



The European Legal Forum

Forum iuris communis Europae

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Westfalen v Beate Pokrzeptowicz-Meyer

The European Legal Forum (E) 4-2002, 235 - 239

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INTERNATIONAL AND EUROPEAN LABOUR AND SOCIAL SECURITY LAW

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Comment on the ECJ decision of 29 January 2002 –
C-162/00 – *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer*

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I. Introduction

In an open, liberal society, as understood in light of the liberal tradition of natural law founded by J. Locke,¹ personal freedom consists *a priori* of the freedom of movement. Having the freedom to move beyond the borders of the nation-state in order to accept a position that one has been offered is one of the fundamental pillars not only of the European Union, but also of the emerging democratic societies of Central and Eastern Europe. This stands in contrast to former totalitarian regimes, which failed to acknowledge their own citizens' freedom to travel.² Consequently, the freedom of movement was laid down as a fundamental right in the new Eastern European constitutions that came into existence in the early 1990s.³ The different forms of the freedom of movement can also be seen as an indication of the scope of the democratisation processes taking place in the individual Central and Eastern European countries.

Nevertheless, migratory workers are confronted with new problems once having crossed the border. Integration into the native ethnical-cultural organisational forms of the guest state, which primarily have not been taken into account for immigrant workers and their family members, represents the main problem of migration. Moreover, as a matter of necessity, defensive reactions, especially of those social groups that consider themselves on the losing side as national social structures open up (insufficient level of education, social vagrants, marginalised groups, etc.). However, these integration problems

experienced by migrants do not fall under the topic of this examination.⁴

Consequently, one must differentiate between the freedom to travel, which applies to tourists who may enter Member States of the EU without a visa (travel endorsement), the freedom of establishment of self-employed persons and undertakings headquartered in Central or Eastern Europe and the freedom of movement for workers and their family members under the Europe Agreements. Crossing the outer borders of the European Union for the purposes of travel is to a large extent exclusively and uniformly regulated by the EU, due to the incorporation of the Schengen Agreement into the Treaty of Amsterdam.^{5/6} Also applicable are the relevant provisions of national laws concerning aliens in the individual EU member states.

The four basic freedoms of the EC (which also includes the free movement of workers) and further Community policies have been extended to third countries by means of Accession Agreements. On proposal of the Commission after a unani-

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¹ Locke, Concerning Human Understanding (Versuche über den menschlichen Verstand), 1689/90, Drittes Buch / Von den Wörtern, Hamburg (D), 1981.

² On the open society and criticism of the social theories of Marxism: Poppert, The Open Society and Its Enemies, Golden jubilee ed. one-volume ed., London (GB), 1995.

³ See e.g. Article 52 of the Constitution of the Republic of Poland or Article 35 of the Constitution of the Republic of Bulgaria. Regarding the fundamental issues on this before and after democratic change in the Eastern and Central European Countries in 1989/90: Stein, International Law in Internal Law: Toward Internationalisation of Central-Eastern European Constitutions?, [1994] AJIL 427 et seq., in particular 432 et seq.

⁴ On the issues of citizenship, nation state, European integration and immigration: *Habermas*, Staatsbürgerschaft und nationale Identität. Überlegungen zur europäischen Zukunft, 1st ed., St. Gallen (CH), 1991, at 5 et seq.

⁵ In 1976 the group of Trevi politically paved the way for the introduction of international cooperation. After signature of the Schengen Agreement on 14 June 1985 as concomitant public international law of the Member States, a relevant provision on a compulsory visa and standardised form of visa for third countries was implemented into the EC Treaty for the first time by means of the Treaty of Maastricht in 1992. See Article 100c EC Treaty, repealed by the Treaty of Amsterdam in 1998, Title IV on visas, asylum, immigration and other policies related to free movement of persons. On this: *Kuijper*, Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis, [2000] CMLR 345 et seq. The Treaty of Nice 2000, OJ EU 2001 C 80, at 1 et seq., has brought about procedural changes to Article 67(5) EC and reinforcement of the third pillar of the EU (Cooperation in Judicial and Internal Matters, Articles 29 and Article 31 EU), most notably in relation to the combating of crime.

⁶ In principle the nationals of Central and Eastern European countries require a visa for entry into the member states of the EU. Since 1 January 2002 all ten associated Central and Eastern European countries are exempted from the compulsory visa requirement. See Article 62(1) No. 2 lit. b i) and No. 3 EC in conjunction with Council Regulation EC No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001 L 81, at 1 et seq. The common list on the exemption of the visa requirement referred Article 1(2) is set out in Annex II. The ECJ has confirmed the necessary Community measures by member states for the control of the common external borders; see ECJ 21 September 1999 – C-378/97 – *Wijzenbeek* [1999] I-6207.

mous decision of the Council of Ministers, and with the approval of the European Parliament, the Europe Agreements were concluded with the Central and Eastern European countries as Accession Agreements under Article 310 EC read in conjunction with Article 300(2) second sentence and Article 300(3)(2) EC. The provisions in the Europe Agreements on the establishment of self-employed persons and undertakings from the Central and Eastern European countries are to be understood in accordance with the definition of establishment in Article 43(1) EC.⁷ The provision takes the form of a prohibition against discrimination and is interpreted as having direct effect in case-law of the European Court of Justice (ECJ).⁸ In accordance with the precedents of the ECJ, the right of establishment laid down in the Europe Agreements implies an ancillary right of entry and residence for nationals of the countries of Central and Eastern Europe who want to exercise industrial, commercial, craft and freelance activities in an EU member state. The regulations of the national state of entry relating to entry, stay and employment are also applicable.⁹

This differentiation appears to me as both helpful and necessary in order to focus on the main theme of this essay. Consequently, I shall primarily attempt to establish the elements of the right of free movement for workers under the Accession Agreements with the Central and Eastern European countries (the so-called Europe Agreements). The corollary rights of family members will likewise be touched upon, albeit only comparatively and as a secondary point.

II. ECJ 29 January 2002 – C-162/00 – *Land Nordrhein-Westfalen v Beata Pokrzepowicz-Meyer*: Facts and legal questions¹⁰

The Polish national Beata Pokrzepowicz-Meyer has resided in Germany since 1992. By a contract concluded on 5 October 1992 she was hired as a teacher and appointed to a half-time post as a Polish-language lecturer at the University of Bielefeld. Since her tasks were composed mainly of teaching

a foreign language, her contract of employment was for a fixed term, from 8 October 1992 to 30 September 1996, in accordance with the German framework law on higher education (*Hochschulrahmengesetz*, hereinafter HRG). Ms Pokrzepowicz-Meyer instituted an action on 16 January 1996 in the Bielefeld Labour Court (*Arbeitsgericht*) and applied for a declaration that the time limitation would by far not terminate her contract of employment on 30 September 1996. She argued that the time limitation of her employment contract was unlawful because § 57b(3) HRG could not be applied to Community nationals and was unjustifiable for lack of an objective reason. Consequently the limitation was discriminatory and in violation of the principle of non-discrimination in the first indent of Article 37(1) of the Europe Agreement with Poland.¹¹

The following questions immediately arise in relation to the facts described: Can Mrs Pokrzepowicz-Meyer invoke the relevant articles of the Europe Agreement in order to enforce directly her rights under the Association against the relevant provisions of German law? Are all her rights enumerated there, or can further labour rights and freedoms be derived from these articles? How is the time limitation of the employment contract affected if the contract has been concluded before entry into force of the Europe Agreement and the stipulated date falls after entry into force?

III. The freedom of movement under the Europe Agreements ...

The Europe Agreements with the Central and Eastern European countries contain, *inter alia*, provisions on the free movement of workers in the same style as Community law.¹² Subject to the conditions and modalities in effect in the individual EU Member States, workers from Central and Eastern Europe are granted treatment that is no less favourable than that accorded to EU nationals. In my opinion, the prescribed principle of national treatment goes beyond the principle of non-discrimination¹³ and provides for an equalisation of the nationals of Central and Eastern European countries and EU workers with regard to conditions of employment, remuneration or dismissal. It is arguable whether this enumeration is

⁷ The law on establishment in the Europe Agreements is found in Chapter II of Title IV on the movement of workers, establishment and the supply of services.

⁸ See the relevant case-law of the ECJ on the law on establishment: ECJ 27 September 2001 – C-63/99 – *Wiesław Gloszczuk and Elżbieta Gloszczuk v Secretary of State for the Home Department* [2001] I-6369 (= [2000/01] EuLF (E) 503-509; [2001] EuGRZ 602 et seq.); ECJ 27 September 2001 – C-235/99 – *Eleanora Ivanova Kondova v Secretary of State for the Home Department* [2001] I-6427 (= [2001] EuGRZ 610 et seq.); ECJ 27 September 2001 – C-257/99 – *Julius Barkoci and Marcel Malik v Secretary of State for the Home Department* [2001] I-6557 (= [2001] EuGRZ 615 et seq.; [2001] EuZW 696-703 with commentary by Weiss); ECJ 20 November 2001 – C-268/99 – *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] I-8615 (= [2000/01] EuLF (E) 509-515; [2001] EuGRZ 621 et seq.; [2002] EuZW 120-125 with commentary by Huber). In detail, on the law on establishment in the Europe Agreements and on the relevant case-law of the ECJ, *Evtimov*, Die Tragweite der Niederlassung in den Assoziierungsabkommen mit den Mittel- und Osteuropäischen Ländern (MOEL) im Hinblick auf die Rechtsprechung des ECJ, [2001] WiRO 289 et seq.; *Ott*, The rights of self-employed CEEC citizens in the Member States under the Europe Agreements, [2000/01] EuLF (E), 497 et seq.; *Lenze*, Europäische Niederlassungsfreiheit und Prostitution, [2002] EuGRZ 106 et seq.

⁹ See to this effect *Gloszczuk* (*supra* note 8), 2nd operative provision.

¹⁰ Not yet available in the official reports, published in: [2002/02] EuLF (E), 90 et seq.

¹¹ First indent of Article 37(1): Subject to the conditions and modalities applicable in each Member State – the treatment accorded to workers of Polish 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 (...)

See the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (hereinafter: EA-PL), OJ EC 1993 L 348, at 3 et seq. The Europe Agreement with Poland came into effect in accordance with Article 124(2) on 1 February 1994.

¹² See e.g. Title IV, Movement of workers, Establishment, Supply of services, Chapter I, Movement of workers, Articles 37-43 and Chapter IV of Title IV, General provisions, Article 58 EA-PL. Consequently, the system of the EC Treaty is followed, see Title III, Free movement of persons, services and capital, Chapter 1, Workers, Articles 39-42, *ibid*.

¹³ The rule of equal treatment merely prohibits the discrimination between the parties; however, it does not require any positive equalisation of the parties concerned. The ECJ also makes use of the term "rule of equal treatment" in its decision *Pokrzepowicz-Meyer*, see para. 22, *ibid*.

exhaustive. In this respect, the important rights to unemployment insurance or the freedom of association (e.g. affiliation with labour unions, exercise of labour rights) are not expressly stated. I am of the view that these labour rights and freedoms are also intrinsic to the exercise of an occupation to which nationals of Central and Eastern European countries are entitled. The rights provided for under the Europe Agreements can only be exercised however by those workers from Central and Eastern European countries who already have secured employment under national labour law and are for this reason guaranteed residence in a EU Member State. This principle of national treatment in relation to the exercise of an occupation is extended also to the close family members – spouses and children, who are legitimately resident in the area of a member state.¹⁴ The workers from Central and Eastern European countries are furthermore on a par with local workers as a result of co-ordination of the social security systems with regard to old-age, disability and survivors' insurance. They can transfer their paid insurance contributions without any restrictions and acquire the designated family allowances for their family members.¹⁵

The freedom of movement for workers primarily affords the right to EU employers to hire workers from Central and Eastern Europe on conditions that exist under collective agreements or rights under bilateral treaties between the individual EU Member States (framework agreements).¹⁶ The skilled workforce of Eastern Europe cannot move freely in order to accept an offered position, however. Thus, these mutually related factors – offer and acceptance – clash in reality. The acceptance of an offered position by an eastern European worker is thus subject to the requirements of the national state relating to entry and stay under the administrative regulations concerning aliens.¹⁷ In order to exercise employment lawfully, the potential candidate must apply for a residence permit in accordance with the national law concerning aliens. Meanwhile, other important questions arise, i.e. whether the legally employed workers from Central and Eastern European countries may unilaterally terminate the employment relationship and whether they may change employers at will.

The Europe Agreements also place positive obligations on the contracting parties to entrench the principle of national treatment in their legal orders and thus to prohibit the adop-

tion of any new discriminatory legislative measures.¹⁸ The principle can be limited by means of the public policy doctrine in the Europe Agreements.¹⁹ Such a restriction must, however, comply with the principle of proportionality and may not be applied in justification of economic difficulties experienced by the contracting parties.²⁰ In addition to this, there are transitional periods that envisage the progressive introduction of national treatment. The Europe Agreements provide for evolutionary clauses in this regard,²¹ which afford the Association Council the opportunity to improve the contents of and reduce the time needed for the establishment of free movement of workers, whereby however the employment situation within the EU must be taken into consideration.²² In its case-law to date, the ECJ has mainly concerned itself with matters regarding the Association Agreements with Turkey, more specifically the freedom of movement for Turkish workers under the Association.²³ European literature has also predominantly dealt with the freedom of movement for workers under the Association. There can be no objection to apply the knowledge gained in that connection also to the legal examination of the Associations with the Central and Eastern European countries in general and in particular the freedom of movement for the workers and their family members.²⁴

¹⁴ Second indent of Article 37(1) EA-PL:

The leave to enter for family members is issued by the public authority for aliens of the Member States in accordance with the national law concerning aliens in the light of Article 62 EC and not under the Europe Agreements.

¹⁵ See to this effect Article 38 EA-PL.

¹⁶ The Europe Agreements allow the continued existence of those bilateral framework agreements between the individual Central and Eastern European countries and the EU Member States, insofar as they provide for a favourable treatment of the workers, see the so-called savings clause in Article 40 EA-PL.

¹⁷ See e.g. Paragraph 1 of the Austrian Bundeshöchstzahlüberziehungsverordnung (Federal regulation on exceeding the maximum number of workers, BHZÜV), ÖBGBl. No. 763/95, and the maximum number of foreign workers fixed annually by this regulation. In 1996, e.g., approximately 9500 workers from Poland requiring a permit were active in Austria per 1000 residents; by way of comparison: in February 2002 it was 10 075. The statistics for Hungarian workers are similar: 9 000 in 1996 compared to 11 253 in February 2002, source: Austrian Chamber of Commerce, 2002.

¹⁸ See Article 44(4) and Article 45(1) EA-PL.

¹⁹ See e.g. Article 35 EA-PL. This article provides for a reservation on the grounds of public policy, security or health, and moreover, also for the protection of national treasures of artistic, historical or archaeological value or for the protection of intellectual, industrial or commercial property.

²⁰ The principle of proportionality.

²¹ See Article 41 EA-PL. On the secondary law of Associations see *Weber*, Art. 238, in: *von der Groeben/Thiesing/Ehlermann*, Kommentar zum EU-/EG-Vertrag, 5th ed., Baden-Baden (D), 1997, at 748 et seq.; also *Gärtner*, Zu Inhalt und unmittelbarer Anwendbarkeit der Europa-Abkommen der EG mit den ostmittleuropäischen Staaten, [1993] ROW 332 et seq.

²² On the limited opportunities to press ahead with the association of Central and Eastern European countries by means of Association Councils, see *Evtimov*, Rechtsprobleme der Assoziierung der MOEL und der Voraussetzungen für ihren Beitritt zur EU, 1st ed., Bern (CH), 1999, at 73 et seq. The competencies of the Association Councils to close loopholes, which are not provided for in the Europe Agreements, distinguishes the Associations of the Central and Eastern European countries from the Turkish Association Agreement in a central field. In the Turkish Association Agreement, it was from the outset envisioned that the further development of the Association would take place on the basis of secondary Association. On how the decisions of the Association Council Turkey E(E)C are then inconsistently interpreted by the ECJ, see e.g. ECJ 10 September 1996 – C-277/94 – *Taflan-Met* [1996] I-4085 on the one hand and ECJ 29 May 1997 – C-386/95 – *Eker* [1997] I-2697 on the other hand. On this *Zuleeg*, Das Urteil Taflan-Met des Europäischen Gerichtshofs, [1997] ZAR 170 et seq.

²³ See the decision as early as ECJ 24 November 1977 – Case 65/77 – *Razanatsimba* [1977] at 2229 as *obiter dictum* for the relevant ensuing case-law of the ECJ. See ECJ 30 September 1987 – Case 12/86 – *Demirel* [1987] at 3719. Regarding the direct applicability of the decisions of the Association Councils, see ECJ 20 September 1990 – C-192/89 – *Sevince* [1990] I-3461, paras 14 and 15, confirmed in ECJ 16 December 1992 – C-237/91 – *Kazim Kus* [1992] I-6781 et seq. See likewise the latest decisions given by the ECJ in connection with the free movement of Turkish workers ECJ 14 March 2000 – C-102/98 and C-211/98 – *Kocak and Örs*, [2000] I-1287; ECJ 16 March 2000 – C-329/97 – *Ergat* [2000] I-1487; ECJ 11 May 2000 – C-37/98 – *Savas* [2000] I-2927.

²⁴ On this subject, see the fundamental publications in European literature, *Krück*, Die Freizügigkeit der Arbeitnehmer nach dem Assoziationsabkommen EWG/Türkei, [1984] EuR 289 et seq.; *Hailbronner*, Die Freizügigkeit türkischer Staatsangehöriger nach dem Assoziierungsabkommen EWG/Türkei, [1984] EuR 54 et seq.; *Nolte*, Freizügigkeit nach dem Assoziationsvertrag EWG-Türkei: Auslegungskompetenz,

IV. ... and the case-law of the ECJ

In accordance with settled ECJ case law,²⁵ a provision of a convention entered into with third countries is directly applicable if, taking into account its wording and the nature and purpose of the convention, it contains a clear obligation that is not subject to the enactment of any further national legislation. In the present case it is a matter of establishing a sufficiently clear and unequivocal obligation to treat a Polish foreign language teacher equal to national citizens. The ECJ determined in this regard that the rule of equal treatment laid down a clear and precise obligation to produce a specific result and, by its nature, could be relied on by individuals before the courts of Member States without being subject to any further implementing measures. Nationals of the Central and Eastern European countries who are legally employed may therefore rely on the rule of equal treatment against discriminatory provisions of national legislation, since these provisions are not applicable to the facts of the case, according to ECJ case-law. The national courts must examine and establish both indirect and direct discriminations in each individual case. Conflicting national regulations of the law applicable to aliens and labour law are thus not void; however, they are displaced by Association law, which enjoys priority application. This provision of the Europe Agreements is applicable to fixed-term employment contracts, if the stipulated expiry date occurs after entry into force of the Agreements.

The asymmetry of rights and obligations, which the Europe Agreements afford or impose on the contracting parties (the EC and the Member States on the one hand and the individual countries of Central and Eastern Europe on the other hand), as the case may be, is aimed primarily at promoting the economic development of the Central and East European states. Nevertheless, the ECJ does not accord the necessary weight to this asymmetry of rights and obligations to exclude the direct application of the individual provisions of the Agreements.^{26/27}

unmittelbare Anwendbarkeit und Familiennachzug, [1987] ZaöRV 755 et seq.; *Rumpf*, Freizügigkeit der Arbeitnehmer und Assoziation EG-Türkei, [1993] RIW 214 et seq.; *Huber*, Das Kus-Urteil des EuGH: Weitere aufenthaltsrechtliche Sicherung für türkische Arbeitnehmer, [1993] NVwZ 246 et seq. and, in particular, 248, with regard to the increased protection of Turkish workers against deportation; *Vedder*, Rechtswirkungen von Assoziationsbeschlüssen – Kus-Entscheidung des EuGH, [1994] EuR 202 et seq.; *Yagli*, Die Rechtsstellung der türkischen Arbeitnehmer in der EU – im Lichte der Rechtsprechung des EuGH, [2000] ZEuS 507 et seq. with further references.

²⁵ See to this extent the fundamental decision ECJ 26 October 1982 – Case 104/81 – *Kupferberg* [1982] at 3641, para. 23: "(...) whether such a stipulation is unconditional and sufficiently precise to have direct effect must be considered in the context of the Agreement of which it forms part. In order to reply to the question on the direct effect (...) it is necessary to analyse the provision in the light of both the object and purpose of the Agreement and of its context."; ECJ 16 June 1998 – C-162/96 – *Racke* [1998] I-3655, lastly ECJ 4 May 1999 – C-262/96 – *Sürül* [1999] I-2685, para. 60; *Gloszczuk* (*supra* note 8), para. 30.

²⁶ *Gloszczuk* (*supra* note 8), para. 33: "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 a Polish 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."

²⁷ *Gloszczuk* (*supra* note 8), para. 37: "Nor is the finding that Article 44(3) of the Association Agreement is directly applicable invalidated by an examination of Article 58(1) thereof, which provides only that the authorities of the Member States remain competent to apply, while

Moreover, the ECJ views it as essential that the Europe Agreements be interpreted in accordance with the aim and purpose of the EC Treaty.²⁸ This speaks in favour of a definition of the provisions of the European Agreements parallel to the EC Treaty. The issue of direct effect is somewhat different, in those instances where such a parallel with the EC Treaty was not envisioned, as is the case in some of the treaties under international law (e.g. in the case of bilateral treaties with Switzerland), or not foreseen (with accession of the EC to the WTO Agreement). In spite of the wide consensus in European literature,²⁹ according to which there is clear support for the direct effect of individual WTO provisions, the ECJ is in no way willing to allow the direct application of the provisions here.

Furthermore, the freedom of movement for the nationals of Central and Eastern European countries is – unlike the freedom of movement in the EU – a bundle of original rights of workers as well as the derivative rights of family members who have already gained legal entry and taken up a first, legitimate employment. Only workers who have obtained an entry and residence permit from the public authority for aliens in the individual member states are considered to have gained legal entry.³⁰ As opposed to the case-law of the ECJ on the right of establishment in the Europe Agreements, entry and stay are not to be understood as a compendium of the free movement of workers from the countries of Central and Eastern Europe. It follows that the Agreements do not touch upon employment that is not self-employment in this regard. Under ECJ case-law, the rule of equal treatment with respect to the employment conditions in the EU member states thus applies only to those workers who are legally employed. By its deci-

respecting the limits laid down by the Association Agreement, their own national laws and regulations regarding entry, stay and establishment. Consequently, Article 58(1) does not concern the Member States' implementation of the provisions of the Association Agreement governing establishment and is not intended to make implementation or the effects of the obligation of equal treatment laid down in Article 44(3) subject to the adoption of further national measures."

²⁸ See to this effect *Evtimov* (*supra* note 22), at 56. For a different opinion, see *Gilsdorf*, Die Außenkompetenzen der EG im Wandel – Eine kritische Auseinandersetzung mit Praxis und Rechtsprechung, [1996] EuR 164, who has put forward the asymmetries in the Europe Agreements as an argument against direct effect.

²⁹ For controversial discussions on the direct effect of WTO provisions, see for instance, *Schroeder/Selmayr*, Die EG, das GATT und die Vollzugslehre oder: Warum der EuGH manchmal das Völkerrecht ignoriert, [1998] JZ 344 et seq.; *Epiney*, Zur Stellung des Völkerrechts in der EU, [1999] EuZW 5 et seq.; *Berrisch/Kamann*, WTO-Recht im Gemeinschaftsrecht – (k)eine Kehrtwende des EuGH, [2000] EWS 89 et seq. For case-law of the ECJ, see ECJ 23 November 1999 – C-149/96 – *Portugal v Rat* [1999] I-8395, paras 43-46, in addition *Rosas*, Urteilsbesprechung, [2000] CMLR 797 et seq.; *Hilf/Schorkopf*, WTO und EG: Rechtskonflikte vor dem ECJ, [2000] EuR 74 et seq. In some cases GATT law is afforded a so-called indirect effect, see *Krenzler*, in: *Grabitz/Hilf*, Das Recht der Europäischen Union, Kommentar, 13th supplement, Munich (D), 1999, para. 63 et seq. In cases where secondary Community law expressly refers to WTO law, the ECJ examines whether this norm is compatible with GATT/WTO law, so ECJ 22 June 1989 – Case 70/87 – *Fediol* [1989] at 1781, paras 19-22; ECJ 7 May 1991 – C-69/89 – *Nakajima* [1991] I-2069, paras 29-32, lastly ECJ 16 June 1998 – C-53/96 – *Hermés* [1998] I-3603, paras 34-44. This can also be seen as a generation problem, in this regard, see *Cottier*, A Theory of Direct effect in Global Law, in: *von Bogdandy/Mavroidis/Mény*, European Integration and International Co-Ordination, FS Ehlermann, Dordrecht (NL), 2002, at 99 et seq.

³⁰ The nationals of a Member State, on the other hand, have an automatic right to a residence permit for the exercise of their activities in another Member State, see in this regard, ECJ 8 April 1975 – Case 48/75 – *Royer* [1976] at 497.

sion in *Pokrzeptowicz-Meyer*, the ECJ has also expressly confirmed on a European level the pre-existing case-law of some member states concerning foreign language teaching staff from third countries.³¹

V. Outlook

If one compares the freedom of movement for workers from Central and Eastern European countries under the Associations with the freedom of movement applicable to EU citizens, fundamental differences are revealed: The freedom of movement for workers under the EC Treaty includes the right to apply for the position that is actually being offered; the right to move freely in relation to acceptance of the anticipated job; the unrestricted right to stay in the sovereign territory of the relevant state for the duration of the employment and, after termination thereof, the right to remain in that territory.³²

In accordance with the freedom of movement for workers embodied in the EC Treaty,³³ the Europe Agreements provide for the equal treatment of legally employed workers from the countries of Central and Eastern Europe. In that regard both direct and indirect discrimination is prohibited. Thus, for example, the first indent of Article 37(1) of the European Agreement with Poland provides that only Polish workers who are *legally employed* within the sovereign territory of an EU member state are accorded treatment, as regards working conditions, remuneration or dismissal, which is free from any discrimination based on nationality. The spouses of these workers enjoy corollary rights of access to the labour market, insofar as they are legally resident with the worker in the member state.³⁴ They are treated the same as their legally employed spouses in relation to working conditions.³⁵ In the relevant case-law in the matter of *Pokrzeptowicz-Meyer*, the ECJ has now confirmed a logical and, as was to be expected, direct effect of this provision. Consequently, the legally employed Polish foreign language teachers may take action against discriminatory national provisions of member states. However, the Member States will continue to apply the provisions on entry and residence under the national law applicable on aliens and not under Association legislation. This must also to the same extent be applicable to the other Europe Agreements with the Central and Eastern European countries, since

those were also drawn up in accordance with a common scheme.

It remains to be seen whether additional positive rights under the European Agreements may be derived from the case-law of the ECJ for workers from Central and Eastern European countries who have terminated their employment after being legally employed in the member states. In my opinion, those workers who have paid their social and retirement contributions up to the point of retirement must be entitled to a right to stay.

Under the provisions of the latest Association Agreements concluded with the Balkan countries (i.e. Albania, Macedonia and Croatia; in this regard, negotiations are being conducted with Serbia), the ECJ case-law concerning the principle of national treatment should apply to the same extent to the legally employed workers of these countries. However, the nationals from the Central and Eastern European countries do not enjoy by far the freedom of movement in terms of the EC Treaty; in particular, the Member States continue to apply the provisions on entry and stay, which are not interpreted as a part of the freedom of movement under the Associations. By means of the latest case-law delivered by the ECJ, the scope of EU citizenship, as provided for in the EC Treaty, has acquired a new dimension.³⁶

³¹ See to this effect the case-law of the Italian Constitutional Court, n. 249 of 16 June 1995, in connection with foreign language teachers from third countries (*insegnanti extracomunitari di lingua straniera*). The Italian Constitutional Court has decided the case without an order for reference to the ECJ under Article 234 EC, on this *Tesouro*, *Diritto Comunitario*, 2nd ed., Padova (I), 2001, at 420, footnote 23, "(...) fino pertanto ad estendere la portata della pronuncia della Corte del Lussemburgo addirittura ai cittadini extracomunitari!"

³² See the primary law regulation on the free movement of persons in Article 39(3) lit. a to c EC Treaty.

³³ See *Pokrzeptowicz-Meyer* para. 34 in conjunction with ECJ 20 October 1993 – C-272/92 – *Spotti* [1993] I-5185, para. 14.

³⁴ Furthermore, the question must be answered whether the marriage must indeed still exist, or whether also partners who have separated are to be subsumed under the term family members in terms of the Europe Agreements.

³⁵ The right to reciprocal equal treatment in the second indent of Article 38(1) read together with Article 38(2) EA-PL.

³⁶ Lastly, on this, see ECJ 20 September 2001 – C-184/99 – *Grzelczyk* [2001] I-06193 (= [2001] EuGRZ 492 et seq.; [2002] EuZW 52-56 with commentary by *Obwexer*), para. 31: "Union citizenship is designed to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."

ECJ 4 June 2002 – C-164/00 – Katia Beckmann v Dynamco Whicheloe Macfarlane Ltd
Directive 77/187/EEC¹ – Article 3 – Safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses – Conditions for applying exceptions to maintenance of rights – Benefits provided for in the event of dismissal

Early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of Council Directive 77/187/EEC on the approximation of the laws of the

¹ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, at 26, hereinafter 'the Directive').