ARTŪRS SPĪGULIS

Freedom of establishment: A means of overcoming restrictions on free movement of persons

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The RGSL Working Papers serve the double purpose of introducing current research at RGSL and introducing new authors, including graduates from the RGSL Master's Degree in International and European Law.

The present paper introduces Arturs Spīgulis, who graduated in 2004 with a Masters Thesis on the freedom of establishment as a possible means of overcoming restrictions on free movement of employees. Arturs Spīgulis is presently working as an assistant attorney-at-law in Law Offices “Heidelberga”, and the working paper is based on his work with the thesis.

The publication of the present paper follows the accession last year of the Baltic States into the European Union. One of the difficult issues in accession has been the deferred right of free movement for workers.

On the contrary, the right of free establishment has applied from the first day of accession, and the work by Arturs Spīgulis explores the limits of establishment as an alternative to employment.

The paper presents a critical analysis of the classic jurisprudence of the European Court of Justice in the field of establishment, together with a comprehensive review of the latest developments in this field of law, and proposes conclusions on the practical application of EU law on working relations that cross the border between employment and establishment.

RGSL is proud to present this academic contribution to the development a clearer understanding of the implications of free movement, which is one of the fundamental rights of the European Union.

Peter Gjørtler

Senior lecturer of EU Law at RGSL

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Introduction

On 1 May 2004 the European Union was experiencing its biggest enlargement ever with ten acceding countries expanding the number of Member States (MS) to 25. However, before the actual accession took place, a question, to restrict or not to restrict, had to be answered by the governments or parliaments of the MS. The question concerned access to the labour market to workers from the ten new MS after 1 May 2004. Only three, namely Ireland, the United Kingdom, and Sweden, decided not to limit access to their labour markets.

This was a disappointment for many in the acceding States because in 2002, during accession negotiations, only Germany and Austria insisted on imposing restrictions on free movement of employed workers from the new MS. Legally, restrictions can be imposed for up to seven years. The reasons why the EU-15 MS opted for restrictions are twofold: worries that citizens from new MS will claim generous social benefits, and potential influx of cheap labour, making it difficult for EU-15 nationals to find work. These forecasts have materialized only partly: four months after accession, Sweden - arguably the most socially oriented MS - had seen no extra burden on its social security budget[1], while some States reported that the number of work permits issued to workers from the new EU MS had doubled.[2]

How grave are restrictions on free movement of employed workers? How well justified are they? How do they fit together with such key EU law principles as citizenship and non-discrimination? Many other questions can be asked concerning restrictions on free movement of workers and many of these will be left unanswered for political reasons. However, one will be answered in this article: what is an alternative for citizens from new MS who wish to work in the territory of those MS that have opted to apply restrictions on free movement of employed workers? Such an alternative indeed exists and is viable because the doors were not closed completely – while restrictions were imposed on free movement of employed workers, they did not cover freedom of establishment. But freedom of establishment means also self-employment, while self-employment means working, and simple logic suggests that someone who works is a worker!

However, in EU law simple logic is not always applicable. That is indeed the case concerning alternatives to free movement of employed workers – self-employment as

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[1] L. Kirk, "Sweden Sees No Sign of 'Social Tourism' After EU Enlargement" (25.08.2004.) EUobserver. Available on the internet at http://www.euobserver.com/?aid=17139. Last visited August 28, 2004.

[2] These States are Ireland, the Netherlands, and Sweden, the increase in Sweden being 1000 work permits as compared to the same period last year, see L. Kirk, "Sweden: Sharp Rise in

part of the right of establishment. This is subject to many conditions and thresholds, the substance of which unfortunately has not been harmonized at the EU level, hence left for MS to decide. But what is left for MS to decide is not always is decided in favour of an ever-closer Europe.

The main purpose of this article is to examine the development of freedom of establishment in EU law. More particularly, the author will focus on the interaction between employment and self-employment and try to answer the question whether and to what extent self-employment can actually replace employment. This article aims to show that economic development and changes in the labour market have created a situation where the difference between employment and self-employment has become vague and needless. The inherent flexibility of self-employment is in line with underlying principles of free movement in the EU and therefore can be very important for citizens from the new MS who after 1 May 2004 wish to work in the EU-15 MS. Although they cannot work as employed workers due to restrictions imposed by the majority of MS, they can freely exercise their right of establishment and pursue an intended economic activity as self-employed persons thus benefiting from establishment's broad scope of applicability. Hence it will be demonstrated that the restrictions on free movement of workers are not absolute and there actually exists free movement of workers, provided that they are self-employed workers.

Applications From New EU Workers" (20.09.2004.) EUobserver. Available on the internet at http://www.euobserver.com/?aid=17326. Last visited September 23, 2004.

I Changing nature of the freedom of establishment

It may seem that the scope of freedom of establishment has already long ago been well defined in the EC Treaty and by the European Court of Justice (ECJ) so that no need exists to revert to this issue. Indeed, O'Leary approaches freedom of establishment very easily, stating that "the Court has had little difficulty in defining what is entailed by the notion of establishment".[3] However, in the fairly recent *Jany* case Advocate General (AG) Leger undertakes an in-depth analysis as to whether prostitution is an activity pursued in a self-employed capacity and so can be considered to fall within the scope of freedom of establishment, implying that establishment can be defined further.[4]

In cases concerning definition of establishment, the regular issue has been how to draw a line between establishment and services so as to decide which Treaty article applies.[5] Since the underlying objective of this article is to compare employment and establishment, for the sake of this discussion freedom of establishment is defined from the perspective of free movement of workers. Hence, the outcome will be freedom of establishment defined somewhere between provision of services and free movement of workers, taking into account recent developments in this field. This now leads us to significant features of freedom of establishment "as it stands today", including weaknesses of this definition and possible changes in future.

1. Freedom of establishment under the EC Treaty. Gradual developments and revolutionary changes

Article 43 EC Treaty refers to both natural and legal persons.[6] This article focuses on movement and establishment of self-employed persons, rather than companies. Thus the relevant parts of Article 43 are the "right to take up and pursue activities as self-employed person" and "to set up and manage undertakings" from the perspective of natural persons and not to set up agencies, branches, or subsidiaries that more apply to legal persons. It needs to be noted that the first paragraph of Article 43 mentions prohibitions whilst the second confers rights on persons, albeit limited by conditions of the MS where the establishment is effected.[7] Surprisingly enough, from the perspective of a person that exercises the right of establishment, the threat to successful exercise of

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[3] S. O'Leary "The Free Movement of Persons and Services", in P. Craig, G. de Burca (eds), The Evolution of EU Law, Oxford, Oxford University Press, 1999, p. 396.
[4] Opinion of Mr Advocate General Léger delivered on 8 May 2001 in Case C-268/99 Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001] ECR I-8615, paras. 134-159.
[5] P. Craig, G. de Burca, EU Law. Text, Cases and Materials, 3rd Ed., New York, Oxford University Press, 2003, p. 766.
[6] Treaty Establishing the European Community (Consolidated Version), March 25 1957, OJ 1997 C 340/145 [hereinafter EC Treaty], Art. 43.

establishment comes from the second paragraph of Article 43. This is so because the prohibition included in the first paragraph is unambiguous and should be considered as a *per se* violation if applied by the MS. However, the second paragraph refers to MS discretion to apply conditions on exercise of the right of establishment. This discretion, in turn, could lead to a result where the right of establishment becomes ineffective because of MS conditions. This issue is explored in more detail when discussing the practice of national authorities while distinguishing between self-employed and employed persons.

As with many provisions of the EC treaty, the scope and application of Article 43 has been developed through ECJ case law. Since freedom of establishment does not exist in a vacuum, much of its substance is based on the ECJ's interpretation of the other two freedoms, namely free movement of workers and free movement of services. However, no consideration of development of the right of establishment should disregard secondary legislation, which actually makes freedom of establishment operative. This leads us to discussion of the impact of legislative and judicial branches of the Community on development of freedom of establishment, which will be discussed further respectively.

1.1. Freedom of establishment as perfected by secondary legislation

The Treaty provisions on the freedom of establishment essentially constitute declaratory norms, yet the secondary legislation, expressly foreseen in Article 44, fleshes out these declaratory norms and facilitates individuals' right of establishment.[8] Two main divisions under which secondary legislation on freedom of establishment can be categorized are: first, concerning entry and residence of persons seeking to exercise freedom of establishment in a host MS and second, concerning mutual recognition of qualifications and diplomas.

The Court and many legal scholars[9] call these derivative rights "corollaries of establishment", which is generally a correct conclusion. However, considering how (in) effective would be freedom of establishment without these two categories of implementing rules, the author would argue that entry, residence and mutual recognition of qualifications constitute rather **prerequisites of establishment** than mere corollaries. It is a common sense conclusion that if one cannot enter a host MS then it is impossible to exercise freedom of establishment. The same applies to mutual recognition – if a person

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[7] Supra note 5, *Craig & de Burca*, p. 772.

[8] Supra note 6, EC Treaty, Article 44 (1) provides: "In order to attain freedom of establishment as regards the particular activity, the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall act by means of directives".

[9] See for instance the judgment in Case C-63/99 the Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk [2001] ECR I-6369, also N. Reich, C. Goddard, K. Vasiljeva, Understanding EU Law. Objectives, Principles and Methods of Community Law, Antwerp, Intersentia, 2003, p. 80.

with a lawyer's diploma is not considered a lawyer in any other MS, then how can that person become established there as a lawyer? Thus, so-called corollaries in fact constitute the very basis of establishment, considerably facilitating exercise of freedom of establishment. Because of their importance, they will be examined in more detail here.

Entry and residence

The rights and conditions in relation to entrance and residence for persons exercising freedom of establishment are laid down in a number of directives and regulations. Possibly the most important of these is Directive 73/148/EEC, which today applies throughout the EU-25, imposing a clear obligation on EU MS to **abolish any kind of restrictions** put on nationals of a MS who are established or who wish to establish themselves in another MS in order to pursue activities as self-employed persons.[10]

The contribution of Directive 73/148/EC to development of establishment can not be underestimated, since the right of entry into the host MS "…merely on production of a valid identity card or passport" was a major step forward and truly stands for abolition of restrictions on freedom of establishment.[11] Crucially, the directive applies not only to those seeking establishment in another MS but also to their families as defined in Article 1,[12] thus being similar in application to the famous regulation 1612/68.[13] In fact, the provisions of Directive 73/148/EC cover an even broader range of persons than Regulation 1612/68.

Bearing in mind the absence of a transitional period for Directive 73/148/EEC *vis-à-vis* new MS, its provisions are a perfect tool for "new Europeans" seeking to work in any of the EU-15[14] states. And this is part of the beauty of establishment because nationals from the EU-10[15] can now invoke their unrestricted rights to establishment and take up

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[10] Council Directive 73/148 of 21 May 1973 on the Abolition of Restrictions on Movement and Residence Within the Community for Nationals of Member States with Regard to Establishment and the Provision of Services, (1973) OJ L 172 p. 14.

[11] Ibid., Article 3 (1) provides: "Member States shall grant to the persons referred to in Article 1 right to enter their territory merely on production of a valid identity card or passport".

[12] Supra note 10, Article 1 states that the Member States shall abolish restrictions on the movement and residence of: (1) nationals of a Member State who are established or wish to establish themselves in another Member State in order to pursue activities as self-employed persons; (2) Nationals of Member States that wish to go to another Member State as recipients of services; (3) the spouse and the children under 21 year of age of such nationals; (4) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them.

[13] Council Regulation 1612/68 of 15 October 1968 on Freedom of Movement for Workers Within the Community (1968) OJ L 257, Article 10 provides a definition of workers' families that have the right to install themselves with a worker who is from a Member State and is employed in another Member State, namely: (1) worker's spouse and descendants who are under 21 or dependants; (2) dependant relatives in the ascending line of the worker and his spouse.

[14] By EU-15 are meant those Member States that were EU members until 1 May 2004.

[15] By EU-10 are meant those states that became EU Member States since 1 May 2004. However, this paper will focus only on the CEEC, namely the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, leaving aside Malta and Cyprus for the reasons that their

activities as self-employed persons in the territory of the EU-15 MS. And once they have established or merely "wish to establish themselves in another MS" they can invoke their unrestricted rights under Directive 73/148/EC and claim right of entry and residence in the host MS not only for themselves but also for a number of relatives. Nevertheless, the definition of family members is the sole common feature of Regulation 1612/68 and Directive 73/148/EEC, since in other respects Directive 73/148/EEC is almost equivalent to Directive 68/360 on the abolition of restrictions on Movement and residence for workers and their families[16].

In a more general context, this means that while the rights of nationals from the EU-10 to the free movement of workers are restricted by suspending the applicability of the secondary legislation therein[17], nationals from the EU-10 can enforce essentially similar rights to those enshrined in secondary legislation on movement of workers by relying on their right to establishment. While there is no direct equivalent act to the generous regulation 1612/68, Barnard argues that this gap can be filled by article 12 of regulation 1612/68, which should be extended to the self-employed and their families.[18]

This incoherence in applying secondary legislation to the nationals of the EU-10 can be explained by the ambiguous character of freedom of establishment. On the one hand, it concerns natural persons and the author argues that self-employed persons exercising establishment are workers too, so that it is natural that the Community legislator conferred similar rights to nationals that are employed workers and established workers, thus avoiding blame for discrimination. On the other hand, establishment concerns legal persons or companies and since companies from the EU-10 pursuing activities in the territory of the EU-15 was considered as a lesser harm than workers, no restrictions were imposed on establishment. Yet the result is that establishment can be very flexible and go further than expected, essentially replacing employment, hence ingenious nationals from the EU-10 can work in the territory of the EU-15 as *de facto* workers claiming that they are merely exercising their duly authorized right of establishment.

The spirit of Directive 73/148/EC is further extended in timing by Directive 75/34, which ensures that those that have pursued activities as self-employed persons in host MS, have a right to remain in that MS also after they have ceased to perform their

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Acts of Accession are in many ways different from the Acts of Accession signed by the eight CEEC, especially in regard to free movement provisions.

[16] Council Directive 68/360 of 15 October 1968 on the Abolition of Restrictions on Movement and Residence Within the Community for Workers of Member States and Their Families, (1968) OJ L 257, p. 13.

[17] J. Aizsils, "VIII Pielikums", in L. Medin, M. Brizgo (eds), Pievienošanās Eiropas Savienībai. Līgums (Izvilkumi) un Komentāri, Rīga, Tiesu namu aģentūra, 2003, pp. 1588-1590.

[18] C. Barnard, EC Employment Law, 2nd Ed, Oxford, Oxford University Press, 2000, p. 166, see also Case C-337/97 C.P.M. Meeusen v Hoofdirectie van de Informatie Beheer Groep [1999] ECR I-3289, para. 28.

activities as self-established.[19] Reading Directive 73/148 in conjunction with Directive 75/34, we get a full circle: right to enter, to reside, while pursuing self-established activities, and right to remain in the territory after these activities have been completed or ceased. This logical and objective chain of rights somewhat loses its significance when considered against Article 1b of Directive 73/148/EC, which provides that service recipients can also enter and reside in other MS. In other words, a Community national does not necessarily have to be a worker or exercise the right of establishment in order to enter and reside in the host MS; it is enough to claim that he/she intends to receive services in the other MS. This principle has been reaffirmed by the ECJ in a line of cases,[20] yet abstaining from defining the scope of services received, thus implying a broad interpretation, which consequently is worth ironic remark that anyone using public transportation or catering "services" in a MS other than their home MS can enter and stay there.

Mutual recognition of qualifications

Another very important principle concerning freedom of establishment is mutual recognition of qualifications. Even though this principle is equally applicable to free movement of workers and services, it becomes crucial in the field of establishment when EU nationals wish to register with professional bodies in another MS where they will be practicing.[21] Generally the issue of mutual recognition is far from being completely resolved and harmonized, which is one of the major obstacles for further development of freedom of establishment.

However, the most influential legislative measure in this regard has been Council Directive 89/48 on systems for the recognition of higher-education diplomas.[22] This is a general directive with broad application in contrast to many "sectoral" directives, which established a common system of recognition of diplomas. In essence, Directive 89/48 laid the foundations of the principle that individuals who complete professional education or training in their home MS may not be denied the right to take up that profession in the host State. Yet it also did not mean automatic permission to practice the profession – a number of conditions should be fulfilled and several of them were subject to MS authorities, a factor that significantly impeded the core values of the mutual recognition principle.

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[19] Council Directive 75/34 of 17 December 1974 Concerning the Right of Nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, (1975) OJ L 014.

[20] See particularly Joined Cases 286/82 and 26/83 Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro [1984] ECR 377 and Case 186/87 Ian William Cowan v. Le Tresor Public, [1989] ECR 195.

[21] Supra note 5, *Craig & de Burca*, p. 777.

[22] Council Directive 89/48/EEC of 21 December 1988 on a General System For the Recognition of Higher-education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration, (1989) L 019.

The scope of Directive 89/48 was subsequently broadened by Council Directive 92/51, which concerns education and training other than that under the previous directive – certificates and diplomas issued after completion of post-secondary courses and qualified their holder to assume a regulated profession.[23] The third directive of a similar nature, Directive 99/42 establishing a mechanism for the recognition of qualifications, replaced the previous directives in particular sectors such as those concerning architects, pharmacists, doctors or lawyers and went a step further than the other two by requiring not only a diploma or qualification but also practical experience.[24]

The general problem that applies to virtually all legislative measures in the field of mutual recognition is over-involvement of national authorities in a recognition process that frequently leads to protectionist attitudes.[25] Another issue for a long period has been qualifications obtained outside the EU, the general practice in such cases being non-recognition. However, in the fairly recent *Hocsman* case the ECJ ruled that authorities should take into account **all** education and experience obtained by an EU national, obtained both within the territory of the EU and outside it.[26] As to ECJ case law, it is relevant to consider the contribution of the Community's judicial organ to the development of the right to establishment.

1.2. Jurisprudence of the European Court of Justice

As with many issues in EU law, the right of establishment has also been defined broadly by the ECJ thus extending the scope of Article 43 and it would not qualify as exaggeration to say that the Court has acted as legislator concerning freedom of establishment. Nevertheless, when reviewing the case law on the right to establishment the watershed case is the *Gebhard* judgment, perhaps the most significant recent case in the field of establishment, which *inter alia* has reiterated the definition of establishment, namely: "the concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a MS other than his State of origin and to profit therefrom".[27]

The most significant feature of *Gebhard* was the ECJ's manifest indication that all freedoms under the EC Treaty are to be interpreted uniformly and even non-

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[23] Council Directive 92/51/EEC of 18 June 1992 on a Second General System For the Recognition of Professional Education and Training to Supplement Directive 89/48/EEC, (1992) OJ L 209.
[24] Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 Establishing a Mechanism For the Recognition of Qualifications in Respect of the Professional Activities Covered by the Directives on Liberalisation and Transitional Measures and Supplementing the General Systems for the Recognition of Qualifications, (1999) OJ L 201.
[25] Supra note 5, *Craig & de Burca*, p. 780.
[26] Case 238/98 Hocsman v. Ministre de l'Emploi [2000] ECR I-6623.
[27] Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 25; first provided in Case 2/74 Jean Reyners v Belgian State [1974] ECR 631, para. 21.

discriminatory hindrances to exercise of any freedom are against the spirit and rules of free movement.[28] In other words, the Court decided to apply its judicial activism equally with regard to free movement of goods, freedom to provide services, freedom of establishment, and free movement of workers, so as to create a single approach to free movement rules. However, for the sake of this article, the most important is the formula clarified in *Gebhard* with the aim to catch national measures hindering exercise of fundamental freedoms, even if they are non-discriminatory measures. This by all means was a legislative step by the ECJ since Article 43 EC Treaty speaks only about discriminatory measures.

Thus, in order to see whether the national rules in question are compatible with Article 43, the following need to be determined:

- Are the national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty?
- Are those measures applied in a non-discriminatory manner?
- Are they justified by imperative requirements in the general interest?
- Are they proportionate?[29]

By establishing this four-step test, the Court started its new approach regarding establishment, which shortly afterwards was also extended to free movement of workers by the *Bosman* judgment.[30] The Court moved towards a single approach to the free movement rules by *Cassis de Dijon* on goods, *Gebhard* on establishment, *Bosman* on workers and *Alpine Investments* on services.[31]

The corollaries of establishment have been discussed already in the section on secondary legislation. However, there are features of establishment that have developed through the case law of the ECJ. Yet, the issues at the Court have been reshaped – the essential question is not whether entry and residence are corollaries of establishment, but rather on the scope and *ratio personae* of those corollaries. This development is due to a simple reason: citizenship of the Union. Whilst the concept of Union citizenship has been introduced by the Maastricht Treaty[32], its provisions to a great extent complement earlier case law and secondary legislation on corollaries of establishment, though not entirely.[33] As the Court's case law subsequently showed, citizenship in combination with the non-discrimination provisions turned out to be a powerful tool for extensive

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[28] Supra note 5, *Craig & de Burca*, p. 784
[29] Ibid., para. 37.
[30] Case C-415/93 Union Royale Belge des Societes de Football Association ASBL and Others v Jean-Marc Bosman and Others, [1995] ECR I-4921.
[31] Case C-384/93 Alpine Investments BV v Minister van Financien [1995] ECR I-1141.
[32] Supra note 6, *EC Treaty*, Article 17.
[33] Article 18 EC Treaty: "Every citizen of the Union shall have the right to move and reside freely within the territory of the of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect".

interpretation of the Treaty provisions, the outer limits of which still have not been drawn.

Thus we now review the Court's case law in chronological order to see how corollaries of establishment have developed through. In the early *Royer* case, the Court ruled that freedom of establishment has an ancillary right of entry and residence, which, moreover, was declared to be a directly applicable right.[34] This case law goes hand in hand with secondary legislation, namely Directive 73/148[35]. Although it could be argued that the Court did nothing more than merely apply Directive 73/148 so that there is no major legal development, nevertheless the Court's wording suggests otherwise. In particular, the Court argued that the right of (then) EC nationals to enter the territory of another MS and reside there in order to look for an occupation or pursue activities as an employed or self-employed person "…is a right conferred directly by the Treaty".[36] While the Court in its judgment also mentions Directive 73/148, it makes no direct reference to it in the operative passages of the judgment. Moreover, subsequent case law on the Association Agreements show that the Court refers to the above quoted paragraph and not secondary legislation when corollaries are discussed.

The scope of the right of residence has recently been widened by the *Baumbast* case, to include also the right to residence for the primary carer of children.[37] Mr. Baumbast, a migrant worker, went to the UK with his wife, a non-EU national, and a child to exercise his free movement rights as a worker and all of them were granted residence permit there. However, after Mr Baumbast ceased to be a worker in the UK, so that his family should have lost right to reside in the UK, the Court ruled that notwithstanding the fact that Mr Baumbast's family members are not EU nationals and also not workers, they still have a right to reside there based on non-discrimination provisions and by virtue of the situation that the wife is the primary carer of the child. As to Mr. Baumbast himself, he was granted the right to reside in the UK on the basis of Article 18 (1) EC Treaty, as a citizen of the Union.

The *Baumbast* judgment has raised considerable confusion since it is the clearest attempt of the Court to grant comprehensive rights to nationals residing in other MS on the basis of equal treatment of nationals and non-nationals and the principle of Union

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[34] Case 48/75 Royer [1976] ECR 497, paras 31, 32.
[35] Supra note 10, Directive 73/148, Article 3(1) "Member States shall grant to the persons referred to in Article 1 right to enter their territory merely on production of a valid identity card or passport"; Article 4 (1) "Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty", on the scope of Article 1 of the directive see footnote 10.
[36] Supra note 34, *Royer*, para. 31.
[37] Case C-413/99 Baumbast and R v Secretary of State for the Home Department [2002], ECR I-7091

citizenship, independent of any "economic category" of those nationals.[38] To put this judgment in other words, the concept or status of market citizen has lost its significance and has been replaced by a much more inclusive principle – Union citizenship.[39] This replacement has not been mechanical but instead is a result of the Court's generosity in filling the gaps left by Community law, by extending the concept of citizenship further and further thus reaching a point where Union citizenship creates even more rights than the Treaty grants to those that are exercising fundamental rights of free movement.

While the *Baumbast* case fell within the free movement of workers provisions, Reich argues that it should apply also to family rights related to establishment.[40] This conclusion is not only logical, but also perfectly in line with the Court's reasoning concerning the principle of non-discrimination: if non-nationals should not be discriminated against, as compared to nationals, then there is no good reason why those working as self-established persons should be discriminated against, as compared with those working as employed persons. Moreover, this extension in application of the *Baumbast* rule would be also supported by the principle of market citizen since those that are self-established are much closer to the status of market citizen as compared with primary carers of children.

While initially it was considered that Union citizenship is nothing more than a corollary to nationality of a particular MS, the practice of the Court has proven the opposite.[41] Starting with *Sala*, where an extensive reading of Article 12 in conjunction with Article 17, elevated an unemployed national of another MS within the EC Treaty provisions and granted her social benefits,[42] the Court continued in *D'Hoop* arguing that exercise of fundamental freedoms includes the freedom to move and reside and also a right to receive social benefits from the home MS, despite the fact that the national resides in the host State.[43] This case is well supplemented by the Court's conclusion in *Baumbast*, namely:

> as regards, in particular, the right to reside within the territory of the Member States under Article 18 (1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty.[44]

However, self-employed persons are denied access to social advantages as conferred on workers by the famous Article 7 (2) of Regulation 1612/68, except if the host MS extends them to self-employed home nationals since due to the non-discriminatory provision they

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[38] J.H.H. Weiler, M. Kochan, "The Law of the European Union", Teaching material, College of Europe, p. 29. Available on the internet at http://www.jeanmonnetprogram.org/totallaw/students_2004. Last visited at July 27, 2004.
[39] Supra note 9, *Reich et al*, p. 69.
[40] Ibid., p. 63.
[41] Ibid., p. 69.
[42] Case C-85/96 Maria Martinez Sala v Freistaat Bayern [1998] ECR I-2691, para. 65, see also opinion of the Commission in para. 59 concerning right of residence pursuant to Article 18.
[43] Case C-224/98 Marie-Nathalie D'Hoop v Office National de l'Emploi [2002] ECR I-6191, para. 29.
[44] Supra note 62, *Baumbast*, para. 84.

must be granted to all.[45] Nevertheless, in *Grzelczyk* appeared the first indications that social advantages should be applied also to self employed persons by virtue of Union citizenship, since MS nationals have ceased to act as economic agents, thus Regulation 1612/68 should be extended to all Union citizens "…whether or not they are workers within the meaning of that regulation", argued the Portuguese government.[46] While the Court did not uphold this position, the first stone has been cast and it remains to be seen when it will be acknowledged that citizenship, together with non-discrimination, is an argument that should extend social advantages also to self-employed EU nationals.

The development of freedom of establishment has shown that any advance is provoked by developments in other freedoms, most often free movement of employed persons. As argued above, it is anticipated that in many respects establishment will get closer to the legal scope of free movement of employed persons by virtue of non-discrimination and citizenship provisions. However, in certain interstate relations freedom of establishment has developed independently of free movement of employed persons because the latter has been restricted in application. These interstate relations existed between the EU-15 and the ten Central and Eastern Europe countries (CEEC) during the applicability of the Europe Agreements. Whilst the wording of establishment provisions in both Europe Agreements and EC Treaty are in many respects similar, the question was how broadly establishment ought to be interpreted under the Europe Agreements. The answer to this question will be given in the next section.

2. Freedom of establishment under the EC Treaty and right of establishment under the Europe Agreements, is there a difference?

The Association or Europe Agreements were concluded between 1991 and 1996 between the European Community and CEEC.[47] While the blueprint for the other Europe Agreements was the Agreement between the EC and Poland,[48] the Europe Agreement with Latvia will be used as a reference for discussion since fundamental provisions of all these agreements are similar, including those relating to the right of establishment, which are of particular interest here.[49]

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[45] Supra note 9, *Reich et al*, p. 64.
[46] Case C-184/99 Rudy Grzelczyk v. Le Centre publice d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, para. 23.
[47] The ten CEEC countries are: Poland, Hungary, the Czech Republic, Slovakia, Bulgaria, Romania, Estonia, Latvia, Lithuania, and Slovenia.
[48] 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 (1993), OJ L 348.
[49] E. Guild, "The Europe Agreements: The Right to Establishment in the Central and Eastern European Agreements", in The Legal Framework and Social Consequences of Free Movement of Persons in the European Union, ed. Elspeth Guild, Hague, Kluwer Law International, 1999, p. 127.

2.1. Provisions of the Europe Agreements from the perspective of potential labour migrants

The Europe Agreement concluded with Latvia mentions workers, establishment and service providers in similar albeit not identical wording to the EC Treaty.[50] The essential difference lies in the fact that the provisions of the Europe Agreement omit a tiny word "freedom" and that is where the problems begin.

Articles 37 to 43 of the Europe Agreement speak about movement of workers but the virtues of those provisions can not be compared to those under the EC Treaty since the wording of the Europe Agreement carries no substantial value. In fact, the only right the Europe Agreements confer on Latvian as well as Community nationals is the right of non-discrimination, though subject to certain conditions and modalities of each MS.[51] Nevertheless, this right does not facilitate too much free movement of persons because it applies to those already employed in one of the MS. Moreover, some doubt arose whether the non-discrimination principle was to be interpreted as a Community concept, or left to MS discretion due to the reference to "…conditions and modalities of each MS".[52]

This issue was resolved by the judgment in *Pokrzeptowicz-Meyer*, where the Court ruled that the non-discrimination provision of Article 37 has direct effect and, even though the judgment concerned the Europe Agreement with Poland, it is equally applicable to situations under the Europe Agreement with Latvia since the relevant article is similar.[53] The Court argued that Article 37 of the Europe Agreement should be interpreted similarly to Article 39 of the EC Treaty and this interpretation leads to the conclusion that both direct and indirect discrimination shall be prohibited.[54] As already noted, Title IV of all Europe Agreements, "Movement of workers, establishment, supply of services" is misleading since it grants very little, if not to say no, movement to CEEC nationals to and within EU MS, for which it has been frequently criticized.[55] However, for careful readers, *Pokrzeptowicz-Meyer* makes a major step forward since it quotes Title IV of the Europe Agreements as "*Free* Movement of Workers" [emphasis added]. One more bright example of the Court acting as legislator, an implication of possible legal developments, or a mere clerical error?[56] Difficult to tell.

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[50] Europe Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part [1998] OJ L 26/1.
[51] Ibid., Article 37.
[52] Ibid.
[53] Case C-162/00 Land Nordrhein-Westphalen v Beata Pokrzeptowicz-Meyer [2002] ECR I-1049.
[54] Ibid., paras. 39, 42; Supra note 9, *Reich et al.*, p. 79.
[55] 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", (2001) *CMLR (Common Market Law Review*) 38: 525-586, p. 571.
[56] Supra note 53, *Pokrzeptowicz-Meyer*, para. 47.

Another relevant case concerning movement of workers under the Europe Agreements is *Kolpak*.[57] Here a Slovakian handball player felt discriminated against by the rules of the German Handball association that limited the number of non-EU national players in each team. The case was referred to the ECJ to determine whether the non-discrimination provisions of the Europe Agreements are applicable in such a situation. The Court in this case very explicitly extended case law on the EC Treaty provisions to the Europe Agreements by applying the well-known *Bosman*[58] ruling to this situation, acknowledging that the relevant provisions of the EC Treaty have the same scope as those of Europe Agreements.[59] This consequently meant for the Court to recognize the horizontal direct effect of the non-discrimination provisions of the Europe Agreement and the Court indeed did so.[60]

Generally, it no surprise that provisions concerning movement of workers under the Europe Agreements are so poor in content and rights, because it is well known how sensitive labour issues are throughout Europe. What is more surprising, though, is the lack of any corollary rights to those persons already working in one of the MS, more particularly the right to residence. MS would not give away too much by including this ancillary right because it would apply only to those already working in the EU, thus already residents. This is moreover so due to the fact that the EEC- Turkey Association Agreement did include a right to continuing access to labour market and residence.[61] Nevertheless, the situation where rights for employed workers were limited but establishment provisions were rather generous resulted in establishment being increasingly invoked by CEEC nationals.

Establishment provisions in the Europe Agreements are unexpectedly similar to establishment provisions in the EC Treaty. Namely, the wording of Articles 44 (1)[62] and 46 d[63] of the Europe Agreement with Latvia very closely resembles Article 43 EC Treaty[64] and

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[57] Case C-438/00 Deutscher Handballbund v Maros Kolpak [2003] ECR I-4135.
[58] Supra note 30, *Bosman*.
[59] Supra note 57, *Kolpak*, paras. 31,34, 36.
[60] Ibid., para. 58.
[61] Supra note 49, *Guild*, p. 130.
[62] Supra note 50, *Europe Agreement with Latvia*, Article 44 (1) "The Community and its Member States shall grant, except for the sectors included in Annex XIV, from entry into force of this Agreement:
(i) treatment no less favourable than that accorded by Member States to their own companies or to any third country company, whichever is the better, with regard to the establishment of Latvian companies;
(ii) to subsidiaries and branches of Latvian companies, established in their territory, treatment no less favourable than that accorded by Member States to their own companies and branches or to subsidiaries and branches of any third country company established in their territory, whichever is the better, in respect of their operation."
[63] Ibid., Article 46 "For the purposes of this Agreement: (d) 'Establishment` shall mean: (i) as regards nationals, the right to take up economic activities as self-employed persons and to set up undertakings, in particular companies, which they effectively control. Self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market or confer a right of access to the labour market of another Party. The provisions of this chapter do not apply to those who are not exclusively self-employed;

in essence mean the same. In other words, while movement of employed workers in the Association Agreement with Latvia are limited in scope, the right of establishment has been given full applicability. The reasons for this generosity are somewhat unclear, since similar provisions can not be found in previous Accession Agreements. In the EEC-Turkey Association Agreement, establishment provisions are in "probability tense" and merely prohibit new national restrictions[65], whereas previous EU accessions involved no transitional periods but, at the same time, right of establishment was not granted earlier than the date accession took place.[66]

According to Böcker, on the one hand, unemployment in most of MS was increasing and many CEEC nationals were asylum seekers, for example in 1992 Germany received 104 000 asylum applications from Romanians and 32 000 from Bulgarians. Therefore, MS were not keen on facilitating this tendency by loose Europe Agreements. On the other hand, a reciprocity clause was a tool for companies from MS to get direct access to the markets of the CEEC. Moreover, inclusion of an unrestricted establishment provision was a nice gesture from the EC side.[67]

Leaving behind the reasoning for insertion of almost unrestricted establishment provisions in the Europe Agreements, it is more important to see how the rights under those Agreements are implemented in practice. As experience with movement of employed workers has shown, similar wording and content of provisions in Europe Agreements and the EC Treaty can lead to extending EC Treaty principles and case law to situations covered by the Europe Agreements. In particular, self-employment under the EC Treaty is a Community concept and should remain such also under the Europe Agreements. The ECJ has ruled that establishment has its corollary rights and, judging in accordance with these principles, it should be the same also in the case of Europe Agreements.

2.2. The ECJ interpreting establishment provisions of the Europe Agreements

In contrast to case law on "movement of workers" within the Europe Agreements, which arguably has two really important cases,[68] establishment has gained greater attention and has been interpreted by the Court in a line of cases. The first case concerning establishment decided by the Court was the *Gloszczuk* case.

(ii) as regards Community or Latvian companies, the right to take up economic activities by means of the setting up of subsidiaries and branches in Latvia or in the Community respectively."

[64] Supra note 6, *EC Treaty*, Article 43.

[65] Agreement Establishing an Association between the European Community and Turkey, (1973) OJ C113/2, Article 13.

[66] A. Böcker, "The Establishment Provisions of the Europe Agreements: Implementation and Mobilisation in Germany and the Netherlands", Zentrum für Europäische Rechpolitik, ZERP-Diskussionspapier 1/2002, p. 13 Available on the internet at: http://www.zerp.uni-bremen.de/english/pdf/dp1_2002.pdf. Last visited September 17, 2004.

[67] Ibid., p. 14.

[68] Supra note 53, *Pokrzeptowicz-Meyer* and supra note 57, *Kolpak*.

The case in point concerned two Polish nationals, Mr and Mrs Gloszczuk, who entered the United Kingdom as tourists and were granted leave to enter for a period of six months and were expressly prohibited to work in the UK. However, after expiry of this period Mr and Mrs Gloszczuk did not leave the UK and Mr Gloszczuk started to work in the building industry but his wife gave birth to a child, thus both being dependants of Mr Gloszczuk. Six years after entry, Mr Gloszczuk applied for leave to remain in the UK, claiming to be self-employed and basing his application on Article 44 of the Europe Agreement with Poland. The Secretary of State rejected his application and Mr and Mrs Gloszczuk appealed this decision to the referring court,[69] which asked the ECJ to rule whether establishment provisions in the Europe Agreement have direct effect and whether a Polish national in the UK unlawfully can rely on them.[70]

Although the Court followed AG Alber's opinion only partly, several aspects of the AG analysis of Europe Agreements are worth attention. First, the AG at length discusses the Europe Agreement with Poland, proposing several methods of interpretation. One of these is to take account of part of the Court's case law on the Association Agreement with Turkey, which he subsequently does,[71] the other being to interpret Europe Agreements not only by considering their terms but also in the light of their objectives.[72] Thus, comparing objectives and - more important - actual accession chances to the EU, AG Alber finds that Europe Agreements should be interpreted more progressively than the EEC-Turkey agreement.[73]

Second, since the applicants in the national court based their arguments on the provisions of the Europe Agreement with Poland, it was crucial to examine whether relevant provisions of the Agreement had direct effect. And, indeed, AG Alber together with Governments of Belgium, Italy, Spain and France concluded that Article 44 (3) of the Europe Agreement, which confers on Polish nationals a right of establishment, is clear, unambiguous, unconditional and directly applicable.[74] Thus, it is acknowledged that the abovementioned article is directly effective with regard to the right of self-employed Polish nationals wishing to establish themselves in any EU Member S and working as self-employed persons.[75]

The third significant aspect of the AG's opinion was with regard to right of residence as a corollary of establishment. However, the AG's conclusion on this point considerably lost its importance after the Court rendered its judgment. Having pointed out that there is no reference to a right of residence in Article 44 (3), the AG started to

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[69] Opinion of Mr Advocate General Alber, delivered on 14 September 2000 in Case C-63/99, the Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk, paras. 15-26.
[70] Ibid., para. 28.
[71] Ibid., paras. 35, 38, 56.
[72] Ibid., para. 36.
[73] Supra note 69, *AG Alber*, para. 64.
[74] Ibid., para. 42.

analyze the scope of this article.[76] Comparing the Europe Agreement with Poland and the Association Agreement with Turkey, the AG deduced that the latter is more advanced in the area of right of establishment and opted to apply a strict interpretation of the former, thus reaching the ultimate conclusion that the right of establishment and a potential right of residence must be "…strictly distinguished one from the other".[77] This was an apparent flaw in his reasoning, in view of the previous conclusion that Europe Agreements should be interpreted more progressively than the EEC-Turkey Agreement, because the right of residence was already announced by the Court as a corollary of employment concerning Turkish nationals stating an obvious truth that without right of residence "the right of access to the labour market (…) would be rendered entirely ineffective".[78]

Nevertheless, the Court had a different opinion and so decided to "legislate" also with regard to Europe Agreements. The Court concurred with the AG with regard to the first two issues discussed above, thus there is no need to discuss them for the second time. Yet it took a different approach with regard to the third concern, namely the right to residence. By concluding that Article 44 (3) of the Europe Agreement in wording is similar to Article 43 EC Treaty, the Court ruled that rights of entry and residence are corollaries to establishment also in Europe Agreements, making an express reference also to its case law on the EC Treaty.[79]

At the same time, the Court tried to limit this statement by reference to Article 58 (1) of the Europe Agreement with Poland[80], claiming that rights of entry and residence are not absolute privileges and may be limited by the host MS rules concerning entry, stay and establishment.[81] This meant that in the particular situation of Gloszczuk, the UK applied its immigration rules, which were approved by the Court as being compatible with the Europe Agreements. Consequently, Mr *Gloszczuk* had to file a new application for establishment due to the fact that he made false statements at his initial entry into the UK.[82] However, the Court also noted that by taking any measures, the MS should observe the national's fundamental rights, such as rights to respect for family life and property, as envisaged in the European Convention for the protection of Human Rights.[83]

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[75] Ibid., para. 50.
[76] Ibid.
[77] Ibid., paras. 64 and 71.
[78] Case C-192/89 Sevince v. Staatssecretaris van Justitie [1990] ECR I-3461, para 29.
[79] Supra note 19, *Gloszczuk*, para. 47.
[80] The corresponding article in the Europe Agreement with Latvia is Article 56, which states: „For the purpose of this Title 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".
[81] Supra note 19, *Gloszczuk*, para. 51.
[82] Ibid., paras. 75, 86.
[83] Ibid., para. 85.

Clearly, the *Gloszczuk* judgment is equally applicable to other Europe Agreements of CEEC, including Latvia, because the relevant provisions of all these Agreements are almost similar. Thus, from a practical perspective, a Latvian national who decides to exercise his right of establishment and pursue activities as a self-employed person in any MS, is free to do so and would be entitled to right of entry and residence, however, subject to the entry and residence conditions of that particular MS. Nevertheless, the actions taken by the national authorities under Article 58 (1) should have "…neither the purpose nor the effect of striking at the very substance of the rights of entry, residence and establishment" which are granted to CEEC nationals by the Europe Agreements.[84]

In addition to *Gloszczuk,* the Court rendered two other judgments at the same date and with the same conclusions in the *Kondova*[85] and *Barkoci*[86] cases.

As concerns *Kondova*, the factual situation in some respects is similar to that of *Gloszczuk* since it also includes false representations, but is astonishing because it concerns a range of potential grounds for staying in the UK: Ms Kondova initially entered as a veterinary student, then claimed political asylum, then married a person who had leave to remain in the UK and finally claimed that she worked as a self-employed cleaner and thus was within the scope of establishment provisions of the Europe Agreement. The factual situation goes further than the one in *Gloszczuk* in the sense that it provides insight how actual self-employment could take place and how it should be properly claimed.

Namely, Ms Kondova, as a potential self-employed cleaner, submitted to the Secretary of State a business plan with confirmation of her financial resources, not forgetting to note that she is planning to get additional support from funds provided by her husband.[87] The Secretary of State accepted her proposition that during the initial phase of her cleaning business she will be supported by funds not related to business, i.e. her husband.[88] This creates a valuable precedent for other self-employed businessmen, since they always can make a reference to this case and argue that in case of short-term difficulties they will be supported by somebody else. At the same time this precedent might be premonitory for the administration as this somebody else at the end of the day can be public funds.

Another relevant feature of *Kondova* case is that it is still relevant for Bulgarian nationals since Bulgaria has not yet joined the EU and accordingly has not signed the Accession Treaty. Hence, the Europe Agreement still applies and Bulgarian nationals can seek self-employment in the UK using the know-how of Ms Kondova.

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[84] Ibid., para. 84.
[85] Case C-235/99 The Queen v Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova [2001] ECR I-6427.
[86] Case C-257/99 The Queen v Secretary of State for the Home Department, ex parte Julius Barkoci and Marcel Malik [2001] ECR I-6557.
[87] Supra note 85, *Kondova*, para. 21.

Barkoci and *Malik* are relatively simple as to factual situation and require no detailed explanation. Mr Barkoci arrived in the UK and claimed asylum on the basis of the Europe Agreement with the Czech Republic arguing that he wishes to establish himself in the UK as a self-employed gardener.[89] Mr Malik used the same argumentation except that he wanted to provide domestic and commercial cleaning services acting as a self-employed person and was rather honest about his plans during the immigration interview, stating that until his business will be profitable enough he is planning to avail himself with the social benefits.[90] They also had their business plans, which, however, were not convincing enough for the immigration officers, but in any case the Court's judgment was similar to that of *Kondova* and *Gloszczuk*.

For the sake of clarity, the Court's decision that entry and residence are corollaries to the right of establishment does not mean that plaintiffs were granted leave to remain in the UK – the final decision, as usual, lay in the hands of the national court because the ECJ merely provided interpretation of the Europe Agreements.

These cases were followed by the widely discussed *Jany* case, which involved both discussion of corollaries of establishment and the scope of the very right of establishment under the Europe Agreements.[91] The factual situation of the case was rather unusual for the supreme judicial organ of the EU, since it involved activities balancing on moral borders. In particular, the case involved two Polish and four Czech nationals working as self-employed window prostitutes in Amsterdam. The six applicants were applying for residence permits in the Netherlands and based their claim on the right to establishment, as envisaged in the Europe Agreements of their respective countries.[92]

The questions referred for a preliminary ruling by the Netherlands court in part overlapped with those already answered in *Gloszczuk* and other cases discussed above. Thus, they will not be discussed once more, since the Court's answer was in line with its previous jurisprudence. The novel aspect of the *Jany* case was the issue whether prostitution, as an activity, is within the scope of establishment and, provided that it is such, whether there can be a distinction drawn between activities of self-employed persons under Article 43 EC Treaty and respective provisions under Europe Agreements. In addition, the referring Netherlands court expressly asked whether it is lawful to require proof of adequate resources for the exercise of the right of entry and residence.

The Court, in contrast to *Gloszczuk*, *Kondova* and *Barkoci*, followed the line of argumentation offered by AG Leger and added only minor modifications. First, the Court expressly underlined that the notion "activities as self-employed persons" has the same

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[88] Ibid., paras. 24, 25.
[89] Supra note 86, *Barkoci & Malik*, para. 19.
[90] Ibid., paras. 21, 24.
[91] Case C-268/99 Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001] ECR I-8615.
[92] Ibid., para. 18.

meaning concerning both the EC Treaty and Europe Agreements.[93] Next, the Court shifted the burden of proof on national authorities as concerns the difficulties to check whether the activity in question indeed is pursued in a self-employed capacity and not in an employment relationship. The Court also argued that any difficulties in checking the nature of activities cannot permit the assumption that an activity is disguised employment relationship and thus reject application for establishment.[94] In other words, the fact that a particular activity usually is carried out on the basis of employment relationship cannot serve as a valid argument for national authorities to reject application for establishment, where this activity is claimed to be performed in a self-employed capacity. Furthermore, the Court set the boundaries for assessment whether prostitution is carried out in self-employed capacity and proposed the relevant conditions as follows:

- Prostitution has to be carried out outside a relationship of subordination as concerns the choice to pursue it as an activity as well as working and remuneration conditions;
- Prostitution has to be carried out under the concerned persons own responsibility;
- Prostitution has to be performed against remuneration in full paid directly to the person concerned.[95]

Jany undoubtedly came as a surprise to both the Court and MS because not many could imagine that such issues will have to be resolved by the supreme judicial organ of the EU and probably the acceding ten CEEC were not too pleased by such entrance in the Court's jurisprudence. However, there have been other cases where the Court had to rule on issues concerning allegedly immoral activities.[96] Trying to forget this event with the six persistent ladies from the CEEC that by all means were trying to enforce their rights under the Europe Agreements, issues concerning prostitution were left behind and the Court resorted to its usual practice concerning customs and competition. Not for a long time, however. In 2002 another case was referred to the Court for a preliminary ruling by the national court of Netherlands and the issue at stake again was six persons that intended to establish themselves as self-employed prostitutes. That was the *Panayotova* case.[97]

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[93] Supra note 91, *Jany*, paras. 38, 39.
[94] Ibid., para. 67.
[95] Ibid., para. 70.
[96] See for example Case C-159/90 Society for the Protection of Unborn Children (SPUC) v Stephen Grogan [1991] ECR I-4685 concerning abortion or Case C-275/92 HM Customs and Excise v Schindler [1994] ECR I-1039 concerning lotteries.
[97] Opinion of Advocate General Poiares Maduro, delivered on 19 January 2004 in Case C-372/02 Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie [not yet reported].

At the time of writing the case is still pending before the ECJ, but AG Maduro has already shared his opinion on the issue of the case. The factual situation and issue was comparably plain: two Bulgarian, three Polish and one Slovak citizen applied for residence permits in the Netherlands with the aim to establish themselves as self-employed prostitutes. Their applications were automatically rejected (without considering the substance of applications) on the basis of national law, which provides that applications will be examined only if the applicant has a valid temporary residence permit.[98] The national court referred this situation to the ECJ, essentially asking whether such national legislation is in compliance with the terms of the Europe Agreements concluded with Bulgaria, Poland and Slovakia respectively and also whether it is in line with the Court's previous jurisprudence concerning Europe Agreements. AG Maduro rephrased the questions of the referring Court and split them in two sub-issues, namely, whether such national legislation and/or practice is in line with Europe Agreements in cases where applicants have complied with initial entrance requirements, i.e. reside lawfully and in cases where applicants reside unlawfully.[99]

Before answering this question, the AG made a concise review of the Court's case law on Europe Agreements concerning entry and residence and, in the author's opinion, clarified several subject matters by putting them in more definite terms. Maduro particularly stressed observance of fundamental rights and general principles of law, noting that authorities and national courts of the MS concerned should not only take into account but are "…bound to observe" them.[100] Moreover, the AG found it appropriate to quote the US Supreme Court to highlight how important is the judicial protection of fundamental rights of third state nationals, which are "discrete and insular minorities".[101] Further he provided the guidelines for national measures on the entry and residence of nationals covered by the Europe Agreements who want to establish themselves in any of the EU Member States, namely:

- National measures have to be based on objective criteria that should be available for applicants before applying and measures should subject for review by the national courts;
- the measures should not adversely affect the right of establishment so that its exercise is impossible or excessively difficult and they are acceptable on condition that their purpose is to control immigration;
- the measures have to be consistent with the relevant fundamental rights and general principles of law that are binding for the MS concerned.[102]

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[98] Ibid., paras 2, 3.
[99] Ibid., para. 23.
[100] Ibid., para. 46.
[101] Ibid., para. 47, cf. United States v Carolene Products Co 304 U.S. 144 (1938).
[102] Ibid., para. 48.

The very answer of the AG to this issue was not surprising. First, having analyzed the situation where nationals from the Associated States are unlawfully residing in EU Member States, AG Maduro concludes that automatic rejection of applications is in accordance with the Europe Agreements. This conclusion is based on reasoning that mere unlawfulness of a person's presence in the host MS is sufficient ground for rejection of application and arguing that there is no reason to think that unlawful presence in the Netherlands was the only way the right of establishment could be exercised.[103]

As concerns the other situation, i.e. where applicants are lawfully present in the host MS, the assessment was rather straightforward, pointing out that from the perspective of Europe Agreements, the national rules indeed have the effect of *nullifying or impairing* the exercise of the right of establishment.[104] In addition to this negative effect, the rules had the automatic consequence to deprive persons of their right to short stay under the Schengen regime.[105] Further, it was stated that requirement of prior control by the home state, as a precondition for any consideration of application by the Netherlands, is an excessive requirement for those applicants that already lawfully reside in the Netherlands and it is moreover so because this condition does not have any legitimate objective.[106] For all these reasons, it was concluded that the national legislation is incompatible with the Europe Agreement in cases where the applicants are already lawfully resident in the Netherlands.

It might initially seem that there is little jurisprudence on the Europe Agreements as only a handful of cases is decided. Nevertheless, this case law has considerably developed the scope of non-discrimination and establishment provisions of the Europe Agreements, recognizing their direct effect and in some instances even horizontal direct effect. It has been ruled that entry and residence are corollaries of the right of establishment and economic activities, as self-employment is a concept with broad interpretation. The EC Treaty provisions have been equated with provisions of Europe Agreements and - more important – the case law on the EC Treaty has been directly extended to situations arising under Europe Agreements. Indeed, that is not the end of the story, as several cases remain pending. However, in the meantime most of the CEEC have now joined the EU and, possibly, there are already issues concerning the Accession Treaty that will be soon considered by the national courts and eventually will be referred to the ECJ.

However, questions come up when one thinks how to make use of the abovementioned jurisprudence. Among them is the question of enforcement of rights granted by the Europe Agreements. Bearing in mind the considerable discretion left to the national authorities of the host MS, it is clear that there will be negative decisions

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[103] Ibid., paras. 50, 60.
[104] Ibid., para. 70.
[105] Ibid.

concerning applications from potential self-employed persons from the CEEC. Few will decide to contest negative decisions of national authorities, nor will it always be feasible. For example, if an application is rejected and the applicant is automatically refused leave to stay as in the case of the Netherlands, an unsuccessful applicant would have no chance to appeal that decision in that host MS, since he would be expelled. If he were to appeal it, or challenge it in his home state, the national court there would correctly argue that ECJ case law, including the *Jany* or *Kondova* rulings, is not binding on them. For example a Latvian national could try to invoke Article 119 Association Agreement of Latvia, but it is not definite that it would be a successful try so that the host MS would grant residence on the basis of this provision.[107]

Another question is whether all discussion provided above has a merely historical value bearing in mind the recent accession of eight CEEC to the European Union, or can it still be applicable as pertinent case law? This question can be answered in two ways. First, beyond doubt it has a historical value and the author believes that it will be a subject for discussion already solely because of the peculiarities of the *Jany* case, thus freshening up any legal debate. Second, taking into account the idea to expand the EU by including the Balkans and possibly also Ukraine, Belarus or even Russia, there will be new Europe Agreements or some other type of agreements so that Europe Agreements' case law will be applied to those Agreements just as the EEC-Turkey Association Agreement case law was applied to the former. But for the sake of this article it will be argued further that this case law will also be relevant for interpretation of the Accession Treaty.

3. Freedom of establishment under the Accession Treaty

The Accession Treaty of Athens was signed in April 2003 by the MS of the EU and 10 Acceding States and entered into force on the first of May 2004.[108] At the particular insistence of Germany and Austria, complete free movement rights of employed workers from the EU-10 are restricted for up to seven years.[109] According to Article 2 of Section 1 "Freedom of Movement for Persons", Annex VIII of the Act of Accession: Latvia

> …until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulation access to their labour markets by Latvian nationals. The

[106] Ibid., para. 72, 73.
[107] Supra note 50, *Europe Agreement with Latvia*, Article 119 provides: "Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals to the competent courts and administrative organs of the Parties to defend their individual rights and their property rights".
[108] Accession Treaty of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (2003) OJ L 236.
[109] Supra note 9, *Reich et al.*, p. 81.

> present Member States may continue to apply such measures until the end of the five year period following the date of accession.[110]

Moreover, the MS may decide to "continue to apply these measures until the end of the seven year period following the date of accession" in case of disturbances to their labour market or a threat in that respect.[111]

Therefore, it appears that the "old" MS might restrict access to their labour market following the above 2+3+2 formula, except those States that have already declared that they will not apply restrictions.[112] Thus, likewise to Europe Agreements, the title of the section again is misleading and no freedom of movement for employed workers actually exists, except cases where restrictions will not be applied or subsequently waived. In fact, freedom of movement will exist within EU-15 States, adding to them Malta and Cyprus, since restrictions do not apply to them and they also do not apply within the EU-10, hence creating two parallel worlds of free movement. Importantly, however, restrictions to freedom of movement are based on reciprocity, i.e. the EU-10 can also impose restrictions towards nationals of EU-15 MS.

Nonetheless, just as in the case of Europe Agreements, while free movement of workers is restricted, freedom of establishment is not and that is where the chance to work in the EU-15 MS comes in.[113] Considering that EU-10 nationals after 1 May 2004 have considerably more rights than in the period governed by Europe Agreements, since they are now EU nationals and have rights to directly invoke EC Treaty provisions, it can be concluded that the right of establishment in the first years of accession will be something in between establishment under the Europe Agreements and establishment under the EC Treaty. Considering all the secondary legislation and ECJ case law, freedom of establishment will be by all means "wider" than that guaranteed in the Europe Agreements. However, without free movement of employees establishment remains the only legal way for potential migrants from CEES to move. How far freedom of establishment can substitute free movement of workers will be discussed in the next chapter.

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[110] Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union is founded, List referred to in Article 24 of the Act of Accession: Latvia (2003) OJ L 236, article 2.
[111] Ibid., article 5.
[112] Those are Ireland, Sweden and the United Kingdom.
[113] Supra note 18, *Aizsils*, p. 1588.

II To what extent self-employment can substitute employment – a practical perspective in the light of restrictions on free movement of workers

In order to propose how freedom of establishment can effectively replace free movement of employed workers one needs to define the parameters of 'worker' and 'employment' on the one hand and 'self-employed' and 'establishment' on the other. According to the International Classification of Status in Employment (ICSE-93)[114], a self-employed worker is a worker that is not an employee.[115] In other words, the terms *self-employed* and *employee* can both be subsumed under the term *worker* on the basis of the following definitions:

- Worker is a person who personally performs a certain type of service for remuneration;
- Employee is a worker holding an employment contract giving basis for remuneration, "which is not directly dependent upon the revenue of the unit for which s/he works".[116]
- Self-employed worker is a worker whose "remuneration is directly dependent upon the profits derived from the goods and services produced" and who make operational decisions affecting the enterprise.[117]

This structure loses its meaning when put in the EU legal system where each term is a "Community concept" with autonomous interpretation. For the purposes of EU law, the term 'worker' is used in its narrow sense making it a synonym of employee, while self-employed workers, together with all the other possible forms of establishment, are considered to be different types of commercial enterprise.

This reveals that in order to attain the aim of this article, the relevant features of the terms 'worker' and 'self-employed' need to be examined, so as to conclude where the line has been drawn between those two, and how easy it can be overstepped due to pressing reasons caused by the terms of the Accession Treaty. As usually, when a definition is sought of a concept governed by EU law one needs to check how the Court has interpreted it and this will be discussed next.

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[114] International Classification of Status in Employment (ICSE-93), International Labour Organization, 1993. Available on the internet at: http://www.ilo.org/public/english/bureau/stat/class/icse.htm Last visited at September 20, 2004.
[115] See also S. Engblom, "Equal Treatment of Employees and Self-Employed Workers", *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 17/2, 211-231, 2001, p. 213.
[116] Supra note 155, *ICSE-93*.
[117] Ibid.

1. Definition of 'worker' and 'self-employed' as developed by ECJ case law

As noted, it is generally not correct to make terms 'worker' and 'self-employed' as two extremes since the former to some extent encompasses the latter. However, in matters concerning EU law the terms *worker* and *employee* have become synonyms, whilst following the structure of the EC Treaty the term *self-employed person* has become a synonym to *company*.[118] The Court has softened the contrasting features of those two concepts by giving them its own definition.

The Court defined 'worker' in the famous *Lawrie-Blum* case independently of national laws, thus making it a Community concept. In any case, the defining elements come from national laws of the MS.[119] The Court ruled that:

> the essential features of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[120]

In addition, the Court drew on its previous case law in stating that for Article 48 to apply, sphere of activity is irrelevant since what matters is that "activity should be in the nature of work performed for remuneration" and it is equally applicable to contracts governed by private law or public law status.[121] Even before the *Lawrie-Blum* judgment the Court had an opportunity to provide guidance what should be understood by the concept 'worker' and, in particular, by a worker who works only part time. Thus, in *Levin* the ECJ at first observed that the notion of worker must be interpreted broadly[122] and ruled that the concept of worker also includes a person, who "pursues or wishes to pursue an activity as an employed person on a part time basis only" for that receiving a remuneration lower than the ensured minimum in that sector, at the same time noting that activities thus pursued have to be effective and genuine excluding purely marginal or ancillary ones.[123]

However, the above definitions apply only in regard to free movement of workers and not to other policy areas left to definitions of each particular MS concerned.[124] For example in *Mikkelsen* it was ruled that a person who can rely on provisions of Directive

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[118] The author uses the concept ''worker" to be consistent with EU practice. Art 39 of the EC Treaty is addressed to workers even though it clearly concerns only employees. Therefore it will be later demonstrated that what in EU law is called worker in fact is an employee and so it must be called since both employees and self-employed workers do work, thus naturally they both can be called workers. For example Emmert in his book under "Free Movement of Employed Persons" places cases that concern free movement of workers while cases concerning freedom of establishment are under the title "The Movement and Establishment of Self-Employed Persons and Companies", see Frank Emmert, European Union Law. Cases, Hague, Kluwer Law International, 2000.
[119] B. Bercusson, European Labour Law, London, Butterworths, 1996, p. 387.
[120] Case 66/85 Deborah Lawrie-Blum v Land Baden-Wurttemberg [1986] ECR 2121, para 17.
[121] Ibid., para. 20.
[122] Case 53/81 D.M. Levin v Staatsecretaris van Justitie [1982] ECR 1035, para 13.
[123] Ibid., paras. 16, 17.
[124] Supra note 119, *Bercusson*, p. 387.

77/187/EEC[125], must be "in one way or another protected as employees under the law of the MS concerned" thus making reference to national employment law and not to any Community concept.[126] In other words, the definitions established in *Levin, Lawrie-Blum* and other cases apply only if it concerns free movement of workers and, of course, if there is an interstate element present so as to make it an EU law issue.

Apart from the Court's extensive case law on mutual recognition of qualifications and diplomas in the field of establishment, there are also judgments where the Court attempts to define the scope of self-employed person. Before them it is relevant to note a case from the former category of judgments, which shed light on the concept of establishment and, consequently, also on those that are self-employed. That is the *Gebhard* case, discussed earlier, but it is relevant to recall here that it brought such defining features of establishment as participation in the economic life on a "stable and continuous basis" and "regularity, periodicity or continuity" of services provided performing an economic activity.[127]

There have been numerous instances when the Court was confronted with a situation that required it to provide a definition of self-employment. And the approach, so far taken, is to define it in a negative way from the perspective of employment definition. For example, in *Asscher* the Court applied the *Lawrie-Blum* criteria on a person that was director of a company of which he was sole shareholder and concluded that the person is not a worker, because there is no relationship of subordination, hence automatically deciding that the person is pursuing activities as a self-employed person.[128] Likewise, in the more recent *Meeusen* case the same formula was applied and, due to factual peculiarities, decided the other way round, namely a person married to the director and sole shareholder of the company can be considered as a worker in the sense of Article 48 EC Treaty, provided they pursue effective and genuine activity and as long as this activity is carried out "in the context of a relationship of subordination".[129]

Finally, the author argues that the *Jany* judgment, although decided on the basis of Europe Agreement provisions, contributes to defining activities pursued in a self-employed capacity. The author submits that if EC Treaty case law can be extended to cases on Europe Agreements then it should work the other way round as well, especially bearing in mind the arguments of AG Leger and the Court that Europe Agreements were more limited in scope than the EC Treaty, so that the Court's conclusions on narrower provisions must be applicable to those broader in reach. If there were a case concerning

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[125] Council Directive 77/187/EEC 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 Undertakings, (1977) OJ L 61 p.26.
[126] Case 105/84 Foreningen af Arbejdsledere i Denmark v A/S Danmols Inventar, in liquidation [1985] ECR 2639, para. 27.
[127] Supra note 28, *Gebhard*, paras. 25, 27.
[128] Case C-107/94 P.H. Asscher v Staatssecretaris van Financien [1996] ECR I-3089, paras. 25, 26.
[129] Supra note 19, *Meeusen*, paras. 13-17.

prostitution as an activity pursued in a self-employed capacity, it is very likely that the Court would attempt to invoke *Jany* reasoning and conclusions. On the other hand, the Court's judgment in *Jany* did not bring particular novelties in defining self-employed activities, since it reaffirmed *déjà vu* principles like absence of subordination and direct remuneration for services provided, the former being particularly stressed due to significant aspects of prostitution as an activity because it verges on crime.

To sum up, it appears the most significant difference between employed and self-employed persons is the existence of a relationship of subordination. As will be shown, many activities can be pursued both in and absent a relationship of subordination, thus the borderline indeed is a narrow one and can be easily transformed or "trespassed". At the same time, subordination may concern many aspects of providing certain type of services, for example an employer could decide when, how, to whom, how often services should be provided and, in addition, the remuneration goes directly to employer and not employee. Engblom provides additional criteria that may well be applicable to distinguish between an employee and self-employed, namely degree of integration concerning tools, machinery and raw materials provided (or not provided) by the employer, degree of economic dependence, i.e. how dependent financially is worker on employer and also allocation of economic and financial risks between worker and employer.[130]

Nevertheless, it is not too surprising that the Court has abstained from providing a detailed definition of activities pursued in a self-employed capacity. The reason for that is lack of harmonization in the field of self-employment.[131] While issues related to employment have not been completely harmonized either, the level of harmonization is less concerning establishment. This can also be explained from the perspective of social protection, which has been developed extensively in EU law concerning workers but very slightly concerning establishment because it is more concerned with companies than persons, or in other words, more legal persons than natural persons.[132]

Thus, a definition of what constitutes a self-employed person in the EU context can be acquired as follows. First, it needs to be examined whether the particular economic activities can be classified as employment, essentially focusing on existence of a subordination aspect. Second, national law concerning self-employed persons of the MS in question have to be reviewed so that to see how self-employed person is defined domestically and what requirements one needs to fulfil to constitute a self-employed person in that MS.

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[130] Supra note 115, *Engblom*, p. 214.
[131] Supra note 6, *EC Treaty*, Article 43 provides *inter alia* "Freedom of establishment shall include the right to take up and pursue activities as self employed persons (…) under the conditions laid down for its own nationals by the law of the country where such establishment is effected…".
[132] Supra note 115, *Engblom*, p. 211.

2. Are national measures that restrict the scope of self-employment contrary to EU law?

As noted above, a lack of harmonization exists in the field of self-establishment and for this reason different national measures apply from State to State to regulate this branch of law. Differences in legal regulation inevitably create a situation where nationals seeking establishment in a host MS, face different requirements than at home. The question is whether the fact that there are more requirements for self-employed persons in the host State than in the home State constitutes a double burden for foreign nationals, or is it a mere result of non-harmonized national measures? In other words, if there are four requirements that ought to be satisfied in MS A to constitute a self-employed person and seven requirements in MS B, besides none of the requirements overlapping in A and B, can a national from MS A claim a double burden situation because he has to satisfy more requirements and can a national from MS B claim a double burden situation because he has to satisfy different requirements?

Maduro argues that any type of burden incurred by a foreign national, including costs necessary to adapt to foreign legislation, constitute a double burden for entering a foreign market that consequently leads to discrimination.[133] This argument does not come so much from Maduro, but instead is a conclusion if one applies a grammatical interpretation to the *Gebhard* test. This, in turn, leads to the question whether the Court should review all non-harmonized national measures or the harmonization should be done by EU legislative organs.[134] One is tempted to conclude here that there is not sufficient case law on the applicability of *Gebhard* as there can be a narrow and a broad approach. It has been suggested that the Court should spend more of its resources "to provide higher incentives for litigation" in the field of free movement of persons, thus increasing the number of cases decided and, consequently, enlightening the public as to how far the double burden test can be applied.[135]

Thus, one can conclude that the concept of hindrances to establishment, and to self-employment in particular, still need to be redefined by the Court if the Court indeed wishes to promote a uniform approach to all free movement rules. However, this article reviews to what extent it is lawful to restrict the scope of self-employment by national measures that vary from State to State.

Given that MS are entitled to apply their national legislation to effect freedom of establishment, then MS are equally entitled to apply their measures to limit establishment and its forms. There can be different goals of national measures that limit the scope of establishment, for example: protectionist policy, public policy concerns,

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[133] Miguel Poiares Maduro, "Harmony and Dissonance in Free Movement", in Mads Andenas and Wulf-Henning Roth (eds), Services and Free Movement in EU Law, Oxford, Oxford University Press, 2002 p. 64.
[134] Ibid., p. 66.

countermeasures to false self-employment and the like. However, from the perspective of EU law, any measure adopted at national level has to be in line with the EC Treaty, secondary legislation and the Court's case law. An exception was (and as to some State still is) the period when Europe Agreements were in force between the EU-10 and EU-15, because then the standard for review was the respective Europe Agreement and, as argued here, also the Court's case law. Thus, national measures in the context of Europe Agreements will be discussed next.

A great advantage of discussing national measures during the applicability of Europe Agreements is that the Court has given its verdict on some of them and so far it has been a 'verdict of guilty'. However, the disadvantage is that those few judgments on Europe Agreements concern national measures of the UK, Germany and the Netherlands only, which prevents one from making a conclusion about the situation in the other MS. The reasons for lack of cases from the other MS differ: national rules could be compatible with Europe Agreements, national courts refer no cases to the ECJ or there are no CEEC nationals in other States exercising their rights under the Europe Agreements. The latter seems the most probable explanation. Whilst more detailed analysis of individual cases on Europe Agreements is provided above, here more attention is paid to the Court's *dicta*.

Generally, the Court has been interpreting the provisions of the Europe Agreements, which state that the MS (EU-15) can apply their laws on entry, stay and establishment, provided that this application does not "nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement".[136] It is clear from the beginning that national measures that do restrict the scope of establishment cannot be applied in a discriminatory manner, since the right to non-discrimination is expressly provided in the Europe Agreements and has direct effect.[137] Furthermore, the Court has taken a position that the MS cannot adopt a formal approach when applying their laws and cannot refuse application to establishment because the applicant has applied for residence permit in the host State and not the home State. At the same time, the EU-15 States were entitled to apply their national laws and reject those applications, possibly expelling applicants based on false premises with the aim to circumvent national and EU legislation.[138] This right to resort to national measures was somewhat limited by the *Jany* case and might become even more restricted should the Court follow the AG's opinion in *Panayotova*, proposing that national measures have to be based on objective criteria, have to be consistent with general principles of law and

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[135] Ibid., p. 67.
[136] Supra note 50, *Europe Agreement with Latvia*, Article 56; similar provisions have been inserted also in the other Europe Agreements.
[137] N. Reich, S. Harbacevica, "The Stony Road to Brussels: The Many Ways of EA Nationals and Residents into Union Citizenship – and the Many Attempts to Keep Them Out", (2002), *Europarattslig Tidskrift*, Nummer 3, 2002, Argang 5, p. 424.

fundamental rights and cannot "…adversely affect the right of establishment so that its exercise is impossible or excessively difficult" and they are acceptable on condition that their purpose is to control immigration.[139]

These are to be minimum guidelines for national authorities when applying their measures with regard to CEEC nationals that seek to be self-employed in the EU-15. Minimum, because it is a well-established practice of the ECJ that restrictions should be interpreted narrowly, while the fundamental freedoms, including freedom of establishment, have a broad application.[140] Therefore, we now examine whether national measures aimed to distinguish between employment and self-employment, thus in fact restricting the scope of self-employment, are compatible with the Court's guidelines on the interpretation of Europe Agreements.

For example in Germany, the distinguishing test between "true" and false self-employed persons is the requirement to produce evidence that a person possesses capital to start a business and paying the living costs of the first year, the minimum amount being € 25 000.[141] Another feature of establishment rules in Germany is a requirement of master craftsman's certificate or special national diploma, in the absence of which it is possible to apply for an exceptional authorization. Since only few CEEC countries have similar requirements at home, it is almost impossible to establish some sort of equivalence of knowledge and skills. Therefore, these requirements have constituted an obstacle for self-employment, as submitted by the associations of Polish entrepreneurs in Germany.[142] That is so also because requirements of certificates have been applied with regard to such professions as painter, building cleaner, garden designer, landscape architect.[143]

The author submits that the requirement to produce starting capital of € 25 000 as the crucial prerequisite for being registered as a self-employed person, cannot be compatible with the provisions and spirit of Europe Agreements. The fact that a person applying for establishment does not have € 25 000 cannot be decisive evidence to establish that the aim of such applicant is to circumvent national legislation and to be falsely self-employed. For example, if a person wishes to be a self-employed painter in Germany, it may well be enough with say € 15 000 or even € 10 000 for the start of business, because it is unlikely that the first year will be spent for market research and

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[138] Ibid., p. 425.
[139] Supra note 97, *Panayotova*, para 48.
[140] This line of argumentation with regard to freedom of establishment has been reaffirmed in Case C-70/95 Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia [1997] ECR I-3395, where the Court in para. 26 states that establishment "allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up".
[141] Supra note 66, *Böcker*, p. 30.
[142] Ibid., p. 31.
[143] Ibid., pp. 31, 32.

there will be no income at all. Therefore, the applicant has to have sufficient means for surviving the first year. On the other hand, if a person wants to be a self-employed dentist, € 25 000 would not be enough to buy the necessary equipment, rent premises and hire support staff and, in addition, pay the living costs of the first year. In other words, the requirement to have some resources for commencement of business can be accepted, but it should be applied in a flexible manner and the amount of the required sum of money should vary from case to case. Thus it is argued that the requirement for a fixed amount of money, disregarding the nature of application, indeed impairs the benefits that accrue to the Party under the terms of Europe Agreement and "adversely affect the right of establishment so that its exercise is impossible or excessively difficult" because their purpose is not immigration control.[144]

Likewise, the validity of any requirement for a master's certificate is somewhat questionable. On the one hand, it indeed makes it excessively difficult for a painter from Latvia who lacks a master's certificate yet has 30 years practical experience to be legally self-employed in Germany. On the other hand, bearing in mind that issues concerning regulated professions have not been completely harmonized at the EU level, it would be unfair to penalize Germany for applying its national rules equally to CEEC nationals and other EU nationals, even though these rules constitute an obstacle to exercise of freedom of establishment. Thus, we revert to the above issue, namely whether the Court should intervene in national practices concerning issues that are not harmonized or abstain from any judgments and wait for the legislator to harmonize them. Consequently, it can be concluded that national legislation, requiring a master's certificate for pursuing an activity in a self-employed capacity, could be an acceptable condition and in accordance with EU law as it stands today. However, it is important to note that AG Alber discussed these issues in the *Jany* case and concluded that in order to pursue activities in a self-employed capacity, a person should neither necessarily have some type of minimum professional qualification, nor extensive financial investments and business strategy.[145] While the Court abstained from addressing these issues, the AG's opinion, if binding, would render German rules invalid.

Is there a need for distinction between self-employment and employment?

This question can be answered from two perspectives – from the workers' perspective and from the MS perspective. Arguably, workers would not be too concerned about distinguishing between self-employment and employment, because what generally matters for any worker are work conditions, job satisfaction, earnings and working

[144] Supra note 97, *Panayotova*, para 48.
[145] Supra note 4, *Leger*, paras. 104, 106, 110, 117.

hours.[146] For the worker probably the most important is to have a right to choose – either to be employed or self-employed, thus having varying degree of independence. On the other hand, the States are much more concerned about the policy aspects and legal considerations, since labour issues have not been harmonized in the EU so far, thus leaving each individual State to apply its policies and rules. Somewhere in between those two are the employers that have to observe rules of the State, yet satisfy workers' wishes, and, at the same time, adjust organization of work to changing market conditions. Hence, each participant in the labour relationship is differently motivated when distinguishing between self-employment and employment; however, the pivotal question remains – is there actually a need to distinguish between these two and what is more – enforce this distinction?

The basic legal concern in distinguishing between employment and self-employment is that the former is within the scope of labour law, while the latter usually is not. Therefore, the issue is whether self-employment ought to be included in the personal scope of labour law, since both employed and self-employed workers perform remunerated work and should be treated equally.[147] Engblom argues that the traditional scope of labour law has been connected to the concept of employee for historical reasons, namely the industrial society and, later on, labour law has been fulfilling three key functions: protection of human rights, promotion of social justice and as an instrument of economic policy.[148]

However, by moving away from industrial society, the organization of workers has become less hierarchical. Now employees have a right to take more decisions themselve, including deciding when and how to perform their tasks, as what matters for employer is to get the end result.[149] Thus, the employment relationship has become looser and now in many aspects resembles self-employment. This trend is further facilitated by new forms of employment, such as part-time and fixed-term employees. In other words, organization of work in employment and self-employment in many aspects has become similar. Nonetheless, it turns out that despite these similarities, self-employed workers are placed in a significantly worse situation as they cannot enjoy the benefits provided by the labour law.

Consequently, there exists non-equality in treatment of workers in comparable circumstances but pursuing activities in employment and self-employed capacity. While it is tempting to suggest that for this reason self-employment should be included in the personal scope of labour law, such straightforward inclusion would be fallacious. This is

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[146] Organization for the Economic Cooperation and Development (OECD) Employment Outlook, 2000; p. 156. Available on the internet at: http://www.oecd.org/document/55/0,2340,en_2649_33729_31677623_1_1_1_1,00.html. Last visited at July 23, 2004 , p. 169-171.
[147] Supra note 115, *Engblom*, p. 212.
[148] Ibid., pp. 217, 219.
[149] Ibid., p. 222

because of the "double nature" of self-employment – if self-employed workers should be treated equally with other workers, then, on the other hand, they should be treated equally with commercial enterprises.[150]

Therefore, the argument here would be not so much for inclusion of self-employed workers in the scope of labour law, but rather granting them similar rights as employed workers, in the name of non-discrimination and promotion of social justice. This would require certain amendments to the legal regulation of self-employment and, possibly, could be based on some minimum harmonization measures at the EU level. Good examples are Council Directives 97/81[151] and 99/70[152] concerning part time and fixed term work, which aim to ensure that part-time and fixed term workers are not treated differently from full time workers, essentially stressing principle of non-discrimination. The call for change of legal regulation is expressed also by Biagi and Tiraboschi, who argue that an old-fashioned legal framework is the main obstacle to creating more jobs via self-employment and note that:

> Legal rules, work contracts and principles formulated over the course of the past century are inadequate for governing and representing the new types of labour of the 21st century.[153]

In case initiative does not come from EU legislative organs, then sooner or later it will come from the Court, which, by developing its jurisprudence, will come upon this obvious discriminatory situation and, most probably, will not uphold it. At the same time, some changes have occurred already at national level, for example in Germany employee-like workers (*arbeitsnehmeränhliche personen*), closely resembling self-employed workers, have been included in the labour law, while the UK has taken a step further and, by the *Employment Relations Act 1999,* the Secretary of State is empowered to extend employment rights by regulation to "specified categories of individuals".[154]

However, these trends reflect a general move to eliminate borders between employment and self-employment and legal issues imply that there should be no strict distinction between those two categories of workers. Consequently, there are no pressing legal reasons for MS to enforce this distinction, thus safeguarding their economic interests yet preventing development of self-employment.

Despite many similarities in organization of work of employed and self-employed workers, the most striking difference between these two categories of workers is that

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[150] Ibid., p. 224.
[151] Council Directive 97/81/EC of 15 December 1997 Concerning the Framework Agreement on Part-time Work Concluded by UNICE, CEEP and the ETUC, (1998) OJ L 014.
[152] Council Directive 1999/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-term Work Concluded by ETUC, UNICE and CEEP, (1999) OJ L 175.
[153] M. Biagi, M. Tiraboschi, "Creating New Markets and New Jobs: The Personal Services Sector. Problems and Perspectives from an Italian Point of View", *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 18/3, 315-328, 2002, p. 316.
[154] Supra note 115, *Engblom*, p. 229.

the latter do not have access to extensive social security and similar privileges.[155] Furthermore, as argued above, the main reason for MS to combat false self-employment is because its primary objective is to reduce tax liabilities. Since indirect taxation has not been harmonized at EU level, taxation principles and rates vary from one MS to another and will not be discussed here. Yet the general principle is that contractors do not pay taxes and social insurance contributions for their sub-contractors, while sub-contractors (self-employed persons) pay certain taxes on the basis of their declared income.[156] Therefore, the situation is as follows: self-employed persons usually do not pay social insurance contributions and payroll taxes, in some cases they do pay income taxes, but at the same time they can not claim social benefits and the like, including the majority of those enumerated in Regulation 1612/68.

Consequently, a worker has a choice either to be employed, thus having access to social benefits yet sacrificing independence, or to be self-employed and assume all responsibility and profitability of business, being aware that social benefits will not "help" in case the business fails. In other words – what you give is what you get. Probably such reasoning was applied also during the enlargement talks, when it was decided that establishment would not be restricted in both Europe Agreements and Accession Treaty. This conclusion makes national practices even more dubious because there are no significant financial burdens on the host State from a self-employed person. Therefore, arguments about social advantages are not relevant in refusing to register a self-employed person only because their intended activity is usually performed in an employment relationship, since the self-employed person can not claim significant welfare benefits as compared to an employed person.

To sum up, pursuant to general legal rules as they stand today, clearly there is a need to distinguish between employment and self-employment from the perspective of social advantages and taxes, by reason of their accessibility. Yet this, by no means, can serve as a reason to refuse to register self-employed persons and prevent the exercise of fundamental freedom of establishment.

3. Concluding remarks: whether extensive and creative interpretation of self-employment can lead to *de facto* employment

From the perspective of EU law, the distinctive feature between self-employment and employment is a state of subordination. Bearing in mind that in employment and self-employment related social relations are governed by the national laws of the MS, each MS has developed its own dividing line between employment and self-employment. However, the common element of both EU and national criteria is that they have become fluid and can be interpreted flexibly. The rules concerning organization of work of

[155] Supra note 9, *Reich et al.*, p. 81.

employed and self-employed workers are getting increasingly similar and so far there has not been a sign that this process will be turning around, making employment and self-employment as two extremely contrasting forms of work organization.

The reasons for looseness of the distinguishing criteria have to be looked for in changes of labour market and growth of economy. It has been argued that self-employment has become a substantial cause for job growth in many countries and, at the same time, increase of self-employment has been observed in the rapidly growing parts of economy.[157] This suggests that self-employment contributes to the growth of the economy, while its inherent flexibility adds competitiveness to the economy where self-employment is promoted. These features should appeal to the EU and its MS bearing in mind the Lisbon strategy and the fact that economy in most of the big MS is in stagnation or has small growth. In other words, self-employment should not be treated as a strategy for tax evasion, but rather should be welcomed and promoted at the EU level, so as to foster economic growth.

While the legal regime governing self-employment rests at the MS level and has remained traditional by giving preference to employment, market forces have motivated society to change its approach and start to perform many activities in a self-employed capacity, even though traditionally these activities have been performed in employment. The inherent dynamism of today's society and economy has shown that the status of employee has become too static if compared to the flexibility of self-employed persons. Thus, practice has outrun legal rules by showing that extensive and creative interpretation of self-employment in many aspects can indeed replace employment. And there are several examples of self-employment conquering the employer, making it become a contractor and contracting with subcontractors instead of hiring employees.

Böcker provides an example how ingenious ideas can help to overcome requirements for work permits. Namely, even since the early 1990's Dutch asparagus growers were selling their harvest to Polish companies with the stipulation that the buyer will harvest the crop.[158] Of course, asparagus is not the only plant that needs to be harvested – the same idea can be equally applied on the harvest of strawberries, grapes, cucumbers and the like. Nonetheless, agriculture historically has been a field where self-employment is widely used as a form of work organization. The same applies to the building and cleaning industry. However, there are many other fields of classic employment activities where now self-employment is gaining popularity. For example, modern technologies and services require people that would care for their maintenance and periodic improvement, yet this can be done once a month and for many clients consecutively. Thus, software developers, database administrators, programmers and the

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[156] Supra note 66, *Böcker*, p. 17.
[157] Supra note 146, *OECD*, p. 155.
[158] Supra note, 66, *Böcker,* p. 29.

like can pursue their activities in a self-employed capacity possibly earning even more while spending less hours at work or even working at home.[159] Also accountants and bookkeepers can work as self-employed persons and conclude contracts for services with several 'employers' at the same time. In fact, it is clear that the majority of workers of so-called regulated professions can provide their services as self-employed, but the novelty lies in the fact that now also many classic employees can easily provide their services as self-employed. Nowadays, university professors and schoolteachers can also be self-employed, as well as medical doctors, nurses, or opera singers.

Another feature of the current market is the rapid increases in franchising and there are good prospects for further expansion, which in turn gives impetus for growth of self-employment. While the level of independence of franchisees varies, the general principle is that franchisees are self-employed persons that conclude a franchising contract with franchisor. It has been argued that franchising has grown in all Member States except CEEC, due to an undeveloped market there. However, since the market in CEEC is expected to develop by EU accession, it is a well-grounded expectation that self-employment will grow accordingly. For example in France franchising represents around two per cent of GDP and in Portugal 15% of the fast food and restaurant sector.[160] Franchising is a comparatively modern way of business organization and its virtues are flexibility and shift of business risk to franchisees. For this reason self-employment is the most appropriate form of work organization in franchising.

Nonetheless, it is important to note here that the author is not proposing a revolutionary change by which all employment relationships should now be transformed into self-employment. Of course, employment will remain the primary form of work organization, yet it is essential to acknowledge the assets of self-employment and remove obstacles for its implementation and further development. The aim of this chapter was to show in how many fields and aspects self-employment can potentially and actually replace employment. Of course, for this to be EU law issue an interstate element is required, i.e. a national from one MS must be willing to pursue economic activities in a self-employed capacity in another MS. The flexibility of self-employment is perfectly in line with the vision and underlying aim of free movement in the EU – efficient allocation of manpower where persons are motivated to move by higher return for their work than in their home State "thereby equalizing the marginal productivity of labour within the integrated area".[161] In other words, the very idea of free movement is

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[159] G. Kunda, S. R. Barley, J. Evans, "Why Do Contractors Contract? The Experience of Highly Skilled Technical Professionals in a Contingent Labor Market", *Industrial and Labor Relations Review*, Vol. 55, No. 2 (January 2002), Cornell University, p. 249. Available on the Internet at Hein Online database. Last visited September 24, 2004.
[160] Supra note 146, *OECD*, p. 163.
[161] Supra note 3, *O'Leary*, p. 383.

that low paid workers without any obstacles move to the MS where they are paid better and the host MS gains from increased productivity.

The EU has been confronted with exactly such a situation since 1 May, 2004, as the standard of living in the acceding CEEC countries is considerably lower than that in the EU-15 and it is no secret that CEEC nationals are quite eager to move for work in the EU-15. In fact, CEEC nationals have openly confessed that cheap labour is their country's main contribution to the EU.[162] The problem though lies in the fact that the EU-15 are not ready to swallow such a big "bite" of cheap workers, since their economies are undergoing recession and unemployment is rising.[163] However, as demonstrated above, protective measures based on economic interests are not valid as justifications for hindrances to fundamental freedoms.

Therefore, while the MS are authorized to apply restrictions on free movement of employees during the transitional period, they do not have the right to do so with regard to self-employed workers, since there is no transitional period concerning freedom of establishment. Consequently, the respective MS are not permitted to refuse applications for self-employment using the "false self-employment" argumentation claiming that intended activity is usually performed in an employment relationship because this argument has been struck down by the Court in the *Jany* case. Thus it is permissible to legally construct a work relationship as self-employment even though it *de facto* resembles employment, provided that the person who performs the work is registered as a self-employed person.

Experience during the application of Europe Agreements has shown that establishment can indeed serve as an alternative for workers from CEEC to work in the EU-15. Clearly, the legal regime under the Accession Treaty has been softened compared to that under Europe Agreements and from 1 May onwards CEEC nationals can invoke EC Treaty principles and ECJ case law on freedom of establishment, which gives them protection also from non-discriminatory national measures unless duly justified. This in turn makes a strong case for the argument that restrictions on free movement of workers are not absolute and can be avoided by creative interpretation of self-employment, the goal of such interpretation being not to circumvent any national rules but instead to follow developments in the labour market. Reich argues that establishment under the Europe Agreements has created a new way to free movement[164] and the author believes that this "new way" will be further developed during application of the recent Accession Treaty.

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[162] L. Kirk, "Cheap Labour Seen As Main Contribution to Enlarged EU", (20.08.2004.) EUobserver. Available on the internet at: http://www.euobserver.com/?aid=17114. Last visited at September 15, 2004.

[163] M. Beunderman, "Netherlands May Protect Labour Market After EU Enlargement", (19.11.2003.) EUobserver. Available on the internet at: http://www.euobserver.com/?aid=13607. Last visited at August 25, 2004.

Conclusion

Free movement of employed workers is one of the key principles of the European Union. However, free movement of employed workers is also one of the most sensitive areas for EU MS. The MS have always sought to protect their national labour markets and this has been done especially neatly during the enlargement of the EU. The recent enlargement was not an exception and the EU-15 MS applied their protectionist policies with regard to workers from prospective MS already since the Europe Agreements entered into force. In contrast to previous accessions, the last one was not only the biggest ever but also significant by the fact that most of the EU-15 MS decided to protect national labour markets also after accession. Protection was implemented through the Europe Agreements and Accession Treaty, by not granting free movement rights to employed workers from the new MS. It was intended that full free movement rights to workers from the new MS will be granted after lapse of a transitional period, which can last seven years. However, when restricting the free movement of workers from the EU-10 States, the MS did not pay adequate attention to the fact that workers can be split into two categories: employed workers and self-employed workers.

Therefore, intentionally or not, but the MS have decided to restrict the movement of employed workers while the movement of self-employed workers remained unrestricted because freedom of establishment was given full effect. In other words, the recent enlargement highlighted the ambiguity of the EC Treaty's terminology because *worker* in EU law has a narrow interpretation and stands merely for employed workers. At the same time, freedom of establishment already for a good while is much more concerned with self-employed workers than companies and in many aspects can replace free movement of employed workers. Thus, it appeared that despite MS efforts to preserve their labour markets, free movement of workers can take place irrespective of restrictions, provided that the work in the EU-15 is performed by a national from new MS who acts in a self-employed capacity. Nevertheless, the legal rules governing self-employment and its supplementary rights, entry and residence, are the MS competence since they have not been harmonized at the EU level. Therefore, a national from new MS finds himself in a situation where the general right to establishment is granted by the EU but more detailed rules and conditions are subject to MS laws.

In fact, the restrictions on free movement of employed workers facilitated the growth of freedom of establishment and many nationals from the new MS chose to pursue economic activities in the EU-15 as self-employed workers. The MS, recognizing that restrictions on free movement of workers are not absolute, continued to pursue their protectionist policy when applying their national rules on nationals from the EU-10, on many occasions rendering their right to establishment ineffective. The most common

[164] Supra note 9, *Reich et al.*, p. 80.

justification for national measures that adversely affect the right to establishment has been the threat of false self-employment. However, it has been proved in this article that this justification is inapplicable and cannot serve as an argument for hindering the exercise of self-employment. Moreover, the Court has significantly broadened the scope of establishment, recognizing that the right to non-discrimination has direct effect, establishment has ancillary rights of entry and residence and that EC Treaty case law can be directly applicable to situations covered by the Europe Agreements.

The development of self-employment has indicated that many activities can be equally performed either by employed or self-employed workers. For this reason the author has argued that on many occasions there is no need to distinguish between employment and self-employment because the same work can be done equally well by employed and self-employed workers. However, the self-employed worker performing the same activities as an employed worker is much more limited with regard to access to social protection and similar advantages. This gap in social protection has arisen because self-employment economically has developed faster than legally and the EU legislator has failed to notice that nowadays self-employed workers work on comparable conditions with employed workers. The failure to treat employed and self-employed workers equally in essence amounts to discrimination. This implies that social protection, which currently is granted to employed workers, should be equally extended to self-employed workers thus avoiding the blame of discrimination. The Court recently has been very active in extending the rights of EU citizens and observing their fundamental rights thus broadening the scope of Regulation 1612/68. Considering the *Baumbast* and *Martinez Sala* judgments, it is very likely that the impetus for extension of rights concerning self-employed workers will come from the Court.

This argument leads the discussion back to the Accession Treaty and restrictions on free movement of employed workers thereunder. Any national from the new MS who, due to restrictions on free movement of employed workers, would be pursuing economic activities in a self-employed capacity, could claim equal treatment with employed workers, provided that the activity concerned is usually performed in an employment relationship. The claim could be based on the *Gloszczuk* and *Jany* cases, which confirm the principle that activity, which usually is performed in employment relationship, can be equally performed by a self-employed worker and non-discrimination provisions in conjunction with Union citizenship, which in case of nationals from the new MS now have direct effect. For example, a self-employed Latvian national who together with an employed Greek national in Germany are working as gardeners in theory should be treated equally; thus the Latvian national could claim the same social advantages granted by EU law as the Greek national enjoys.

The claim for equal treatment would be very much in line with the Court's decision in the *Jany* case and AG Maduro's opinion in the *Panayotova* case, which stress

the importance of fundamental rights. The recent case law can even lead to the situation where the claim is based on the European Convention on Human Rights or the Charter of Fundamental Rights inserted in the European Constitution. In other words, there are several legal grounds to claim that self-employed and employed workers should be treated equally, notwithstanding the fact that they pursue their economic activities on the basis of different Treaty articles. Furthermore, the Court is famous for its judicial activism and there are no obstacles for it to rule that the spirit and *effet utile* of Union citizenship requires freedom of establishment to be interpreted uniformly with free movement of workers, thus granting similar rights to employed and self-employed workers who all are Union citizens and deserve equal treatment. The *Gebhard*, *Bosman* and *Alpine Investments* cases can serve as an example for uniform interpretation of fundamental freedoms.

The author argued in this article that the changing nature of the freedom of establishment has led to the situation where self-employment can in many ways replace employment. This development was facilitated by the restrictions on free movement of employed workers that have been included in the Europe Agreements and Accession Treaty because EU-10 nationals have extensively invoked their unrestricted rights to establishment, which consequently resulted with several references to the ECJ asking to interpret the notion of establishment. The Court has interpreted establishment so generously that it seems the right time to take the next step and place employment and self-employment on the same level, at least concerning EU law. Therefore it seems that the Court's interpretation of the Europe Agreements has provoked it to apply a similar interpretation with regard to the EC Treaty, now extending the case law the other way round - from Europe Agreements to the EC Treaty.