the citizens of the Republic of Turkey²¹.

¹⁹ See: Article 1 of 'Agreement between the Republic of Turkey and the Republic of Bulgaria on Paying Pensions Entitled in Bulgaria to be paid in Turkey'.

²⁰ See: Article 2 of 'Agreement between the Republic of Turkey and the Republic of Bulgaria on Paying Pensions Entitled in Bulgaria to be paid in Turkey'.

²¹ Based on Article 39 of the Additional Protocol stating that the social security rights or schemes stated in the Council Regulation No 1408/71 which we have stated above shall be applied to natural persons of Turkish nationality living and residing within the EU Member States and to their families, the Association Council established the Decision No 3/80 of the Association Council 19 September 1980 (see: <http://www.deltur.cec.eu.int/i-3-80.html>).

The most important method for the natural persons who owned Bulgarian citizenship but then passed to Turkish citizenship to enable the transfer of their social security rights, which they had legally been entitled to in Bulgaria, to Turkey is the agreements which Turkey and Bulgaria has signed among themselves in accordance with the international law. The persons in this category can make the transfer of their social security rights entitled in Bulgaria to Turkey with an international law action (such as an agreement or an arrangement), which will be concluded between Turkey and Bulgaria. However, Bulgaria must show a favourable position in order to realise this.

The persons in this category or the natural persons who own both Turkish citizenship and Bulgarian citizenship may resort the preliminary ruling method, by relying on the association regulations. Although the association regulations did not provided for the preliminary ruling method²², which was adopted within the Community Law, it has become possible for the natural and legal persons, who are subject to the association regulations, to resort to this preliminary ruling method in certain circumstances. The association regulations of Ankara Agreement and the Additional Protocol²³, must not be thought as independent from the Community Law, due to the fact that they are legal actions which were realized and put into effect by the acts of the Council of Ministers on behalf of the European Communities, as well was by the acts of the Member States in accordance with Article 300 and Article 310 of the Treaty Establishing the European Community²⁴. Therefore, the natural and legal persons with the Turkish citizenship may request a preliminary ruling from the Court of Justice of the European Communities, based on the provisions of Article 234 of the Treaty Establishing the European Community, for the cases in which they meet charges before the national courts of the Member States of the European Communities, if the acts established

²² For a more detailed information on the preliminary ruling method, see: Ayşe Füsün Arsava, *Roma Antlaşmasında Önkara Prosedürü ve Bu Prosedür Çerçevesinde Doğan Sorunlar*, (Ankara: Ankara Üniversitesi Avrupa Topluluğu Araştırma ve Uygulama Merkezi Yayını, Yayın No: 5, 1989), *passim*. Also see: 'Guide pratique pour la mise en oeuvre du droit communautaire', <http://www.ccbe.org/Documents/Fr/Vadefr.pdf>, pp. 49–61; Haluk Kabaalioğlu, *Avrupa Birliği ve Kıbrıs Sorunu*, Yeditepe Üniversitesi Yayınları, İstanbul, 1997, pp. 269-301; Neville Brown and Francis Jacobs, 'Avrupa Toplulukları Adalet Divanı', (trans: Murat Tahsin Yörüng), *Danıştay Dergisi*, Year: 19, No: 74–75, 1989, pp. 41–55; Kamuran Reçber, *Avrupa Toplulukları İlk Derece Mahkemesi*, (Bursa: Ezgi Kitabevi Yayınları, 2002), pp. 155–181.

²³ The following part of our study has been taken extensively from the book on Turkey–European Union Relations, which we authored previously. See: Kamuran Reçber, *Türkiye–Avrupa Birliği İlişkileri*, (İstanbul: Aktüel Yayınları, 2004), pp. 62–80.

²⁴ See: Mehmet Genç, 'Türkiye–AT Ortaklık Mevzuatında Uyuşmazlıkların Çözümü', *Prof.Dr. Nurhan Akçaylı'ya Armağan*, (Bursa, 2000), pp. 141–142.

according to the association regulations applies to the cases²⁵.

Considering the Community Law, the Court of Justice of the European Communities includes not only the related provisions of the founding treaties but also the provisions of the annexes of the founding treaties²⁶, protocols, Accession Agreements to the European Union and thus to the European Communities, agreements between the Communities and the third parties (such as trade or customs agreements), treaties amending the founding treaties (for example Fusion Treaty) into its jurisdiction for the preliminary ruling²⁷. The Court of Justice may also interpret the acts, which were established by the Community institutions. Moreover, under certain circumstances, the Court of Justice considers some of the arrangements of the Association Agreements and Additional Protocols within the context of the interpretation and legality of the acts of the Community institutions and extends its jurisdiction to these arrangements. Besides, even though the preliminary ruling method does not, in principle, cover the interpretation of the conventions signed among the Community institutions, it may use its judicial power through the preliminary ruling method if it is delegated authority by the conventions in question²⁸.

According to the provisions under Article 234 of the Treaty Establishing the European Community; where a problem or a dispute regarding the application or validity of the Community law or regarding of the Community law itself is raised before any court or tribunal of a Member State, that court or tribunal may request the Court of Justice to give a preliminary ruling. Where the problem or the dispute is raised before

²⁵ Article 234 of the Treaty Establishing the European Community covers the following arrangement:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

²⁶ The Court of Justice of the European Community agreed to include the annexes to treaties into its power of interpretation in its judgment of 08 February 1968: C-32/67, Arrêt du 08.02.1968, Van Leeuwen and Gemeente Rotterdam, Rec. 1968, p. 63. Also, see: Haluk Günüğü, *Avrupa Topluluğu Hukuku*, (Ankara: Avrupa Ekonomik Dayanışma Merkezi Yayını, 1996), p. 363.

²⁷ See: Ünal Tekinalp and Gülören Tekinalp vd., *Avrupa Birliği Hukuku*, (İstanbul: Beta Basım Yayım Dağıtım A.Ş., 2000), p. 262; Tuğrul Arat, *Avrupa Toplulukları Adalet Divanı*, (Ankara: ATAUM Yayını, No: 3, 1989), p. 106; Mehmet Genç, *Avrupa Topluluklarının Kurumsal ve Hukuksal Yapısı*, (Bursa: Uludağ Üniversitesi Basımevi, 1993), p. 200.

²⁸ For a number of examples of conventions on this subject, see: Günüğü, op. cit., p. 364.

the court of first instance or the court of appeals of a Member State²⁹, that national court may, if it considers that a preliminary decision on the question is necessary to enable it to give judgment, request the Court of Justice to present an interpretation through the preliminary ruling method. The national judicial body of the Member State is free whether to bring the issue before the Court of Justice for a preliminary ruling or not.

Where a situation related to the preliminary ruling is claimed before a superior judicial body, that is to say, a court or tribunal of a Member State against whose decisions have no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice for its jurisdiction to give the preliminary rulings³⁰. In fact, the necessity for the national superior judicial body to bring an issue, which itself has encountered in a pending case, before the Court of Justice for its preliminary procedure also provides a legal guarantee for the parties to the case³¹. The reason for this is that the decisions of this kind of judicial bodies are unappealable with regard to domestic law.

This method can be enjoyed both by the natural and legal persons from Member States and by the natural and legal persons from the third countries which are in the position of third party in the Community law. The natural persons who live in one of the EU Member States legally and who are the citizens of the Republic of Turkey resort to this method rather frequently. Where the Member State in which they reside performs an unlawful act or activity against their rights resulting from the association regulations, the natural persons who are the citizens of the Republic of Turkey apply to the competent national judicial bodies of the Member State, in which they reside in, in order to protect their rights. The association regulations are taken as a part of the Community Law by the Court of Justice of the European Communities and, for this reason, where a problem or a dispute regarding the interpretation and application of the association regulations is claimed before any court or tribunal of a Member State, the judicial body appeals to the Court of Justice and gives its judgement on the problem or dispute, after receiving the legally-binding interpretation of the Court of Justice.

Apart from the method, which we have tried to explain above briefly, we may suggest one more method, which is possible to be applied but which is not a guaranteed way for reaching a favourable result. Especially the natural persons shall try or push to get a result through this method. Every individual citizen of the Republic of Turkey who

²⁹ In the preliminary ruling method, the right for the courts of first instance to resort to the Court of Justice cannot be limited directly or indirectly by the national arrangement. For a discussion on whether or not the superior courts can revoke the requests for the preliminary ruling and for the judgments established by the Court of Justice of the European Community on this subject, see: *Arsava*, op. cit., pp. 65–71.

³⁰ For a number of examples of decisions that the national judicial bodies against whose decisions there is no judicial remedy under national law takes by infringing the 3rd subparagraph of Article 234 of the Treaty Establishing the European Community, see: *Arsava*, op. cit., pp. 104–109.

³¹ *Günuğur*, op. cit., p. 366.

lives on the territory of the Republic of Turkey can use this method. We will try to explain it with a fictional example:

24 years–old Turkish citizen Nurgul Ozcan who lives in Bursa and also whose residence is in Bursa wants to go to France in order to work there. She applied for a visa in the Consulate of the Republic of France in Istanbul, but the Consulate declared in writing that she wouldn't granted a visa by asserting various reasons. The act here, which was declared in writing, is an administrative act. The agent, which established this act, is the Consulate of France, which is an affiliated agency of the Ministry of Foreign Affairs of the Republic of France. This act is established in a negative manner against the request of Nurgul Ozcan to go to France. If Nurgul Ozcan resides or lives in France in conformance with the arrangements of France's domestic law, she could apply to the authorized Administrative Court and request the annulment of this act. However strained our interpretation may be, we claim that this method is also applicable. Nurgul Ozcan can apply to an authorized Administrative Court of France through her authorized agency of a natural person who is a citizen of one of the EU Member States or, in order to reach a practical solution, of a lawyer who is a citizen of the Republic of France.

In the application petition of Nurgul Ozcan, Article 36 of the Additional Protocol, which the Court of Justice of the European Communities takes as a part of the Community Law, can be presented as the legal ground. Article 36 of the Additional Protocol is as follows: *"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."* Although the Association Council has not established the necessary or adequate decisions on the entry into force of the free movement of workers relating to aforementioned Article 36, this point can be brought forward in the application petition. As a pilot case, the authorized administrative court of France may request a preliminary ruling from the Court of Justice of the European Communities, based on Article 234 of the Treaty Establishing the European Community or from the Court of First Instance of the European Communities, based on the third paragraph of the new Article 225 of the same treaty.

The Association Council did not or could not establish the necessary decisions on the free movement of workers, which was mentioned in Article 36 of the Additional Protocol. For this reason, there is a strong possibility that the Court of Justice of the European Communities presents a negative opinion in its preliminary ruling. On the same subject, the Court of Justice adopts the opinion stating that *"examination of Article 12 of the [Ankara] Agreement and Article 36 of the [Additional] Protocol therefore reveals that they essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers"* in the 23rd paragraph of its decision on

Meryem Demirel case³². Taking this decision into consideration, it can be said that the Court of Justice most probably repeat the same matter in the preliminary ruling which it will present based on the cases within this context. However, the financial burdens such as instructing an attorney for the litigation may be considered as obstructive factors against bringing the cases of this kind before the court.

Another way of bringing a case before the court for private law personalities and in this context especially for Turkish ones, to seek a remedy is regulated in Article 230 of the Treaty Establishing the European Community. Here, against the binding acts such as regulation, directive and decision which the EC institutions uses based on the treaties and which have a compulsory effect over legal status of the respondents; in accordance the 2nd subparagraph of Article 230 of the Treaty Establishing the European Community³³, it is possible to bring an action or actions before the Court of First Instance of the European Communities for the annulment of these binding acts on the grounds of “*lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers*”. There are no implications in this article requiring that the natural or legal persons having the competence for bring an action before the courts must be a citizen of a Member State. The fact that the possibility for the corporate bodies to institute proceedings for annulment has been linked to certain special conditions and to certain final terms limits, profoundly, the power of Turkish corporate bodies to institute proceedings for control of the EU’s secondary law which may be effective on the implementation of the association regulations.

Based on the 4th subparagraph of Article 230 of the Treaty Establishing the European Community and 3rd subparagraph of Article 146 of the Treaty Establishing the European Economic Community, “*Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former*”³⁴. It is important to emphasize that the phrase of “*any natural or legal person*” covers not only the natural and legal persons owning the citizenship of the Member States of the community, but also the natural and legal persons owning the citizenship of a third State. For that matter, for example if the acts of common trade

³² For this subject, see: C-12/36, Arrêt du 30.09.1987, Demirel/Stadt Schwäbisch Gmünd, Rec. 1987, s. 3719.

³³ The 4th subparagraph of Article 230 of the Treaty Establishing the European Community must also taken into account.

³⁴ For the examples of the cases which was established by the Court of First Instance of the European Communities on this subject, see: T-86/96, Arrêt du 11.02.1999, Arbeitsgemeinschaft Deutscher Luftfahrt-Unte, Rec. 1999, p. II-179; T-288/97, Arrêt du 15.06.1999, Regione autonoma Friuli-Venezia Giulia/Commission, Rec. 1999, p. II-1871. Also, see: Pascal Nicollier, ‘Le recours en annulation formé par des particuliers (art. 173 al. 4 CE, nouvel art. 230 al. 4): Object de recours, titulaires du droit et qualité pour recourir’, *Droit Institutionnel européen*, Faculté de Droit de l’Université de Fribourg, Fribourg, 1997: <http://www.liberte.ch/wp-content/uploads/dt-eur.pdf>, p. 10, 21-23.

policies which the EC put into effect against the third countries is going to be formalized, it is possible for the natural and legal persons owning the citizenship of the third countries which respond to especially the anti-dumping decisions³⁵ to institute proceedings for the annulment of these decisions.

Where the acts, which take the natural and especially legal persons owning the citizenship of the Republic of Turkey, affect these subjects in question, actions against annulment may bring before the Court of Justice in accordance with 2nd subparagraph of Article 230 of the Treaty Establishing the European Community. There may be two reasons for this way not to be used so far: 1) the lack of information which the natural or legal persons have about the subject or the lack of information provided to these persons, and 2) the lack of ability of these persons to accept to bear the expenses resulting from bringing the issue before the court. The second reason is that the hesitance of the natural and legal persons for the costs. The factors such as the necessity for proceeding before the court to be in one of the official languages of the Member States of the European Communities, the financial burden brought by instructing an attorney or a consultancy service under the citizenship of one of the Member State of the European Communities for the litigation and the uncertainty of the result of the proceedings may be evaluated as having deterring effects over the natural and legal persons owning the citizenship of the Republic of Turkey.

Moreover, it is worth to emphasize that the Court of First Instance of the European Communities accepted to hear a case which a legal person owning the Turkish citizenship brought before it by presenting, the damages which it had been exposed to with the entry into force of Customs Union resulting from the association regulations, as legal grounds. *Yedas Tarim ve Otomotiv Sanayi ve Ticaret A.S.*, manufacturer of roller bearings for automotive related industry, instituted proceedings against the Council of Ministers and the Commission on 2 December 2003; and the Court of First Instance of the European Communities accepted to hear the case as Case T-367/03 "*Yedas Tarim and Otomotiv Sanayi ve Ticaret A.S. v Council*"³⁶. This case, in which Yedas A.S. was represented by R. Sinner, attorney, with an address for service in Luxembourg, may encourage other legal persons and constitute a precedent for their actions. For this reason, the case presents a direct point of interest for the legal persons owning the citizenship of the Republic of Turkey and especially for those who have been negatively affected by the association regulations. However, the Court of First Instance gave its judgment on 30 March 2006 and dismissed the action. Yedas A.S. appealed the Court of Justice of the European Communities against the judgement of the Court of Justice of the European Communities on 6 June 2006³⁷.

³⁵ See: <http://ekutup.dpt.gov.tr/kuresell/oik441.pdf>.

³⁶ For the judgment regarding the acceptance of the Court of First Instance of the European Communities to hear the case in question published in the Official Journal of the EU see: *Journal Officiel de l'Union Européenne*, C 59, 6 March 2004, p. 22.

³⁷ For this subject, see: Case C-255/06 before the Court of Justice of the European Communities, <http://www.curia.europa.eu/fr/content/juris/index.htm>.

CONCLUSION

The social policy and the social security issues within the EU through the primary law and secondary law, which we have tried to explain above briefly, has been arranged in order to bear rights and obligations for the natural persons in the Member States. When Bulgaria became a full member of the EU as of 1 January 2007, this membership also raised the question whether the issue of social security rights of Turks (some of them are both Bulgarian citizen and Turkish citizen, owning the dual-citizenship and some of them only owns the Turkish citizenship) which is a great problem between Turkey and Bulgaria for years can be solved by taking the EU law and thus the Community law.

The easiest way to solve the problem for Turks who left Bulgaria and reside in Turkey is to establish an international law act between Turkey and Bulgaria regulating the transfer of the social security rights which they were entitled to benefit in Bulgaria to Turkey. However, Bulgaria does not present a favourable position for solving this problem (because the transfer of the social security rights will naturally create a financial burden for Bulgaria). The other methods, which we have tried to explain above, are to resort to legal courses. These legal courses must be appealed by the wronged person or persons.