



## Freedom of Movement of Self-Employed Persons and the Europe Agreements

Comments on Case C-63/99, *Gloszczuk*; Case C-235/99, *Kondova*; Case C-257/99, *Barkoci and Malik* (judgments of 27 September 2001); and Case C-268/99, *Jany* (judgment of 20 November 2001)

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### 1. Introduction

In the four cases to be discussed in this case report, nationals of several Central and Eastern European Countries (CEECs) sought entry into and residence in the territory of two of the current EU Member States (the United Kingdom and the Netherlands) in order to work there as self-employed persons. Since they did not have such rights of entry and residence under national law, the Eastern European nationals invoked the provisions on the right of *establishment* laid down in the Europe Agreement which applied to them.<sup>1</sup>

In almost identical terms, the various Europe Agreements state that “each Member State shall grant, from entry into force of this Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of [CEEC] companies and nationals [. . .] and shall grant in the operation of [CEEC] companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and

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<sup>1</sup> In the *Gloszczuk* case the Europe Agreement between the EC and Poland was invoked (OJ 1993, L 348/1); the *Kondova* case concerned the EC/Bulgaria Agreement (OJ 1994, L 358/1); in the *Barkoci & Malik* case the EC/Czech Republic Agreement was at stake (OJ 1994 L 360/1); and in the *Jany* case the Europe Agreements with Poland and the Czech Republic were relied upon. Europe Agreements have furthermore been concluded between the European Communities (and the Member States) and Hungary (OJ 1993, L 347/1), Romania (OJ 1994, L 357/1), the Slovak Republic (OJ 1994, L 359/2), Latvia (OJ 1998, L 236/1), Lithuania (OJ 1998, L 51/1), Estonia (OJ 1998, L 68/1) and Slovenia (OJ 1999, L 51/1). The terms ‘Europe Agreement’ (EA) and ‘Association Agreement’ will be used interchangeably. Natural persons having the nationality of one of these Eastern European Countries will be referred to as ‘EA nationals’ or ‘CEEC nationals’.

nationals”.<sup>2</sup> According to the applicants in the four cases, a directly effective right of entry and residence could be deduced from this national treatment clause. After all, what is the use of giving to EA nationals a right to national treatment if they cannot enter the host country in the first place?

Consequently, in the *Gloszczuk* case, a Polish couple argued that they had the right to stay in the UK because Mr Gloszczuk had been working there as a self-employed building contractor since 1995. The *Kondova* case concerned a Bulgarian national who, after having studied in the UK, intended to commence working as a self-employed person ‘offering general household care services’. *Barkoci* and *Malik* were two members of the Roma community who could not find work in the Czech Republic. Following rejection of their application for asylum, they invoked the Europe Agreement EC/Czech Republic in order to work in the UK as a self-employed gardener and to provide ‘domestic and commercial cleaning services’. Finally, the *Jany* case dealt with two Polish and four Czech prostitutes who invoked the Europe Agreements in order to obtain Dutch residence permits and then be able to work as self-employed prostitutes in the red light district in the centre of Amsterdam.

## 2. Relevant Provisions of the Association Agreements

Titles IV of the Europe Agreements are entitled ‘Movement of workers, establishment, supply of services’. Regarding the right of *establishment*, it is stated – as was already pointed out above – that each Member State shall grant, from the entry into force of the Agreement concerned, for the establishment of companies and nationals of the CEECs, and for the operation of their companies and nationals established in its territory, a treatment no less favourable than that accorded to its own companies and nationals.<sup>3</sup>

For the purpose of the Europe Agreements, ‘establishment’ means, as regards natural persons, the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, in particular companies, which they effectively control. It is explicitly added that self-employment and business undertakings by these nationals, does not extend to seeking or taking employment in the labour market of the other parties to the Europe Agreements. Moreover, the provisions of the chapter on establishment do not apply to those who are *not exclusively* self-employed (but who also work in a salaried capacity). *Economic activities* are defined as the activities

<sup>2</sup> See paragraph 2 below for the specific references to the relevant provisions of the Europe Agreements.

<sup>3</sup> See, e.g., Article 45(1) of the Europe Agreement EC/Bulgaria, and Article 44(3) of the EC/Poland Agreement.

of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions.<sup>4</sup>

Of particular importance to the immigration authorities of the Member States is that at the end of Title IV (on workers, establishment and services) it is explicitly said that the Member States may continue to apply their national *immigration* rules to CEEC nationals. At the same time the ‘specific benefits’ that have been conferred upon these nationals by the Europe Agreements may not be nullified or impaired. The core provision, drawn up in almost identical terms in all Europe Agreements, reads: ‘For the purpose of Title IV, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement’.<sup>5</sup>

The provisions of the Europe Agreements on the right of establishment are thus rather vague and even seem contradictory, in particular when the equal treatment clause is read in conjunction with the national immigration clause at the end of Title IV. Does the right to equal treatment really imply a right to enter the host State and to reside there in order to work in a self-employed capacity if it is explicitly stipulated that “nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services”? On the other hand, what is the use of giving to self-employed EA nationals a right to national treatment if the Member States would still enjoy complete discretion as to whether these nationals may reside in their territories? Moreover, the immigration clause itself contains an important reservation: it explicitly stipulates that national immigration rules may not be applied in such a manner that benefits under the terms of a specific provision of the Europe Agreements – such as, presumably, the non-discrimination clause for the self-employed – are nullified or impaired. But then again, the reservation seems to be addressed to the contracting parties (“benefits accruing to any Party”) and not, at least not directly, to natural and legal persons coming from the EA countries.

All in all, the time had come for the national courts to ask the Court of Justice of the European Communities for an authoritative ruling as to whether the right of establishment includes a (directly effective) concomitant right

<sup>4</sup> This definition was at issue in the *Jany* case: is prostitution an economic activity? See further paragraph 6.

<sup>5</sup> See, e.g., Article 59 of the EC/Bulgaria Agreement and Article 58(1) of the Association Agreement EC/Poland. Hereinafter these provisions will also be referred to as the (national) *immigration clauses* of the Europe Agreements.

to reside in the Member State within the territory of which an EA national wishes to be active as a self-employed person.<sup>6</sup>

### 3. Direct Effect of the Provisions on the Right of Establishment

All national courts asked whether the provisions on establishment in the Europe Agreements had *direct effect*. Are these provisions to be construed as meaning that they can be relied on by an individual before the national courts of the Member States, notwithstanding the fact that the authorities of the host Member State remain competent to apply to the Eastern European nationals their own national rules and regulations regarding entry, stay and establishment?

In order to answer this question, the Court first reiterates its settled case law on the direct effect of treaties concluded between the EC and third countries. A provision in such an agreement is directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.<sup>7</sup>

In order to ascertain whether the provisions on establishment in the Association Agreements meet these criteria, it is therefore necessary, first, to consider their *wording*. In the Court's view, they lay down, in clear, precise and unconditional terms, a prohibition preventing the Member States from discriminating, on grounds of their nationality, against CEEC nationals wishing to pursue within their territory economic activities as self-employed

<sup>6</sup> See also my plea in *Migrantenrecht* (1998), p. 300 for quickly obtaining an Article 234 answer from Luxembourg in light of the fact that national courts ruled differently on this issue. In legal writing the issues of direct effect/concomitant rights of residence have, of course, also been discussed extensively. See for example E. Guild, *European Community Law From a Migrant's Perspective* (2000), 170–178; M. Hedemann-Robinson, "An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident Within the European Union, with Particular Reference to the Case Law of the European Court of Justice", *CML Rev.* (2001), 525, 574–576; W. Weiss, "The Chapter II on Establishment in the Europe Agreements", *EFAR* (2001), 243.

<sup>7</sup> Reference is made to Case C-262/96 *Sürül* [1999] ECR I-2685 (paragraph 60). See also, e.g., Case 12/86 *Demirel* [1987] ECR p. 3719 (paragraph 14) and Case C-162/96 *Racke* [1998] ECR I-3655 (paragraph 31). In general on the issue: H.G. Schermers, "The Direct Application of Treaties with Third States", *CML Rev.* (1982), 563; G. Bebr, "Gemeinschaftsabkommen und ihre mögliche unmittelbare Wirksamkeit", *EuR* (1983), 128–160; A. Caeiros, "L'effet direct des accords internationaux conclus par la CEE", *RMC* (1984), 526; A.F. Gagliardi, "The Right of Individuals to Invoke the Provisions of Mixed Agreements before the National Courts: a New Message from Luxembourg?", *EL Rev.* (1999), 276–292; J. Vanhamme, "Inroepbaarheid van verdragen en volkenrechtelijke beginselen voor de Europese rechter: stand van zaken", *SEW* (2001), 247–256.

persons or to set up and manage undertakings which they effectively control. This rule of equal treatment lays down a precise obligation to produce a specific result and, by its nature, can be relied on by an individual before a national court to request it to set aside the discriminatory provisions of a Member State's legislation making the establishment of an EA national subject to a condition which is not imposed on that Member State's own nationals, without any further implementing measures being required for that purpose.<sup>8</sup>

Examination of the *purpose and nature* of the Europe Agreements does not invalidate this finding. The main objective of the Association Agreements is to promote the expansion of trade and harmonious economic relations between the Contracting Parties, in order to foster dynamic economic development and prosperity in the various EA countries, with a view to facilitating their accession to the European Union. The fact that the Association Agreements are intended essentially to promote the economic development of the Eastern European countries – and not so much the economic development of the current Member States – and therefore involve an imbalance in the obligations assumed by the Community towards these non-member countries, is not such as to prevent recognition of the direct effect of certain provisions of these Agreements.<sup>9</sup>

The finding that the non-discrimination clause is directly applicable is furthermore not invalidated by the fact that the authorities of the Member States remain competent to apply their national laws and regulations regarding entry, stay and establishment. The immigration clause at the end of Title IV does not concern the Member States' implementation of the provisions of the Association Agreements on establishment. These clauses are, in the Court's view, not intended to make implementation or the effects of the obligation of equal treatment of self-employed CEEC nationals subject to the adoption of further national measures.

The Court therefore concludes in all four cases that the provision on establishment in the Association Agreements is to be construed as establishing, within the scope of application of those Agreements, a precise and unconditional principle which is 'sufficiently operational' to be applied by a national court and which is therefore capable of governing the legal position

<sup>8</sup> See also, as regards Turkish nationals, Case C-262/96 *Sürül* [1999] ECR I-2685 (paragraph 63).

<sup>9</sup> Established case-law of the ECJ, see e.g. Case 87/75 *Bresciani* [1976] ECR 129 (paragraph 23); Case C-469/93 *Chiquita Italia* [1995] ECR I-4533 (paragraph 34) and Case C-262/96 *Sürül* [1999] ECR I-2685 (paragraph 72).

of individuals.<sup>10</sup> EA nationals therefore have the right to invoke the equal treatment provision before the courts of the host Member State, notwithstanding the fact that the authorities of this State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment.

It seems that the Court in this conclusion has those EA nationals in mind which *already legally reside* in the territory of one of the Member States on the basis of national immigration law.<sup>11</sup> They must be treated equally and may not be discriminated against because of their nationality. One can think of the self-employed Polish baker who legally resides and works in Germany but who does not receive subsidies by the local government under strictly the same conditions as this Member State's own national bakers. For this group of self-employed EA nationals, it is very likely that the equal treatment clause not only covers all forms of direct discrimination but also all forms of *indirect* discrimination on grounds of nationality.<sup>12</sup>

#### **4. Also a Directly Enforceable Right of Entry and Residence for Self-Employed Persons from Eastern Europe?**

The core issue in the four cases was whether the right of establishment, as laid down in the Europe Agreements, also implied a right to *enter* the territory of the EU Member States and a right to *stay* there in order to pursue economic activities as a self-employed person. Prior to the judgments of the Court, opinions on this issue were very much divided.

The Belgian Council of State, for example, ruled that the non-discrimination principle in the Poland Agreement indeed implied a (directly enforceable) right for Polish nationals to enter the host country and to work there as a self-employed person.<sup>13</sup> On the other hand, the district court of The Hague, in the *Jany* case, initially ruled that the Polish and Czech prostitutes could not directly invoke the Europe Agreements in order to obtain a residence permit. This Dutch court argued that self-employed nationals of the Member States

<sup>10</sup> The language used ('sufficiently operational to be applied by a national court') reminds us of the influential article of S. Prechal, "Does Direct Effect Still Matter?", *CML Rev.* (2000), 1047–1069.

<sup>11</sup> Because the Court in other parts of its judgments pays separate attention to the (concomitant) rights of EA nationals in the sphere of free movement and migration (to be discussed below, see the next paragraph).

<sup>12</sup> To be discussed in more detail in paragraph 7, dealing with the legal position of EA workers and the recent *Pokrzeptowicz-Meyer* judgment.

<sup>13</sup> Belgian Council of State, Case 60.404/X-4217, *Pozarowsky*, judgment of 3 April 1995 (in particular paragraphs 3.1.2.2 and 3.1.2.3). The Dutch text of this judgment was published in *Tijdschrift voor Vreemdelingenrecht* (1995), no. 2, p. 150.

derive their right of free circulation within the internal market from *secondary* Community law and not directly from the Treaty itself (i.e. Article 43 of the EC Treaty). Well, then it is only 'logical' that EA nationals as well can only rely on 'secondary' legislation (decisions of the Association Councils established by the various Europe Agreements) in which the rights of entry and residence of self-employed EA nationals have been worked out. Such 'secondary' legislation was, however, still missing at the time of the national ruling in the *Jany* case (1 July 1997).<sup>14</sup> The way in which the district court of The Hague thus interprets the Europe Agreements, and in particular its refusal to ask the ECJ for assistance, is subtly criticised by the Court in its *Jany* judgment.<sup>15</sup>

Be that as it may, right at the start of its discussion on this core issue, the ECJ principally acknowledges that the principle of non-discrimination of self-employed EA nationals *presupposes* a right to stay in the EU Member States. The right of these nationals to take up and pursue economic activities not coming within the labour market, implies that that person has a right to enter and remain in the host Member State. In this context the Court refers to its case law on rights of residence of EC nationals and Turkish workers.<sup>16</sup>

However, the Court subsequently stresses that the right of establishment of the Europe Agreement is nevertheless not equivalent to the right of establishment of Article 43 of the EC Treaty. The important difference is that only the Europe Agreements contain national immigration clauses at the end of Title IV. Therefore, application of a national system of *prior* control to check the exact nature of the economic activity envisaged by the EA national has a legitimate aim, in so far as it makes it possible to restrict the exercise of rights of entry and stay by EA nationals invoking the right of freedom of establishment.

This system of prior control enables the immigration authorities to verify that the EA applicant actually satisfies the conditions laid down in the Europe

<sup>14</sup> The Hague District Court, Case no. AWB 97/1311 VRWET, judgment of 1 July 1997. In an earlier publication I have criticised this way of reasoning and thinking, see R.H. van Ooik, "Vrije vestiging van Oost-Europese prostituties in Nederland", *Nederlands Tijdschrift voor Europees Recht (NTER)* (1997), 245–248.

<sup>15</sup> See paragraph 20 of the judgment for this criticism on the way in which the national court applies the so-called *acte clair* theory: 'However, the referring court ruled in its judgments of 1 July 1997 that the applicants could not invoke the direct effect of Article 44(3) of the Association Agreement between the Communities and Poland or of Article 45(3) of the Association Agreement between the Communities and the Czech Republic. It took the view that the replies to the questions raised in that regard by the applicants could not give rise to any reasonable doubt, so that it was not necessary to refer their cases to the Court for a preliminary ruling'.

<sup>16</sup> With regard to nationals of the Member States, see Case 48/75 *Royer* [1976] ECR 497 (paragraphs 31 and 32). Regarding Turkish workers, see Case C-37/98 *Savas* [2000] ECR I-2927 (paragraphs 60 and 63).

Agreements on establishment, i.e. (1) that he shows that he genuinely intends to take up an activity as a self-employed person, (2) without at the same time entering into employment or having recourse to public funds, and (3) that he possesses, right from the outset, sufficient financial resources and has reasonable chances of success. The application by the authorities of a Member State of the national immigration rules requiring EA nationals to obtain leave to enter is therefore not in itself liable to render ineffective the rights granted to such persons by the provision on establishment of the Association Agreements.

### **5. Why the Court's Judgments are of Crucial Importance to European Migration Law**

The Member States are thus entitled to continue to apply their systems of prior control to EA nationals. The Court however continues by saying that it is none the less the case that the power of the host Member State to apply its domestic rules regarding entry, stay and establishment of natural persons to applications made by EA nationals is expressly subject to the condition of *not nullifying or impairing the benefits* accruing to any Party under the terms of specific provisions of the Europe Agreements.

If it turns out, within the framework of the system of prior control, that the EA national who submitted in due and proper form a prior request for leave to reside in a Member State for purposes of establishment, indeed fulfils the three conditions mentioned above, then compliance with this express condition *obliges* the competent national authorities to recognise that EA national as having a right of establishment in a self-employed capacity and to grant that person, for that purpose, leave to enter and remain in its territory. The host Member State then cannot refuse to an EA national admission and residence for the purpose of establishment for any other reasons – in particular this Member State may not refuse to issue a residence permit

- on grounds of the *nationality* of that person or his *country of residence*,  
or
- because the national legal system provides for a *general limitation on immigration*, or
- because the host Member State has subjected the right to take up an activity as a self-employed person to confirmation of a proven *need in the light of economic or labour-market* considerations.

Here we clearly touch upon the fundamental importance of the Court's judgments for European migration law and migration lawyers. It is true that the Europe Agreements do not preclude a system of prior control which makes the issue by the immigration authorities of leave to enter and remain



subject to the strict conditions that the applicant must show that he genuinely intends to take up an activity as a self-employed person, without entering into employment or having recourse to public funds, and, moreover, that he possesses sufficient financial resources and has reasonable chances of success. However, when the (lawyer of the) EA national can show to the immigration authorities of the host Member State that all of these substantive conditions have been fulfilled, then these national immigration authorities cannot refuse to issue a residence permit for the self-employed EA national. In particular her or his nationality should be irrelevant, as well as the fact that the host Member State pursues a restrictive immigration policy vis-à-vis third country nationals. Also, the question whether the economy or labour market of the host Member State really needs another (self-employed) Hungarian butcher or Romanian haircutter may not be asked when deciding on letting them in or keeping them out.

On this point the ECJ clearly takes a different view than the Advocates-General. They all concluded that the non-discrimination clause had direct effect but only for guaranteeing equal treatment to EA nationals who are already legally residing in the territory of the host Member State. But in their view the obligation of equal treatment “does not confer any legal entitlement to entry or residence” on EA nationals, precisely because of the existence of the immigration clauses at the ends of Titles IV.<sup>17</sup>

If, on the other hand, the CEEC national does not submit to the prior control system, but simply starts to work as a self-employed person in the territory of a Member State, then this Member State may in principle refuse leave to remain in its territory, even if the conditions for establishment have been met.

In this regard the Court stresses that the effectiveness of the system of prior control depends to a very large extent on the correctness of the representations made by the persons concerned at the time when they apply for an entry visa from the authorities in their State of origin or when they arrive in the host Member State. If EA nationals were allowed at any time to apply for establishment in the host Member State, notwithstanding a previous infringement of its national immigration legislation, then such nationals might be encouraged to remain illegally within the territory of that State and submit to the national system of control only once the substantive requirements set out in that legislation had been satisfied.

<sup>17</sup> See points 50 and 85 of the conclusion of Advocate General Alber in the *Gloszczuk* case; points 59 and 94 of the conclusion of AG Alber in *Kondova*; point 74 of the conclusion of AG Mischo in *Barkoci and Malik*; and points 51 and 68 of the conclusion of A-G Léger in the *Jany* case.

An applicant might then rely on the clientele and business assets which he may have built up during his unlawful stay in the host Member State, or on funds accrued there, perhaps through taking employment, and so present himself to the national authorities as a self-employed person now engaged in, or likely to be engaged in, a viable activity, whose rights ought to be recognised pursuant to the Association Agreement at issue. In the Court's view, such a 'lenient' interpretation of the Europe Agreements would risk depriving the Member States' right to apply their immigration rules of its effectiveness and open the way to abuse through endorsement of infringements of national legislation on admission and residence of foreigners.

In the *Kondova* case, for example, Ms Kondova's application for leave to remain in the UK was rejected because she had entered the country illegally, given the fact that she had made false representations both to the official who issued her with her visa in Bulgaria, and to the immigration officer who questioned her on her arrival in the UK. Such an EA national "places herself outside the sphere of protection afforded to her under the Association Agreement" and it is therefore compatible with this Agreement to reject the application on the sole ground that she was residing illegally within the territory of the UK.<sup>18</sup>

## **6. Is Prostitution an Economic Activity and/or a Threat to Public Policy?**

As was pointed out earlier, the Europe Agreements define the concept of establishment as the right to take up and pursue economic activities as a self-employed person and to set up and manage undertakings which this person effectively controls. Economic activities are the activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions.<sup>19</sup>

In the *Jany* case, the national court asked whether the activity at stake, namely prostitution, could be regarded as an economic activity within the meaning of the Europe Agreements, in view of its illegal nature and/or for reasons of public morality. At the national level of the Member States, prostitution for this reason was sometimes indeed placed outside the sphere of the 'ordinary' economy. In Germany for example, until 1990, prostitution was not considered to be an economic activity within the meaning of the EC Treaty because "das Ausüben der 'Erwerbsunzucht' als sittenwidrige und mit

<sup>18</sup> See paragraph 90 of the judgment in the *Kondova* case. Regarding circumvention of national law by Community nationals improperly or fraudulently invoking Community law, see Case C-212/97 *Centros* [1999] ECR I-1459 (paragraph 24).

<sup>19</sup> See paragraph 2.

der Menschenwürde unvereinbare Art der Einnahmeerzielung nicht Teil des Wirtschaftslebens sein könne”.<sup>20</sup>

To answer the question, the Court first refers to the fact that all language versions of the provision which defines the concept of economic activities, with the exception of the Spanish and French versions,<sup>21</sup> but including the Polish and the Czech versions, add to the definition words signifying “in particular”, “inter alia”, or “especially”.<sup>22</sup> This expresses the unequivocal intention of the Contracting Parties not to limit the notion of economic activities solely to the activities listed. That being so, it is sufficient to hold that prostitution is a provision of services for remuneration in any event, and therefore falls within the concept of economic activities. The Court defines prostitution, more specifically, as “an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods”.<sup>23</sup>

As for the (putative) *immorality* of prostitution, the Court argues that this does not affect its finding as to the economic nature of this activity. The host Member State can, however, derogate from the application of the provisions on the freedom of establishment on grounds of, inter alia, *public policy*.<sup>24</sup>

Under the Court’s consistent case-law a national authority’s use of this public policy derogation presupposes in any event that there is a “genuine and sufficiently serious threat affecting one of the fundamental interests of society”.<sup>25</sup> However, conduct may not be considered to be of a sufficiently

<sup>20</sup> Borrowed from B. Huber, *EuZW* (2002), 120. The remarkable thing is that the ECJ had already delivered (in 1982) its *Adoui* judgment (Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, see also below) where it ruled, in some many words, that prostitution should be considered as an economic activity within the meaning of the EC Treaty.

<sup>21</sup> Respectively, “Actividades económicas: las actividades de carácter industrial, comercial y artesanal, así como las profesiones liberales” and “Activités économiques: les activités à caractère industriel, commercial, artisanal ainsi que les professions libérales”.

<sup>22</sup> Cf., for example, the German version (“*insbesondere gewerbliche Tätigkeiten, kaufmännische Tätigkeiten, handwerkliche Tätigkeiten und freiberufliche Tätigkeiten*”), the English version (“economic activities shall *in particular* include activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions”) and the Italian version (“*in particolare* le attività di tipo industriale, commerciale, artigianale e professionale”).

<sup>23</sup> A definition which can only cross the minds of lawyers, and therefore the title of my article on the *Jany* case in *NTER* (2002), 1–7.

<sup>24</sup> A public policy derogation is to be found in all Europe Agreements, see, e.g., Article 53 of the EA between the Communities and Poland, and Article 54 of the Agreement EC/Czech Republic. Regarding Community workers, the public policy/public health/public security derogation is laid down in Article 39(3) EC and it has been worked out in the Public Policy Directive 64/221/EEC.

<sup>25</sup> Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 8. See also Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 21, and, with regard to the

serious nature to justify restrictions on entry to, or residence within, the territory of a Member State where this Member State does not adopt, with respect to the same conduct on the part of its *own* nationals, repressive measures or other genuine and effective measures intended to combat such conduct.<sup>26</sup>

Well, it is clear that that condition is not met in the *Jany* case. After all, we are talking about the most 'liberal' country in the whole wide world when it comes to non-economic, ethical issues such as abortion, euthanasia, the use of soft drugs and also prostitution. That is why window prostitution and street prostitution are permitted in the Netherlands and are regulated in that country at communal level.<sup>27</sup> Consequently, the Netherlands could not invoke the public-policy derogation laid down in the Europe Agreements against the Polish and Czech prostitutes, since this Member State had not adopted effective measures to monitor and repress activities of the same kind when pursued by Dutch ladies.

## 7. No Freedom of Movement for Eastern European Workers

The provisions in the Europe Agreements on the movement of *workers* are not as 'generous' as those on the freedom of establishment of self-employed persons. The Europe Agreements certainly do not establish a *freedom* of movement of EA workers. In fact, they only grant a right to equal treatment to those Eastern European nationals who are already legally residing and working in one of the Member States under national immigration law. For that group of EA workers, the core provision runs: 'Subject to the conditions and modalities applicable in each Member State, the treatment accorded to workers of [Polish, Bulgarian, etc.] nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals'.<sup>28</sup>

Association Agreement EEC/Turkey, Case C-340/97 *Nazli* [2000] ECR I-957, paragraphs 56 to 61.

<sup>26</sup> *Adoui and Cornuaille*, paragraph 8.

<sup>27</sup> Also subtly noticed by the Court: "Far from being prohibited in all Member States, prostitution is tolerated, even regulated, by most of those States, *notably* the Member State concerned in the present case" (see paragraph 57 of the *Jany* judgment).

<sup>28</sup> See, e.g., Article 37(1) of the EC/Poland Agreement, Article 37(1) of the Europe Agreement with Estonia, and Article 38(1) of the Association Agreement EC/Romania. The second paragraph of the core provision on EA workers stipulates that the legally resident spouse and children of an EA worker legally employed in the territory of a Member State, with the exception of seasonal workers and of workers coming under bilateral Agreements (unless otherwise provided by such Agreements) shall have access to the labour market of that Member State,

Because of the cautious wording used ('Subject to the conditions and modalities applicable in each Member State') there was some doubt as to whether this non-discrimination clause was directly enforceable before the national courts of the Member States. Did the Contracting Parties not intentionally make the obligation of non-discrimination *conditional* upon national legislation and practices of the Member States, precisely in order to prevent the ECJ from ruling that this non-discrimination clause could be relied upon by EA workers before the Member States' courts?

In the recent *Pokrzeptowicz-Meyer* case the Court, nonetheless, ruled that the right of equal treatment for EA workers, legally residing and working in the territory of a Member State, could be invoked directly by them before the courts.<sup>29</sup> The opening phrase ('Subject to the conditions and modalities applicable in each Member State') may not be interpreted in such a way as to allow the Member States to subject the principle of non-discrimination to conditions or discretionary limitations. Such an interpretation would render the EA workers' right to equal treatment meaningless and deprive it of any practical effect.<sup>30</sup>

As for the substantive scope of application, the prohibition to discriminate against EA workers not only covers all forms of direct discrimination but also all forms of *indirect* discrimination.<sup>31</sup> It seems quite likely that many more preliminary references will follow on this last point of how to interpret the prohibition of all forms of indirect discrimination, given the fact that the Court's case-law on indirect discrimination of Community workers is very strict,<sup>32</sup> in particular as regards the requirement that the EC worker should have her or his place of residence in the host Member State.<sup>33</sup>

Further, the *Kolpak* case, which is still pending, will probably also be of great practical importance to EA workers who legally work and reside in a Member State. The national court asks whether the prohibition of discrimination on grounds of nationality also has so-called *horizontal* direct effect. Can this prohibition also be invoked to the detriment of private individuals, such

during the period of that EA worker's authorized stay of employment. It is not unlikely that this provision on the rights of access to the labour market for family members will also initiate quite some preliminary references.

<sup>29</sup> Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer*, judgment of 29 January 2002. On this case, see H. Staples, *NTER* (2002), 81.

<sup>30</sup> *Pokrzeptowicz-Meyer*, paragraph 24.

<sup>31</sup> *Pokrzeptowicz-Meyer*, paragraph 42.

<sup>32</sup> See, for example, Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 17: unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as *indirectly discriminatory* if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

<sup>33</sup> See, e.g., Case C-57/96 *Meints* [1997] ECR p. I-6689.

as private sports associations, and not only *vis-à-vis* the public authorities of the Member States?<sup>34</sup>

### **8. How to Distinguish the Self-Employed Persons from the workers: The New *Jany* Criteria**

Since the Europe Agreements grant rights of entry and residence to self-employed EA nationals only (see paragraphs 4 and 5), but not to EA workers (paragraph 7), it is very important to know exactly how to distinguish the self-employed persons from those in a salaried capacity. The Europe Agreements are quite different from the EC Treaty in this respect. The latter confers several fundamental freedoms on nationals of the Member States at the same time, including the freedoms to work in both an employed and a self-employed capacity. It is therefore not of such great importance to examine the precise status of an economically active national of a Member State in the territory of another Member State. In this context the Court ruled that Articles 39 and 43 of the EC Treaty are based on the same underlying principles both as regards entry into and residence in the territory of the Member States by persons covered by Community law and as regards the prohibition of all discrimination against them on grounds of nationality.<sup>35</sup>

For natural persons falling within the scope of the Europe Agreements the situation is very different. Since the right of establishment applies only to persons who are genuinely and exclusively self-employed, it is necessary to determine whether the activity planned in the host Member State is an activity performed in an employed or a self-employed capacity. In particular in the *Jany* case the ECJ addresses this issue of how to separate the self-employed persons from the workers.<sup>36</sup>

The Court first emphasises the *practical possibility* for the Member States to separate the two groups right from the start. As we noticed earlier, the Europe Agreements do not in principle preclude a system of prior control

<sup>34</sup> Case C-438/00 *Deutscher Handballbund eV v Maros Kolpak* (case still pending, see OJ 2001 C 61/2). The referring court asks whether it is contrary to Article 38(1) of the Europe Agreement EC/Slovak Republic if a sports association applies to a professional sportsman of Slovak nationality a rule it has adopted under which clubs may play in championship and cup matches only a limited number of players who come from third countries not belonging to the European Communities. In the *Bosman* case (C-415/93, [1995] ECR I-4139) a similar rule limiting the number of foreign players was found to be incompatible with Article 39 EC, as far as migrant workers holding the nationality of a Member State were concerned.

<sup>35</sup> See, for example, Case C-106/91 *Ramrath* [1992] I-3351 (paragraph 17) and Case C-107/94 *Asscher* [1996] ECR I-3089 (paragraph 29).

<sup>36</sup> See the *Jany* judgment, paragraphs 63–71. See on the issue also *Gloszczuk*, paragraphs 57–60 and the *Barkoci and Malik judgment*, paragraphs 61–64.

which makes the issue of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment.<sup>37</sup> Member States thus have the possibility to check whether the EA national will really and exclusively be engaged in a self-employed activity. Both the national administrative authorities (the immigration services) and, at a later stage, the national courts can determine in each individual case, in the light of the evidence adduced before them, whether or not the economic activity is being carried on in a self-employed capacity.

Regarding the *substantive decision* (employed or self-employed?), the Court in the *Jany* case mentions three criteria which should be taken into account by the national authorities (administration, national judiciary) when deciding whether the EA national is a worker or a self-employed person. A self-employed person is somebody who works:

- outside any relationship of subordination concerning the choice of the economic activity, working conditions and conditions of remuneration;
- under that person's own responsibility; and
- in return for remuneration paid to that person directly and in full.

Specifically with regard to the economic activity at stake in *Jany*, namely prostitution, the Court ruled that this type of economic activity could be carried on both in an employed and in a self-employed capacity. It is therefore up to the national immigration authorities and the national courts to apply in each individual case the three *Jany* criteria, mentioned above, and decide whether the EA prostitute is the owner of her own business or whether her personal and working freedom is so much restricted (by her pimp) that she must be treated as a person in an employment relationship. It goes without saying that this may cause quite a lot of trouble for the national judiciary. How to check in each individual case that the prostitute is really working “outside any relationship of subordination”? And how do we know that the beneficiary of her services really paid his money “directly and in full” to the provider of the service, and not (partly) to the pimp?

Still, the national authorities will have to get used to applying the three new *Jany* criteria. The Court explicitly rejected the argument put forward by the Netherlands Government that the prostitute is always working in a salaried capacity. In the Court's view such an interpretation would be unacceptable since it would put an economic activity entirely beyond the freedom of establishment arrangements introduced by the Association Agreements. Similar problems may – and probably will – arise with respect to other types of economic activities that can also be carried on in both an employed and in a self-employed capacity. Examples are the offering of general house-

<sup>37</sup> See paragraphs 4 and 5.

hold care services (*Kondova, Barkoci and Malik*), many economic activities in the agricultural sector (in which the Dutch company *Texpol* is involved) and even the activities of doctors and medical specialists – but each time the new *Jany* criteria will have to be applied in order to separate the bosses from the workers.

## 9. Concluding Remarks

The European Court of Justice has delivered a number of well-balanced judgments on the freedom of establishment laid down in the Europe Agreements.

On the one hand, nationals of the EA countries cannot simply start to work as self-employed persons when illegally present in the territories of the Member States, and subsequently argue that for this reason they should be given a residence permit. The host Member State may then *refuse* leave to remain in its territory, even if the substantive conditions for establishment, laid down in the Europe Agreements, would have been met. The reason is that at the end of Title IV of the Europe Agreements, a so-called immigration clause has been inserted, giving the Member States the power to continue to apply their domestic rules regarding entry, stay and establishment of natural persons holding the nationality of one of the EA countries.

These nationals must enable the immigration authorities of the Member States to check beforehand whether they really fulfil the Europe Agreements' conditions for establishment, namely: (1) that the applicant shows that he genuinely intends to take up an economic activity (e.g. prostitution) as a self-employed person, (2) without at the same time entering into employment or having recourse to public funds, and (3) that he possesses, right from the outset, sufficient financial resources and has reasonable chances of success.

On the other hand, if it turns out, within the framework of the strict system of prior immigration control, that the EA national indeed fulfils the substantive criteria mentioned above, then the immigration services of the Member States *must* issue a residence permit. The Europe Agreements force them to do so and their discretion has genuinely been limited by the provisions on the right of establishment laid down in the Europe Agreements, as interpreted by the ECJ in the four cases discussed in this case report. If these conditions have been fulfilled, the Member States' immigration authorities cannot refuse the EA national from staying and working in their countries on other grounds, such as the fact that the national legal system provides for a general limitation on immigration or because there is no (economic) need for the kind of economic activities the EA national is about to carry on.



We may therefore conclude that the ECJ has succeeded in establishing a truly *free* movement of self-employed people from the Eastern European countries, candidates for EU membership. At the same time the Court has given sufficient possibilities to the current fifteen Member States to prevent EA nationals from making abuse of their newly gained freedom to migrate to the West.

