LEGAL PERSPECTIVES AND THE "CYPRUS ISSUE"

Hukuki Perspektifler ve "Kıbrıs Sorunu"

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SUMMARY

In the study, the complex and multi-dimensional *"Cyprus issue"* is taken from the perspective of legal analysis. In this respect, the ***Treaty of Guarantee,*** compulsory elements to be considered to accept an entity as a state, *"recognition of states",* authorities of states including declaration of *"exclusive economic zone"* are some fundamental aspects taken into consideration. These relevant topics together with the *"unique"* matters relevant to EU-Turkey accession relationship are concentrated upon in detail where the *"Cyprus issue"* is an essential aspect to take into consideration in this respect.

The dimensions with regard to the interpretations of the *"Cyprus issue"* in terms of international organizations -with emphasis on the UN and CoE- together with international courts also form an important part of the study. In this context, some of the ECtHR and CJEU court judgments of essence are underlined to mark the perspectives of the judiciary organ regarding the ECHR system adopted under the auspices of the CoE and the judiciary organ of the EU.

In this framework, within the scope of study, assessments are made and recommendations are put forward with regard to the *"Cyprus issue"*.

Keywords: Turkey, Turkish Republic of Northern Cyprus, European Union, "Cyprus", Accession, Legal

ÖZET

Çalışmada, karmaşık ve çok boyutlu "*Kıbrıs sorunu"* hukuki analiz anlamındaki bakış açısıyla ele alınmaktadır. Bu çerçevede, ***Garanti Antlaşması***, bir varlığın devlet olarak kabul edilmesi için gereken koşullar, "devletlerin tanınması", "münhasır ekonomik bölge" ilanı da dahil olmak üzere devletlerin yetkileri, incelenmesi gereken bazı temel konulardır. AB-Türkiye katılım süreci anlamında ele alınması gereken tüm bu konular, bu boyutun gerektirdiği diğer *"kendine özgü"* konular da dahil olmak üzere çalışma kapsamındadır. Bu anlamda, AB-Türkiye katılım müzakerelerinde *"Kıbrıs sorunu"*nun ele alınması ayrı bir önem taşımaktadır.

Uluslararası örgütler -Birleşmiş Milletler ve Avrupa Konseyi- ile uluslararası mahkemeler çerçevesinde *"Kıbrıs sorunu"*nun yorumunun boyutları da ayrıca bu çalışmanın önemli bir bölümünü oluşturmaktadır. Bu bağlamda, bazı önemli Avrupa İnsan Hakları Mahkemesi ve Avrupa Birliği Adalet Divanı kararlarının, Avrupa Konseyi nezdinde kabul edilen Avrupa İnsan Hakları Sözleşmesi sisteminin yargı organının ve Avrupa Birliği'nin yargı organının bakış açılarının vurgulanması açısından altı çizilmektedir.

Bu kapsamda, çalışmanın içeriğinde, *"Kıbrıs sorunu"* ile ilgili olarak değerlendirmeler yapılmakta ve önerilerde bulunulmaktadır.

Anahtar Kelimeler: Türkiye, Kuzey Kıbrıs Türk Cumhuriyeti, Avrupa Birliği, "Kıbrıs", Katılım, Hukuki

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I. Introduction

International legal problems especially as to the interpretation of relevant treaty provisions together with the "*recognition issue*" of the Turkish Republic of Northern Cyprus (hereinafter referred as "TRNC") should be taken into consideration to comprehend the main legal issues on the longstanding and complex *"Cyprus issue"*. Furthermore, the membership of *"Cyprus"* to the European Union (hereinafter referred as the "EU")[1] is interpreted as "*converting*" the "*Cyprus issue*" to an internal problem of the EU and that as far as the *"status quo"* continues, membership of Turkey to the EU is impossible[2]. In this respect, the perspective of the EU in relation to Turkey's accession process to the EU is also an important aspect to assess about the problem, especially after *"Cyprus"* being admitted to the EU as a member though there is a contrary provision on the matter in the ***Treaty of Guarantee***.

The interpretations of international organizations like the United Nations (hereinafter referred as the "UN") and the Council of Europe (hereinafter referred as "CoE") concerning the *"Cyprus issue"* are to be focused on to have an outlook on the understanding of the *"international community"* on the matter. There are also important judgments of the European Court of Human Rights (hereinafter referred as "ECtHR") and Court of Justice of the EU (hereinafter referred as "CJEU") that are fundamental to be concentrated upon having implications for both sides.

II. Asssesment of Relevant International Agreements

In Article I/Paragraph 1 of the ***Treaty of Guarantee***[3] it is stipulated that: *"The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity, and security, as well as respect for its Constitution"* whereas in the same treaty, in Article IV/Paragraph 1, it is regulated that: "*In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions".* In Article IV/Paragraph 2, it is stated that ***"In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty".***

1 The term "European Union" (EU) is used for meaning the "European Economic Community" (EEC) and "European Community" (EC) in the text of the study.

2 Yılmaz, Kadir**;** *"A Partitioned State that is in the European Union The Case of Cyprus",* Ankara Bar Review, Vol. 3, Issue 1, 2010, p. 130.

3 For the **Treaty of Guarantee of 1959**, see http://www.mfa.gov.tr/treaty-concerning-the-establishment-of-the-republic-of-cyprus.en.mfa

In the intervention of Turkey to *"Cyprus",* Turkey uses its right as a *"guranteeing power"* as explicitly agreed in the ***Treaty of Guarantee***; this legal situation may be put forward as having the same *"logic"* as a *"justified intervention"* which is realized with the consent of the state that is being intervened[4]. On the other hand, it is claimed that there is a problem of international law in terms of the UN Charter where it is underlined that since the UN Charter promotes the peaceful settlement of disputes, the relevant Article in the ***Treaty of Guarantee*** is put forward as *"null and void ab initio"*[5]. On this argument, it may be highlighted that there is no provision in ***Vienna Convention on the Law of Treaties*** - signed under the auspices of the UN - which explicitly prohibits adoption of such kind of a provision in an international agreement. The UN also refers to the ***Treaty of Guarantee*** as a valid international agreement[6] and there is no resolution of the UN which declares that the ***Treaty of Guarantee*** or any provision regarding this Treaty is *"null and void ab initio".*

On the issue, there is also a **Greek High Court of Appeal Judgment**[7] where it is stated that ***"The Turkish intervention in Cyprus is legal, the real responsibles are the Greek officers".*** In the same parallel, in a **CoE Resolution**[8], it is submitted in Paragraph 3 that "*Regretting the failure of the attempt to reach a diplomatic settlement which led the* ***Turkish Government to exercise its right of intervention*** *in accordance with Article 4 of the* ***Gurantee Treaty of 1960".***

Another issue emerges from Article I/Paragraph 2 of the ***Treaty of Guarantee*** where it is stated that: *"****The Republic of Cyprus undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever.*** *It accordingly declares prohibited any activity likely to promote,* ***directly or indirectly,*** *either union with any other State or partition with the island".*

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4 The recent intervention of Russia to Syria with the consent of President Assad as representing the state Syria is assessed as a *"justified intervention"* in this respect.

5 ;Kyriakides, Klearchos A.; "*The 1960 Treaties and the Search for Security in Cyprus",* Journal of Balkan and Near Eastern Studies, Vol. 11., No 4., December 2009, p. 431.

6 For the UN perspective on ***Treaty of Guarantee*** see http://peacemaker.un.org/cyprus-greece-turkey-guarantee60

7 For the **Greek High Court of Appeal Judgment** dated 21 March 1979 with no. 2658/79, see ECtHR judgment *Demades v. Turkey*page 13 in "Partly Dissenting Opinion of Judge Metin A. Hakkı and http://www.academia.edu/4215618/TURKEY_S_INTERVENTION_TO_CYPRUS_IS_LEGAL

8 For the **Council of Europe Resolution** dated 29 July 1974 with no. 573 see http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xNTk4NiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTE1OTg2

In this context, it is underlined that the Treaty has been violated by taking "*Cyprus*" into the EU, since it has been a member before Turkey is a member to the EU[9]. On the other hand, it is put forward that there is an "*ambuguity*" with regard to whether there is the prohibition on the union with only one state or states. The Article 31 paragraph 1 of the ***Vienna Convention on the Law of Treaties*** stipulating *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"* is to be remembered in this context.

Furthermore, it is emphasized that the drafters of the ***Treaty of Gurantee*** desire to imply unification with Greece and/or Turkey. But, even with this logic, it is claimed that the already existing strong relationship between "*Cyprus*" and Greece is much stronger after the membership of "*Cyprus"* to the EU. In this context, it is highlighted that even if it is accepted that the EU is not a single state and therefore not an obstacle for "*Cyprus"* to be a part of, *"Cyprus"* and Greece relationship is defined very close to *"Enosis"* which is clearly prohibited in the ***Treaty of Guarantee*** and it is also stressed that the wording includes *"directly or indirectly union with any other State"*[10].

It may be concluded in this respect that the right approach to adopt to interpret the relevant Article in terms of *the* ***Treaty of Guarantee*** is that since the EU is composed of states, when *"union with any other State"* is prohibited, this prohibition is to definitely include each state that is a member to the EU. Any state's membership to the EU necessitates to be a part of the EU system and this system is formed by the union between states. Therefore, when *"Cyprus"* is part of the EU, it is in a union with other member states of the EU.

III. Analysis of the "Recognition Issue"

In Article 1 of the ***Montevideo Convention on Rights and Duties of States***, it is stipulated that *"The State as a person of international law should possess the following qualifications: a. permanent population, b. defined territory, c. government and d. capacity to enter into relations with the other States".* As an international agreement, the provisions of the ***Montevideo Convention on Rights and Duties of States*** is to be binding for the relevant parties and it is observed that there is no *"recognition"* criteria stipulated in terms of the ***Montevideo Convention on Rights and Duties of States*** as a *"founding requirement"* to accept that an entity is a *"state".*

9 Selami Kuran;*"Müzakere Çerçeve Belgesinin Değerlendirilmesi",* http://selamikuran.com/node/7

10 Yılmaz, Kadir; p. 132.

Parallel with this approach, in terms of contemporary international law, it is accepted that *"recognition"* of the relevant *"state"*s by others is not a "*founding requirement*" to take into consideration to assess whether the relevant entity is a *"state"*[11]. In this regard, it may be concluded that although the TRNC is not *"recognised"* as a *"state"* by any state other than Turkey, TRNC should be accepted as a state since all the criteria for being considered as a *"state"* is existent in terms of the TRNC.

About the "*government*" criteria, it is put forward that although the TRNC possesses a "*government*", it is doubtful that it has full *"internal autonomy"* with Turkey's continued presence with soldiers and contributions to the TRNC budget. It is underlined on the other hand that "*statehood"* is not put into question if a government invites a foreign army to be situated on its territory for mutual defence purposes[12]. If this aspect had an effect in the interpretation of the *"statehood"*, it would be possible to put forward that Syria is not a state relevant to the current situation in the country; this is not even a matter of discussion at this very point.

It is stated that the justification for "*non-recognition"* of the TRNC is its formation as the result of an "*illegal use of force*" which is incompatible with the principles of international law[13]. On the contrary, the Turkish side emphasizes that the TRNC is not established as a result of the Turkish intervention, but, in 1983 by Turkish Cypriots in the exercise of their right to *"self-determination"*[14]. It may be contended that there is no *"illegal use of force"* in terms of Turkish intervention in *"Cyprus"* as marked by a Greek High Court of Appeal judgment and CoE Resolution reflected above emerging from the right explicitly enshrined in the ***Treaty of Guarantee***[15].

In this respect, it is highlighted that although "*recognition*" of a state is deemed to have a *"declaratory"* effect, a "*non-recognized*" state is not considered competent to act in international relations and does not have the same status as the "*recognized*" states in *"international community"*[16]. Also, the effect of this situation in terms of Turkey's accession process is underlined and it is emphasized that certain actions to be taken by Turkey in

11 For conditions for a State see Sur, Melda; Uluslararası Hukukun Esasları, 9. Baskı, Beta, İstanbul, 2015, pp. 104-118.

12 Yılmaz, Kadir**;** p. 135. The same perspective may be advocated in terms of the recent situation in Syria; Russia intervened with the consent of Syrian government and there is still a *"government"* in Syria.

13 Akgün, Cansu**;** "*The Case of TRNC in the Context of Recognition of States under International Law",* Ankara Bar Review, Vol. 3, Issue 1, 2010, p. 8.

14 Akgün, Cansu**;** p. 16

15 p. 3.

16 Akgün, Cansu**;** p. 17.

the EU accession process would imply its political, diplomatic or *"de facto"* recognition of "*Cyprus*" as a member of the EU. In this context, the emphasis is reflected in relation to the fact that Turkey objects the claim of the Greek Cypriot-led government to be the government of the original "*Republic of Cyprus*" which is comprised of the entire territory of the island that represents the whole *"Cyprus"* including the Turkish Cypriots[17]. In this framework, it is to be remembered that there is ***"29 July 2005 Declaration of Turkey"*** that confirms clearly that Turkey does not recognize *"Cyprus"* as a state.

In scope of the UN, which is a *"global"* international organization with 193 state members, there are many resolutions of the UN Security Council - with the main task of the maintenance of international peace and security - regarding the *"recognition issue".* For instance, in the Resolution 550 of 1984[18], the TRNC is described as *"legally invalid"* and the member states to the UN are called upon not to recognize the TRNC set up by *"secessionist acts"* and facilitate or in anyway assist this *"entity".* The same UN refers to the ***Treaty of Guarantee*** as a valid international agreement which includes *"right of intervention"* of guarantor states.

IV. Assessments about Turkey-EU Relationship

A. Focus on EU Summit Presidency Conclusions

The "*EU Summits*" which are the meetings of the European Council are important to take into consideration since they are the highest level meetings of the EU with heads of states and governments of the EU member states. In this regard, the conclusions of these meetings shed light to the opinion of the EU at the highest level regarding the *"Cyprus"* issue.

In **Luxembourg Summit of 1997 Presidency Conclusions[19],** it is stated that[20] the accession negotiations of "*Cyprus*" are to contribute positively to the search for a political solution to the "*Cyprus*" problem through the talks under the aegis of the UN which is identified as a *"must"* to continue with a view to creating a "*bi-community*", "*bi-zonal*" federation. It is also put forward that[21] Turkey's links with the EU depends on the support for negotiations under aegis of the UN on a political settlement in "*Cyprus*" on the basis of the relevant UN Security Council Resolutions.

17 Talmon, Stefan; *"The European Union-Turkey Controversy over Cyprus or a Tale of Two Treaty Declarations",* Chinese Journal of International Law, Vol 5, No. 3, 2006, p. 583.

18 For the **UN Resolution** 550 of 1984, see http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/487/80/IMG/NR048780.pdf?OpenElement

19 For the **1997 Luxembourg Summit** Conclusions, see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/032a0008.htm

20 Para. 28.

21 Para. 35.

In the **Helsinki Summit of 1999 Presidency Conclusions[22] -** where Turkey is declared as a candidate for membership to the EU - it is underlined that[23] if no settlement is reached on the issue of *"Cyprus"* by the completion of accession negotiations of *"Cyprus"* for the membership to the EU, the Council's decision on accession of *"Cyprus"* is to be made without this situation being a pre-condition in *"Cyprus"*s membership. It is highlighted that in assessing the situation, the Council is to take account of all the relevant factors. In this respect, it may be claimed that the EU declares that it stands on one side of the conflicts, the *"Greek Cypriots",* with the confirmation that albeit the conflict continues, the Council is in a decision to take *"Cyprus"* as a member to the EU.

In the **Copenhagen Summit of 2002 Presidency Conclusions[24],** it is underlined that[25] the European Council confirms its strong preference for accession of *"Cyprus"* to the EU by a "*united Cyprus*" and that[26] in case of a settlement, the Council is to decide upon adaptations of the terms concerning the accession of "*Cyprus*" to the EU with regard to the *"Turkish Cypriot"* community. Furthermore, the European Council declares that in the absence of a settlement, the application of the "*acquis*" to the "*northern part*" of the island shall be suspended and it is put forward that the Council invites the Commission, in consultation with the government of "*Cyprus"*, to consider ways of promoting economic development of the *"northern part"* of Cyprus and bringing it closer to the EU[27]. This last issue is important to highlight since it explicitly reflects the perspective taken at the highest level of EU meeting in terms of the TRNC.

In the **Brussels Summit of 2004 Presidency Conclusions[28],** it is emphasized that the European Council welcomes Turkey's decision to sign the ***"Additional Protocol"*** regarding the adaptation of the ***"Ankara Association Agreement"*** taking account of the accession of the new Member States including "*Cyprus".*

According to the **Brussels Summit of 2006 Presidency Conclusions[29]**, the Council agrees that the EU member states will not decide on opening policy area

22 For the **1999 Helsinki Summit** Conclusions, see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/ACFA4C.htm

23 Para .9.b.

24 For the **2002 Copenhagen Summit** Conclusions, see http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/73842.pdf

25 Para. 10.

26 Para. 11.

27 Para. 12.

28 For the **2004 Brussels Summit** Conclusions, see http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf

29 For the **2006 Brussels Summit** Conclusions, see http://ec.europa.eu/echo/civil_protection/civil/prote/pdfdocs/gaerc_11_december.pdf

chapters relevant to Turkey's restrictions as regards the "*Republic of Cyprus"* until the Commission verifies that Turkey has fulfilled its commitments related to the ***"Additional Protocol"*** in terms of extending 1963 ***"Ankara Association Agreement"*** and ***"Additional Protocol"*** to the new EU members including *"Cyprus"*. The relevant chapters are stipulated as: Chapter 1: Free movement of goods, Chapter 3: Right of establishment and freedom to provide service, Chapter 9: Financial services, Chapter 11: Agriculture and rural development, Chapter 13: Fisheries, Chapter 14: Transport policy, Chapter 29: Customs Union and Chapter 30: External relations. The Council further agrees that the EU Member States will not to decide on provisionally closing chapters until the Commission verifies that Turkey has fulfilled its commitments related to the "***Additional Protocol".***

In the current situation regarding the *"Cyprus"* effect in scope of the accession negotiations of Turkey to the EU[30], it is observed that eight Chapters of which "*opening benchmark"* is the extension of the "***Additional Protocol***" to *"Cyprus"* is the same as stated above. In this context, *"Chapters Blocked by Southern Cyprus Unilaterally"* are six Chapters as: Chapter 2. Freedom of Movement for Workers, Chapter 15: Energy, Chapter 23: Judiciary and Fundamental Rights, Chapter 24: Justice, Freedom and Security, Chapter 26: Education and Culture and Chapter 31: Foreign, Security and Defense Policy.

B. Approaches on the Accession Partnership Document, National Programme and Progress Report

The EU ***"Accession Partnership Document"***s are one of the basic references to be taken into consideration with respect to Turkey's EU accession process since they reflect the "*pinpoint*" expectations of the EU from Turkey. In this context, in the latest "***Accession Partnership Document"*** of 2008[31], Turkey's support to the settlement of the "*Cyprus"* problem within the UN framework and in line with the EU founding principles is put forward as an expectation of the EU. It is also highlighted that implementation of the "***Additional Protocol"*** adapting the "***Ankara Association Agreement"*** to the accession of *"Cyprus"* and removal of all existing restrictions on "*Cyprus*"-flagged vessels together with taking concrete steps for the normalization of bilateral relations between Turkey and "*Republic of Cyprus*" are the priorities of the EU.

The ***"National Programme"***s of Turkey are other important documents to take into account in the accession process of Turkey to the EU since they reflect

30 See the current situation table on status of EU-Turkey accession negotations http://www.ab.gov.tr/files/5%20Ekim/yatay_muzakere_tablosu__30_06_2016.pdf

31 For the **2008 Accession Partnership Document**, see http://www.abgs.gov.tr/files/AB_Iliskileri/Tur_En_Realitons/Apd/Turkey_APD_2008.pdf

the commitments of Turkey with respect to the process. In this framework, pursuant to the latest "***National Programme"***[32] of 2008, in the "*Preamble"*, it is stated that Turkey is to continue to support efforts of the UN Secretary General based on the existence of two seperate people and democracy, "*bi-zonal*" political equality of both sides, equal status of both founding states and parameters of "*new partner state*".

The annual EU ***"Progress Report"***s are also essential documents to assess the stage in accession of Turkey to the EU since they are composed of positive and negative aspects in the *"eyes"* of the EU with regard to all relevant issues including the "*Cyprus issue".*

In the latest ***"Progress Report for Turkey"*** of 2016[33], Turkey is criticized as *"not fulfilling its obligation to ensure full and non-discriminatory implementation of the Additional Protocol to the Association Agreement"* and also with regard to *"not removing all obstacles to the free movement of goods, including restrictions on direct transport links with Cyprus".* It is also underlined that there is no development in terms of *"normalising bilateral relations with the Republic of Cyprus".* Furthermore, it is highlighted that accession negotiations will not continue on *"eight chapters relating to Turkey's restrictions regarding the Republic of Cyprus"* and that none of the chapters of accession negotiations is to be provisionally closed *"until the Commission confirms that Turkey has fully implemented the Additional Protocol to the Association Agreement".*

It is also emphasized that Turkey is expected to *"commit itself unequivocally to good neighbourly relations, international agreements, and to the peaceful settlement of disputes in accordance with the United Nations Charter, having recourse, if necessary, to the International Court of Justice".* Turkey is called to *"avoid any kind of threat or action directed against a Member State, or source of friction or actions that damages good neighbourly relations and the peaceful settlement of disputes"*[34]*.*

Furthermore, on the recently current *"issue"* with respect to exploiting *"hydrocarbon resources"* in the *"Exclusive Economic Zone",* the EU stresses that there are sovereign rights of EU Member States - referring to *"Cyprus"* - in this sense. The EU underlines that "*Cyprus"* has the right to enter into bilateral agreements and exploit natural resources within the scope of the EU acquis and international law, including the UN Convention on the Law of the

32 For the **2008 National Programme**, see http://www.abgs.gov.tr/index.php?p=42260&l=2

33 For the text of **2016 EU-Turkey Progress Report** see http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_turkey.pdf

34 p. 7.

Sea. The same call is repeated regarding respect for rights of *"sovereignty"* of EU member States -meaning *"Cyprus"* on the topic - over territorial sea and national airspace. There is also an emphasis on the non-progress of *"normalising bilateral relations with the Republic of Cyprus"* and a further remark on Turkey continuing to veto applications by the *"Republic of Cyprus"* for joining international organisations like OECD[35].

In the ***"Progress Report"*** of 2016, there is also a concern on *"air safety"* which is expressed due to the *"lack of communication between air traffic control centres in Turkey and Cyprus"*[36]. In terms of Turkey's accession process to the EU, it is stressed that a condition to be considered as having fully implemented the relevant EU acquis, Turkey is expected to lift the "*restrictions on vessels and aircraft registered in or related to Cyprus or whose last port of call was Cyprus"*[37].

There are also references to some judgments of the ECtHR relevant to the *"Cyprus issue".* In this context, it is underlined in ECtHR judgment of ***Cyprus v. Turkey*** that there is a problem concerning the enforcement of ECtHR judgment of "*just satisfaction".* It is furthermore emphasized that ECtHR judgments of ***Xenides-Arestis v. Turkey, Demades v. Turkey, and Varnava and others v. Turkey*** are not fully enforced[38]. Lastly, it is highlighted that as part of a *"visa regime", "Turkey continues to apply a discriminatory visa regime towards 11 Member States including the Republic of Cyprus for which the e-visa system refers to the country option Greek Cypriot Administration of Southern Cyprus"*[39].

Since, there is the *"sovereign equality of states"* as a *"general principle of international law",* Turkey as a sovereign state has discretion to recognize or not to recognize an entity as a state. In general terms, all the criticism against Turkey is basicly on the consequences of non-recognition of *"Cyprus"* by Turkey. In this context, it may be concluded that the EU in *"Cyprus issue"* is *"biassed"* taking *"Cyprus"* as an EU member state whilst the conflict continues.

C. Analysis of 2005 Negotiating Framework, 2005 Turkey Declaration, 2005 EU Counter-Declaration

The ***"Negotiating Framework"***[40] is another basic reference on EU-Turkey accession process since it contains the principles which is the "*roadmap*"

35 p. 30.
36 p. 53.
37 p. 54.
38 p. 69.
39 p. 81.
40 For the **2005 Negotiation Framework Document**, see http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf

for Turkey. In this respect, it is stated that the development in accession negotiations is to be guided by Turkey's continued support to reach a comprehensive settlement of the "*Cyprus"* problem within the UN framework parallel to the founding principles of the EU which includes improvement in the bilateral relations between Turkey and the "*Republic of Cyprus*" [41]. It is highlighted that in the period up to accession, Turkey is to be required to progressively align its positions within international organisations with the positions adopted by the EU and EU member States[42].

In the same ***"Negotiating Framework"***, it is put forward that accession to the EU implies the acceptance of the rights and obligations in the EU and its institutional framework, known as the *"Acquis of the EU",* where *"Acquis of the EU"* is constantly evolving via acts - legally binding or not - international agreements concluded by the Communities jointly with EU member States, the EU and by the EU member states among themselves[43]. It is underlined that the rights and obligations in this framework imply termination of all existing bilateral agreements between Turkey and the Communities and other international agreements concluded by Turkey which are incompatible with the obligations of EU membership. It is also specified in this respect that any provisions of the "***Ankara Association Agreement"*** which depart from the "*Acquis of the EU*" are not to be considered as precedents in the accession negotiations[44]. This last remark is rather an important one to highlight since provisions in the "***Ankara Association Agreement"*** - which is the legal basis of all the legal relationship between the EU and Turkey - are in a condition to be put aside with respective provisions in the *"Acquis of the EU".* The international agreements - which are in written form - may be regarded as the most important binding sources of international law.

In this context, it should be remembered that if there is a need for an amendment in an international agreement or the termination of an international agreement, the relevant provisions of the ***Vienna Convention on the Law of Treaties*** shed light on the matter. In parallel, it may be contended that it is impossible to make an amendment in an international agreement beyond the scope of the ***Vienna Convention on the Law of Treaties*** since even for the non-parties to the ***Vienna Convention on the Law of Treaties,*** many of its provisions have also *"customary international law"* effect. Turkey is not a member of the EU and is regarded as a *"third country"* in terms of the relations with the EU; if there is a need to amend any provision or terminate

41 Para. 6.
42 Para. 7.
43 Para. 10.
44 Para. 11.

the "***Ankara Association Agreement",*** procedures in scope of the ***Vienna Convention on the Law of Treaties*** are to be applied. In this respect, it may be concluded that it is contrary to international law to put forward that any provision of the ***"Ankara Association Agreement"*** is not to be taken into consideration if it conflicts with the *"EU Acquis".*

In this respect, about the complications of the ***"Negotiating Framework",*** it is submitted that all agreements between Turkey and the TRNC shall be *"void".* This is underlined due to the fact that according to the EU, it is "*Cyprus*" that represents the whole island and all the "*EU Acquis"* recognizes only the "*Greek Cypriots*". On this issue, as highlighted above, it may be concluded that in the termination of international agreements, provisions of the ***Vienna Convention on the Law of Treaties*** are to be taken into consideration in terms of international law. In this context, it may be contended that it is not possible to terminate an international agreement with the provisions stipulated in the ***"Negotiating Framework"***.

Furthermore, regarding the provision in the *"**Negotiating Framework"*** on Turkey's requirement to progressively align its positions within international organisations with the positions adopted by the EU and EU member states is interpreted to lift the veto against *"Cyprus"*s membership to NATO[45]. Since the *"sovereign equality of states"* is an important *"general principle of international law"* guaranteed by the UN Charter and with the ***"29 July 2005 Declaration of Turkey",*** it is officially declared that Turkey does not recognize *"Cyprus"* as a state, it may be claimed that this argument may not be put forward against Turkey.

According to ***"29 July 2005 Declaration of Turkey"***[46] where ***"Additional Protocol"*** for the extension of the ***"Ankara Association Agreement"*** to "*Cyprus*" is at issue, it is stated that Turkey is to continue to support the efforts of the UN Secretary General for a comprehensive settlement to lead to the establishment of a new "*bi-zonal*" partnership state[47]. It is emphasized that the "*Republic of Cyprus*" referred to in the Protocol is not the original partnership state established in 1960[48] and that Turkey is to continue to regard the Greek Cypriot authorities as exercising authority, control and jurisdiction only in the territory south of the buffer zone and as not representing the "*Turkish Cypriots*"[49]. Furthermore, Turkey declares that signature, ratification and implementation of the relevant ***"Additional Protocol"*** does not verify any

45 Selami Kuran; http://selamikuran.com/node/7

46 For the **2005 Declaration of Turkey**, see http://www.mfa.gov.tr/declaration-by-turkey-on-cyprus_-29-july-2005.en.mfa

47 Para.1.

48 Para.2.

49 Para. 3.

form of recognition of the "*Republic of Cyprus*"[50].

About the legality of ***"29 July 2005 Declaration of Turkey",*** it is claimed that it can not only be regarded as an expression of Turkey's refusal to recognize "*Greek Cypriot Administration"*s claim of representation of the "*Republic of Cyprus*". It is introduced as much more defined in terms of reflection regarding Turkey's perspective not to enter contractual relationship with "*Greek Cypriot Administration".* It is also put forward that these remarks of Turkey can not be accepted as *"reservations*" in terms of the ***Vienna Convention on the Law of Treaties*** since "***29 July 2005 Declaration of Turkey"*** is not linked with the "*exclusion of the legal effect of certain provisions of the treaty"* rather to the "*exclusion of a party to a treaty"*[51]*.* For the legal character of the statement, it is highlighted that it should be interpreted in "*good faith"*, in accordance with the ordinary meaning to be given to its terms in the light of the treaty which it refers and the decisive criterion defined on the basis of the drafters intend to produce[52].

On the other hand, it is put forward that "***29 July 2005 Declaration of Turkey"*** is to be interpreted as a "*general statement of policy*" that does not have any legal effect on its obligations under the Treaties concerned[53]. It is also claimed that Turkey's signature of the ***"Additional Protocol"*** means that Turkey has impliedly legally recognized "*Cyprus Republic"* and it is underlined that dissolution process for TRNC has started with this step of Turkey. The right path to be followed by Turkey is put forward as the introduction of a "*declaratory clause*" emphasizing that the "***Additional Protocol"*** shall be applied after *"the Cyprus issue*" is settled[54].

The basic problematic matter in terms of extension of the ***"Additional Protocol"*** to *"Cyprus"* is Turkey's*"non-recognition"* of "*Cyprus".* In this context, ***"29 July 2005 Declaration of Turkey"*** may be interpreted to have a legal effect since it is the *"will"* of states that is fundamentally important to take into consideration in international law. It may be remembered that even in terms of *"international customary law"* - which is a non-written binding source of law - the relevant rule in *"international customary law"* cannot be claimed against a state which continuously objects to the relevant rule. In parallel, when an international agreement is concerned - like the ***"Additional Protocol"*** at issue - such a written objection of a state should be taken into consideration and have a legal effect since it reflects the *"will"* of the relevant state.

50 Para. 4.
51 Talmon, Stefan; p. 588-589.
52 Talmon, Stefan; p. 603.
53 Talmon, Stefan; p. 605.
54 Selami Kuran; http://selamikuran.com/node/7

In ***"21 September 2005 Counter-Declaration of the EU"***[55]*,* it is stressed that the European Community and member states consider that ***"29 July 2005 Declaration of Turkey"*** by Turkey is unilateral, does not form part of the "***Additional Protocol"*** and has no legal effect on Turkey's obligations under the "***Additional Protocol***"[56]. It is added in this respect that Turkey is to apply the ***"Additional Protocol"*** fully to all EU member states, including *"Cyprus"*. Furthermore, it is stated that the European Community and its member states stress that the opening of negotiations on the relevant chapters depends on Turkey's implementation of its contractual obligations to all member states and that failure to implement its obligations in full is to affect the overall progress in the negotiations[57]. In "***21 September 2005 Counter-Declaration of the EU",*** it is also highlighted that the European Community and member States recognise only the *"Republic of Cyprus"* as a subject of international law[58] and finally it is underlined that recognition of all member states is a necessary component of the accession process[59].

V. Relevant Cases of the ECtHR and CJEU

A. The ECtHR Cases

In ECtHR ***Louzidou v. Turkey*** case of 1996[60], a Greek Cypriot claimant files a case against Turkey on the "*right to property*" for an immovable which is situated in the TRNC; it is remarkable to note that these cases are not filed against the TRNC or *"Cyprus".* The ECtHR, in its judgment of ***Louzidou v. Turkey***, makes references to the TRNC Constitutional provision which regulates that the immovables are in scope of the "*property*" of the TRNC[61]; UN resolutions on the *"non-recognition"* of the TRNC[62] and to the decision of the CoE Committee of Ministers which states that the "*Cyprus government*" is the only authority to represent "*Cyprus"*[63].

It is essential to assess in this important ECtHR ***Louzidou v. Turkey*** judgment that there is the acceptance of the TRNC's legal powers to a certain aspect. **In this framework, the ECtHR*"recognises"* the "*legitimacy of certain legal***

55 For the **2005 Counter-Declaration of the EU,** see http://www.mfa.gr/images/docs/kypriako/declaration_by_the_ec_and_its_member_states.pdf
56 Para. 2.
57 Para. 3.
58 Para. 4.
59 Para. 5.
60 For the **ECtHR *Louzidou v. Turkey* case,** file:///C:/Users/bdeniz/Downloads/001-58007%20(3).pdf
61 Para. 17.
62 Paragraphs 19, 42 and 44.
63 Para. 21.

arrangements and transactions… for instance as regards the registration of births, deaths and marriages…" **concerning the TRNC[64]. Judge Jambrek, in the *"Dissenting Opinion"*** to the ***Louzidou v. Turkey*** judgment, emphasizes the same feature: "***It would be going too far to say that no purportedly legal acts of the "TRNC" administration are valid.*** *For example, a marriage conducted by a "TRNC" official, and registered in the "TRNC", would have legal effect outside that "jurisdiction". Similarly, a transfer of property between private individuals in northern Cyprus, registered by an official of the "TRNC", would have legal effect elsewhere in the world[65].* In parallel, **Judge Pettiti, in the *"Dissenting Opinion"*** to the ***Louzidou v. Turkey*** judgment, highlights that: *"It is true that the United Nations General Assembly has not admitted the "TRNC" as a member, but* ***the lack of such recognition is no obstacle to the attribution of national and international Powers"[66].***

On the same issue, there is the **"*Dissenting Opinion*" of Judge Golcuklu** to the ***Louzidou v. Turkey*** judgment which reads as: *"not only does northern Cyprus not come under Turkey's jurisdiction,* ***but there is a (politically and socially) sovereign authority there which is independent and democratic. It is of little consequence whether that authority is legally recognised by the international community.*** *The Commission and the Court have stated more than once that the concept of "jurisdiction" within the meaning of Article 1 of the Convention covers both de facto and de jure jurisdiction.* ***In northern Cyprus there is no "vacuum", whether de jure or de facto, but a politically organised society, whatever name and classification one chooses to give it, with its own legal system and its own State authority[67]".***

In again this landmark judgment of ***Louzidou v. Turkey***, in the ***"Dissenting Opinion of Judge Bernhardt Joined by Judge Lopes Rocha",*** it is established that "*Turkey has accepted the jurisdiction of the Court only in respect of the facts which occurred subsequent to 22 January 1990. Such a limitation excludes an inquiry into and final legal qualification of previous events, even if these were incompatible with a State's obligation under the Convention"[68].* The judges also underline *that: "Turkey can be held responsible for concrete acts done in northern Cyprus by Turkish troops or officials.* ***But in the present case, we are confronted with a special situation: it is the existence of the factual border, protected by forces under United Nations command, which makes it impossible for Greek Cypriots to visit and to stay in their homes and on their property in the northern part of the island.*** *The presence of*

64 Para. 45.
65 II. Para. 5.
66 Para. 8.
67 Para. 3.
68 Para. 2.

Turkish troops and Turkey's support of the "TRNC" are important factors in the existing situation; ***but I feel unable to base a judgment of the European Court of Human Rights exclusively on the assumption that the Turkish presence is illegal and that Turkey is therefore responsible for more or less everything that happens in northern Cyprus.[69]"***

Furthermore, in the *"Dissenting Opinion"* of Judge Golcuklu in the judgment of ***Louzidou v. Turkey***, the Judge introduces the *"central legal problem in the case"* as "*the question of jurisdiction and responsibility for the purposes of the Convention".*It is underlined by Judge Golcuklu in this respect that: *"for the first time, the Court is passing judgment on an international law situation which lies outside the ambit of the powers conferred on it under the Convention's supervision machinery. In this judgment the Court projects Turkey's legal system on to northern Cyprus without concerning itself with the political and legal consequences of such an approach"[70].*

In ECtHR *Xenides-Arestis v. Turkey* case of 2005[71], again, the main argument in the case is on the "*right to property"* for an immovable in the TRNC. In the judgment, there is the expression of the Court that is stated as: ***"international law recognises the legitimacy of legal arrangements and transactions in certain situations akin to those existing in the "TRNC"*** *and that the question of the effectiveness of these remedies provided therein had to be considered in the specific circumstances where it arose, on a case-by case basis"*[72]*.* It is underlined that the Turkish Cypriot authorities on 22th December, 2005 enacted a *"Law on compensation"* with law no 67/2005 and established an authority to examine the applications called "*Immovable Property Commission".* Since there is the "*non-recognition"* of the TRNC, it is submitted that the *"Immovable Property Commission"* is considered as an *"emanation"* of Turkey[73].

Accordingly, in the ECtHR ***Demopoulos v. Turkey*** case of 2010[74], the ECtHR decides on the applications as inadmissible[75] and declares that *"remedies available in the "TRNC", in particular, the "Immovable Property Commission" may be regarded as a "domestic remedy" of the respondent State*"[76].

69 Para. 3.

70 Para. 2.

71 For the **ECtHR *Xenides-Arestis v. Turkey* case,** see http://hudoc.echr.coe.int/eng#{"itemid":["001-71800"]}

72 Para. d. i.

73 Hakkı, Murat Metin; *"Property Wars in Cyprus: The Turkish Position According to the International Law"*, Turkish Studies, Vol 12., No. 1, March 2011, p. 85.

74 For the **ECtHR *Demopoulos v. Turkey* case,** see file:///C:/Users/bdeniz/Downloads/001-97649%20(6).pdf

75 Last sentence.

76 Para.103.

Parallel to the *"logic"* of the "*Dissenting Opinion"*s of Judge Jambrek, Judge Pettiti and Judge Golcuklu in ***ECtHR Louzidou v. Turkey*** case, there is no legal obstacle at least to accept that some legal acts of the TRNC are valid. In the same parallel, in **ECtHR *Xenides-Arestis v. Turkey*** case, it is accepted by the ECtHR that *"international law recognises the legitimacy of legal arrangements and transactions in certain situations akin to those existing in the "TRNC".*

Furthermore, *"Dissenting Opinion of Judge Bernhardt Joined by Judge Lopes Rocha"* in ***ECtHR Louzidou v. Turkey*** case*,* there is a discussion on Turkey's being considered as the *"Respondent"* in the judgment since they put forward that it is wrong to claim that Turkey is "*responsible for more or less everything that happens in northern Cyprus".*

In the light of the *"Dissenting Opinions"* highlighted above in ***ECtHR Louzidou v. Turkey*** and ***ECtHR Xenides-Arestis v. Turkey*** cases, legal effect should be attributed to the acts of the TRNC. This may be interpreted due to the fact that TRNC is a state since *"recognition"* is not compulsory for acceptance of an entity as a *"state"* in terms of contemporary international law and all other conditions to be considered as a *"state"* are present for the TRNC. Furthermore, it may be put forward that the TRNC is to be taken into consideration in terms of the *"respondent"* state when relevant in the ECtHR; on the other hand, the TRNC is not recognized by any other state than Turkey and relevant cases are not brought against the TRNC in this respect. It may be submitted in this framework that it should be the ECtHR to accept these types of applications against Turkey as *"inadmissible".* It should be remembered that the CoE refers to the *"right of intervention"* of Turkish Government in accordance with the ***Treaty of Guarantee*** and the ECHR system including the ECtHR is adopted under the auspices of the CoE.

B. The CJEU Cases

In CJEU ***Anastasiou and Others v. UK*** case of 1994[77], there is the interpretation issue relevant to 1972 ***"Association Agreement"*** between the EU and *"Cyprus*; the subject of the conflict is the trade on patatoes and citrus fruit[78]. It is underlined in the judgment that the UK does not accept documentation with reference to the TRNC and that it permits the entry of citrus products and potatoes from *"Cyprus"* in accordance with the relevant EU legislation[79]. The CJEU decides that since the TRNC is not recognized by the relevant states, *"in the absence of any possibility of checks or cooperation",*

77 For the **CJEU *Anastasiou and Others v. UK* case,** see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992CJ0432:EN:PDF

78 Para. 1. and 2.

79 Para.11.

the *"movement and phytosanitary certificates"* not issued by the *"Republic of Cyprus"* is not to be accepted[80]. Although, this is the conclusion reached by the Court, the CJEU accepts that "*the advantages stemming from the Association Agreement have on several occasions been accessible to the whole population of Cyprus. Thus, the financial protocols concluded pursuant to the Agreement are administered in such a way that the resources made available by the Community are used for purposes that are equally for the benefit of the population established in the northern part of Cyprus"*[81].There is also a reference to the uniform interpretation in EU member states and it is underlined that some EU member states accept certificates issued by authorities other than those of the "*Republic of Cyprus"* where others do not[82].

This inconsistency is reflected as an *"uncertainty of a kind likely to undermine the existence of a common commercial policy and the performance by the Community of its obligations under the Association Agreement"*[83]. About the interpretation of the judgment, it is stated that after the partition in "*Cyprus"* in 1974, the United Kingdom, Germany and some other member states of the EU continued to accept movement and "*phytosanitary certificates"* accompanying citrus fruits and potatoes from the TRNC issued by the *"Turkish Cypriot Chamber of Commerce*" if those certificates are not issued in the name of the "*Turkish Federated State of Cyprus*", the "*Turkish Republic of Northern Cyprus*" or other equivalent term[84]. The reasoning of the CJEU is outlined as the EU's certificate system established on the principle of mutual reliance and cooperation between the competent authorities of the exporting state and those of the importing state and this cooperation is excluded with the authorities of an entity which is not "*recognized"* either by the EU or member states; hence, the certificates issued by the TRNC which is a "*non-recognized"* state are not accepted[85]. This reasoning of the Court is criticized as being far beyond the principle and that it applied economic sanctions which should be a measure that should be reserved for the political bodies responsible for the conduct of the EU's foreign relations[86].

On the other hand, it is put forward that international "*non-recognition*" does not necessarily preclude cooperation between the authorities of the

80 Para. 40, 41 and 67.
81 Para. 45.
82 Para. 52.
83 Para. 53.
84 Talmon, Stefan;*"The Cyprus Question before the European Court of Justice",* European Journal of International Law, Vol. 12, No. 4, 2001, ("CJEU"), p. 731-732.
85 Talmon, Stefan; "CJEU", p. 742-743.
86 Talmon, Stefan; "CJEU", p. 750.

"*non-recognizing*" state and those of the *"non-recognized"* state. **It is added that the practice between 1974 to 1994 is in such a framework that there is a cooperation between EU member states and Turkish Cypriot authorities and that there is no rule of international or EU law which prohibits states from cooperating with *"non-recognized"* authorities in general terms.** It is concluded that cooperation with Turkish Cypriot authorities within the framework of the system of *"trade certificates"* could only be excluded if it implies "*recognition"* of the TRNC[87].

In CJEU ***Meletis Apostolides v. Orams*** case of 2006[88], the enforcement of a judgment of the "*Greek Cypriot Administration"* which is on an immovable in the TRNC is being requested in the UK where the plantiff desires to enforce the judgment taken by the *"Greek Cypriot Administration"* Court. According to the CJEU, although the *"EU Acquis"* is suspended in the *"northern area",* relevant EU Law is to be applied to the judgment given at a *"Cypriot Court"* in the *"Cypriot Government-controlled"* area related with the land in the *"northern area"*[89], furthermore, it is concluded that this judgment is "*enforcable"*.[90]

Although, the EU accepts *"Cyprus"* as a member, this situation does not change the legal situation to consider the TRNC as a state. In this respect, no international actor - be a state or international (or supranational) organization with the union of states - may have a right for a legal act in the territory of another state in conflict with Article 2 of the UN Charter and the CJEU is a judiciary organ of the EU which should act in conformity with international law according to the primary law of the EU. In this context, the CJEU in such cases as above may be expected to deliver *"inadmisibility"* decisions, since, it may be claimed that it has no *"jurisdiction"* to deal with the relevant cases.

VI. Conclusion

It may be concluded that the explicit provision under the ***Treaty of Guarantee*** "*announces"* that it is the right of Turkey to intervene when security is at stake and cannot be maintained on the island. The other provision in the same Treaty about membership of *"Cyprus"* to the EU is assessed to be a "*prohibited move*" since the international organisations are basicly made up of states which are "*derived"* subjects of international law; membership in the EU means at least union with one state. The "*Recognition"*of states is not a "*compulsory*" element to accept that an entity is a state and in this context, it

87 Talmon, Stefan; "CJEU"; p. 743.

88 For the **CJEU *Meletis Apostolides v. Orams* case,** see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0420:EN:HTML

89 Para. 39.

90 Para. 71.

may have only a "*declaratory*" effect; since the TRNC has the other elements to be accepted as a "*state"* - regardless of being *"recognized"* by only Turkey - it is a state.

In the EU summit decisions, the approach of the EU may be interpreted as "*biassed*", as it assesses the issues taking into consideration *"Cyprus"* as a state and accepts *"Cyprus"* as a member to the EU. As for the *"Negotiation Framework Document*", it may be highlighted that even only taking the provisions that *Turkey* should abide to the *"EU acquis*" - "*whether binding or not"* - and the legal effect for "*the agreements contradicting"* in this regard may lead to *"risky"* situations about Turkey. In this respect, especially provisions of the ***Vienna Convention on the Law of Treaties*** are to be focused on the invalidity of international agreements. On the issue of the effect of Turkey's signature of the extension of the ***"Additional Protocol"***, it may be concluded that it does not mean Turkey's recognition of "*Cyprus*" since Turkey has made an explicit written declaration on the issue.

Furthermore, on the decisions of the ECtHR and CJEU, although in the ECtHR judgments, "*hints*" for accepting the authorities in the TRNC are present; severe perspectives may be identified in CJEU judgments. In this respect, in CJEU *Anastasiou* judgment, there is a clear emphasis on the "*non-recognition"* of the TRNC where in CJEU *Orams* judgment, the *"EU acquis"* is applied for an immovable within the TRNC. Since the TRNC is a state, it may be submitted that the relevant cases should be directed to the TRNC instead of Turkey with respect to the cases dealt at the ECtHR. In accordance with the relevant cases at the CJEU, although the EU recognizes *"Cyprus"* as a state since the TRNC is a state, it may be submitted that the CJEU may declare that it has no jurisdiction and deliver an *"inadmisibility"* decision.

It may be concluded that "the *Cyprus issue*" is much more political and in this context, it is not easy to *"predict tomorrow from today".* In this study, the rightfulness of Turkey in terms of international law is put forward with legal justifications and in this context "the *Cyprus issue*" is not a "*mission impossible"*.

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