The Rights of Non-Member State Nationals under the EU Association Agreements

Alfred E. Kellermann*

A. Introduction

I. Scope of the Paper

This paper will discuss the legal effects of EU Association Agreements for non EU nationals. Association agreements are international agreements and fall in the category of mixed agreements. The EU Association Agreements include: the Europe Agreements (EA), the Turkey Association Agreement, the Stabilisation and Association Agreements (SAA) and finally the Partnership and Cooperation Agreement (PCA). The direct effects of the Euromed Agreements and Free Trade Agreements with the ENP (European Neighbours Policy) countries will not be covered in this paper. Only the SAA with Albania will be addressed. The SAAs with Macedonia and Croatia are not covered.

With regards to the PCAs, only the PCA with the Russian Federation will be analysed, excluding any other PCAs. Personal experiences have influenced this selection, due to my appointment as a long term Team Leader of Tacis projects in Russia (2002-2006) and of a Card Project in Albania (2007-2009).

The EU Association Agreements have, as we will demonstrate hereafter, legal effects in several legal orders. These agreements establish rights and obligations after ratification and in the case that accession is the objective, already before the date of accession. This phenomenon may be considered as the so-called pre-accession effect of Community law. Moreover, decisions of the European Council have pre-accession effect and legal consequences in the Community legal order as well as in the national legal order of the candidate country.

II. Copenhagen Criteria and Pre-Accession Effect

The Copenhagen European Council declared in June 1993 that every country, which has signed the Europe Agreement with the European Communities and the Member States, may apply for accession if it fulfils the necessary political and economic criteria as well as the other obligations for Membership. Although a candidate country is not yet an EU Member State, the citizens of the candidate

* Team Leader EU Project Strengthening the Ministry of European Integration in Tirana; Legal and Policy Advisor T.M.C Asser Institute, the Hague.

European Journal of Law Reform, Vol. X, no. 3, pp 339-382.

country will have many rights and obligations derived from the Europe Agreement upon its entry into force. Other obligations of candidate countries are based on the negotiations, Accession or European Partnership and the Copenhagen criteria. These criteria state that Membership requires

- stability of institutions guaranteeing the rule of law, human rights and respect for the protection of minorities; (*political criteria*)
- a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union; (*economic criteria*)
- the stability to take on obligations of membership, including adherence to the aims of a political, economic and monetary union.

Some of the Copenhagen criteria have been of such importance that they were inserted by the Treaty of Amsterdam in Article 49 EU, which refers to Article 6 EU.[1] The political criteria are more or less laid down generally also in the texts of national constitutions and the compliance with all these criteria is monitored by the European Commission in its Progress Reports.

We will first discuss the legal effects of the EU Association Agreements in doctrine and theory. Subsequently, we will analyse the legal effects in practice with examples from case law in the community legal order and national legal orders of non-member states, both (potential) candidate countries and PCA countries.

Section B of this paper will deal with the legal effects of the EU Association Agreements in the Community legal order (including the national legal order of EU Member States) for citizens and nationals of (potential) candidate countries and PCA countries. I will focus on the Preliminary Rulings of the ECJ (ECJ), originating from the direct effect of the Europe Agreements concluded between the EC and countries that became Member States between 2004 and 2007. The ECJ Preliminary Rulings on EU Association Agreements will be covered in this section as well, in which Polish, Czech, Bulgarian, Turkish and Russian nationals have been involved before the national courts of EU Member States. Although no Croatian, Macedonian or Albanian nationals were involved in national court cases yet, possible scenarios are set out to start the Preliminary Rulings procedure of Article 234 EC.

Sections C and D will focus on the legal effects of the EU Association Agreements in the national legal orders of non-Member States. Section C will address the Europe Agreements concluded with Poland, Bulgaria, the Slovak Republic, Slovenia and Romania. Section D will cover other EU Association Agreements with Croatia, Albania and Turkey. The relationship with the Russian Federation is also covered in this section and serves as an example of the effects of an EU Association Agreement in the national legal order of a country that is not applying for EU Membership. Special attention will be given to court cases in non EU Member States referring to the respective national constitutional provisions of (potential) candidate countries, as these constitutional provisions regulate the effects of the EU Association Agreements in the national legal orders of non

[1] "The Union is founded on the principles of liberty, democracy, respect for human rights and the rule of law."

EU Member States. In addition, focus will be on those national constitutional provisions that are regulating the relationship between international law, national law and the role of the judiciary.

B. Legal Effects of EU Association Agreements in the Community Legal Order

I. Principles and Sources of Community Law

In order to have a better understanding of the possible legal effects in the Community legal order in the pre-accession period, a tour d'horizon is given to the fundamental principles of Community law (primary and secondary sources, court cases like Van Gend & Loos, Costa ENEL;[2] agreements with non-member countries; Demirel case).[3] The role of the ECJ in the Preliminary Rulings Procedure (Article 234 EC) is discussed, in which the national courts from all the EU Member States can refer a question on interpretation of the Treaties and Secondary legislation to the ECJ.[4]

1. Tour d'horizon

The sources of community law can be divided into primary and secondary (or derived) Community law.

Primary Community law consists of those provisions, which were adopted directly by the Member States, like the EEC, Euratom, ECSC and EU Treaty provisions. Together with the general principles of law, recognised in the Community legal order, they constitute the 'constitutional provisions' of Community law; Primary law also includes the protocols annexed to the Treaties, concluded international agreements like the Europe Agreements, Stabilisation and Association Agreements, and Accession Treaties.

Secondary law consists of the acts of the institutions (autonomous acts like regulations, directives, decisions, recommendations etc.). Much of the development of the Community legal system has not been laid down in Treaty rules or secondary legislation but in the interpretative practices of the ECJ, as we will see in the following

The relationship between the primary and secondary law sources is not expressly laid down in the Treaties, but its hierarchy of norms may be derived from Article 230 EC (ex Article 173) of the EC Treaty, under which an action

---

2 Case 26/62 Van Gend & Loos (1963) ECR 1 en Case 6/64 Costa v. ENEL (1964) ECR 585.

3 Case C-12/86 ECR 1987, 3719 (Demirel).

4 H. G. Schermers, C. W. A. Timmermans & A. E. Kellermann (Eds.), Article 177 EEC: Experiences and Problems (1986); S. Blockmans & A. Lazowski (Eds.), The European Union and its Neighbours, A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration (2007); K. Lenaerts & P. van Nuffel, Constitutional Law of the European Union 534 (1999); A. E. Kellermann, *et al.* (Eds), EU Enlargement: The Constitutional Impact at EU and National Level (2001).

may be brought for the annulment of actions of the Community institutions, *inter alia* on the ground of "infringement of this Treaty or of any rule relating to its application." Judicial review includes examining whether the acts in question are compatible with all superior rules of law. Primary Community law is at the top of the hierarchy, including the general principles of law, which the ECJ ensures, are observed pursuant to Article 220 (ex Article 164) of the EC Treaty.

The relationship between Community law and national law is not explicitly laid down in the treaties. Nor are the principles of primacy and direct effect of community law. These principles were interpreted by the ECJ in the ground-breaking judgments in *Van Gend & Loos* and *Costa Enel*.[5] These cases form the basics for understanding the character of Community law and the role of national constitutions. The following passages are pivotal in this respect.

> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights, which become part of their legal heritage. These rights arise therefore not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon the institutions of the Community[6]

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which are bound to apply.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds their nationals and themselves ...
>
> The precedence of Community law is confirmed by Article 189 EEC (*now Article 249 EC*) whereby a regulation "shall be binding" and directly applicable in all Member states ...[7]

These observations show that domestic legal provisions, however framed, cannot override the law stemming from the Treaty,which is an independent source of law, and is of a special and original nature. Judging otherwise would ignore its character as Community law, thus calling into question the legal basis of the Community.

The transfer of the rights and obligations from a domestic legal system to the Community legal system carries with it a permanent limitation of sovereign rights. Hence, a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

---

5 *See supra* note 2.

6 Case 26/62.

7 Case 6/64.

The ECJ has no jurisdiction to rule on the validity of primary Community law. It may only give preliminary rulings on the interpretation. This means that provisions, constituting an integral part of accession, for example in the Stabilisation and Association Agreements, Partnership and Cooperation Agreements, and Europe Agreements, may not be subject to judicial review by the ECJ.

2. Agreements with Non-Member Countries – Europe Agreements, Stabilisation and Association Agreements, Partnership and Association Agreements – Direct Effect

Article 300 of the EC Treaty sets out the procedure for the Community to conclude agreements with non-member countries or international organizations. Agreements concluded under the conditions of that article are binding on the Community institutions and on Member States. The provisions of such agreements, such as, for example, the Europe Agreements, Stabilisation and Association Agreements, Association Agreements, Partnership and Cooperation Agreement, form an integral part of the Community legal order from the time they enter into force.

This is in accordance with the monist approach: agreements concluded by the Community form part of the Community legal order without the necessity of transposing the provisions into Community law.

The rules ensuing from agreements binding on the Community rank higher than the acts of Community institutions. This is based on the fact that the ECJ considers itself bound to examine whether the validity of acts of the institutions may be affected because they are contrary to a rule of primary law. In view of the fact that international agreements concluded by the Community rank higher than provisions of secondary Community legislation, such provisions must, as far as possible, be interpreted in a manner that is consistent with those agreements. In proceedings before national courts, individuals may rely on a provision of an agreement concluded by the Community only if the provision has direct effect. In the *Van Gend & Loos* Case the Court considered that:

> The wording of Article 12 [now Article 25] contains a clear and unconditional prohibition which is not a positive but a negative obligation. The Treaty did not only create rights and obligations for Member States but created also rights and obligations for the citizens.

To increase the import duty was therefore contrary to the prohibition mentioned in Article 12 EEC and creates rights for Member State citizens and has, as a consequence, direct effect, allowing nationals to rely on the national courts.

Does the general test for direct effect as developed in *Van Gend & Loos* also apply to international agreements? According to the ECJ's well-established jurisprudence, for example in the *Demirel case*,[8] the answer to our question is affirmative:

> A provision in an international agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being

[8] *See supra* note 3.

> had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

Put differently, provisions in SAAs and in PCAs allow nationals of the respective countries to rely on these provisions before national courts of the host country. Identical provisions with negative obligations or the so-called standstill provisions such as in the *Van Gend & Loos* Case, are also set out in the SAAs and PCAs.

According to these criteria a considerable number of specific provisions in the SAAs and PCAs could be invoked before national courts during the pre-accession period. *Van Gend & Loos* showed that this applies to negative obligations (in this case an obligation not to raise the customs duties after a special date). Provisions on non-discrimination in the field of the right of self employed citizens and movement of workers of candidate countries in the Member States might be invoked before national courts as well. However, in the pre-accession period the direct effect depends on the interpretation of the respective national constitution as we will see in Section II of this paper.

Although the European Council and Commission developed flexible forms of integration in its pre-accession strategy, Agenda 2000 and the Accession Partnerships, the core of the constitutional and substantive principles of the Community have to be met by all the Member States. The candidate countries have to accept the *acquis communautaire*, which term has been included in the 1991 Treaty of Maastricht in Articles B and C (new version: Articles 2 and 3). However, a definition of the term *acquis communautaire* has never been given in the Treaty. In practice the institutions of the European Community (Parliament, Council, Commission and Court of Justice) refer to the *acquis communautaire* as the whole body of legal texts and Court decisions which have been produced since the existence of the European Communities in 1952 and which are still in force. The *acquis* therefore includes the latest version of all primary European legislation (i.e. the provisions of the EU and EC Treaty), the concluded international agreements (for example the Europe Agreements, the Accession Treaties), and the case-law of the ECJ as well as secondary and tertiary legislation (regulations, directives etc.). The ECJ referred in several decisions to the *acquis communautaire* and explained that from the date of accession the uniform application of the *acquis communautaire* is necessary and considered that the new Member States are subject to the same obligations as the original Member States.[9]

[9] *See supra* note 3.

II. Relevant ECJ Cases Concerning the Pre-Accession Effect of Europe Agreements in the Community Legal Order and Relevant Court Cases in the EU Member States

Since 1991 ten Europe Agreements have been in force.[10] After the countries, which concluded these agreements, became an EU Member State in 2004 and 2007, the doctrine of direct effect of Europe Agreements is of academic interest.

However, the ECJ's preliminary rulings on the direct effect of the Europe Agreements form excellent examples of the possible direct effect of SAAs and PCAs. It took until 1999 before the ECJ had to answer preliminary questions referred by national courts on the rights under the Europe Agreements, invoked by citizens from Poland, the Czech Republic and Bulgaria, who were aware of their pre-accession rights. The cases *Gloszczuk*, *Kondova* and *Barkoci* were referrals from the High Court of Justice of England and Wales. *Jany* was a referral from the Arrondissementsrechtbank in the Hague (The Netherlands). In these cases the issue was raised before the respective national courts whether the establishment provisions laid down in the Europe Agreements had direct effect and whether nationals could enforce their rights of establishment before national courts of the Member States.[11] In the following a summary of the facts of these cases is given.

In the *Gloszcuk* case a Polish couple entered the United Kingdom in 1989 and 1991 respectively on tourist visa, which they had obtained by making false representations to the immigration officials as to their personal circumstances and the true intentions of their stay. Following the birth of their son in 1993 and the entry into force of the Europe Agreement with Poland on 1 February 1994, the applicants argued that they had the right to stay in the UK because Mr. Gloszcuk had been working in the UK as a self-employed building contractor since 1995 and had the right to establish himself in the United Kingdom under Article 44 of the Polish Europe Agreement.

The *Barkoci* and *Malik* cases concerned Czech citizens, who were members of the Roma Community and who could not find work in the Czech Republic. Originally they came to the UK in 1997 and unsuccessfully applied for asylum.

---

[10] EC Poland Europe Agreement OJ 1993 L 348/1; EC Hungary Europe Agreement OJ 1993 L347/1; EC Czech Republic Europe Agreement OJ 1994 L 360/1; EC Slovak Republic Europe Agreement OJ 1994 L 359/1; EC Romania Europe Agreement OJ 1994 L 357/1; EC Estonia Europe Agreement 1998 L 68/1; EC Latvia Europe Agreement 1998 L 26/1; EC Lithuania Europe Agreement OJ 1998, L 51/1. For pre-accession effect of Europe Agreements *see* Kellermann, de Zwaan & Czuczai, *supra* note 4, at 412.

[11] European Court of Justice of 27 September 2001- Case C-63/99 – Gloszczuk; - C-235/99 – Kondova and - C-257/99 – Barkoci and Malik; 20 November 2001 – C-268/99 – Jany and Others; A. Ott, *The Rights of Self-Employed CEEC Citizens in the Member States under the Europe Agreement*, 2001The European Legal Forum 497. Also on the cases Gloszczuk, Kondova and Barkoci: R. H. van Ooik & H. Staples, *Het Rechtstreekse Beroep van Oost-Europese Zelfstandigen op de Europa Akkoorden*, 2001 Nederlands Tijdschrift voor Europees Recht 313; R. van Ooik, *Freedom of Movement of Self-Employed Persons and the Europe Agreements*, 4 European Journal of Migration and Law 377 (2002).

Following the rejection of their application for asylum they invoked the Europe Agreement between the EC and the Czech Republic in order to work in the UK, respectively as a self-employed gardener and as a provider of 'domestic and commercial cleaning services'. The immigration authorities were not satisfied with the financial viability of the business plans and the genuine intention to act as a self-employed worker. They were refused entry to the UK for a second time.

The *Kondova* case concerned a Bulgarian national who, after having studied in the UK, intended to work as a self-employed person 'offering general household care services'. Kondova entered the United Kingdom in 1993 – before the Europe Agreement with Bulgaria entered into force – on the basis of a visa she had obtained by making false representations to the immigration authorities as to the purpose of her stay. Once present in the United Kingdom she made a claim for political asylum, which was refused on 19 April 1994. Legal challenges against the refusal to grant asylum failed. Ms. Kondova then married a Mauritian national, who had indefinite leave to remain in the UK. On 2 August 1995 Ms Kondova applied to the British Secretary of State for leave to remain in the UK on the basis of her marriage. Ms Kondova had acknowledged during an interview that her true intention on arrival in the UK had been to seek asylum. She had knowingly misled both the entry clearance officer, who had granted her the visa in Bulgaria, and the immigration officer, who had questioned her on her arrival. The Secretary of State concluded that Ms Kondova had entered the UK illegally. On 9 November 1995 she was granted 'temporary admission', pending her deportation from the UK. On 2 January 1996 Ms Kondova commenced working as a self-employed cleaner and applied for leave to remain in the UK pursuant to the Europe Agreement. This new application was refused by the Secretary of State on 24 July 1996 on the ground that he was not satisfied that the income, which Ms Kondova would receive from the proposed business, would be sufficient to maintain her without recourse to employment other than her business. Ms Kondova was arrested on 10 September 1996 and detained in a police station with a view to effecting her deportation from the United Kingdom. Since the resolution of the dispute required an interpretation of the Europe Agreement with Bulgaria, the High Court of Justice of England and Wales, Queen's Bench Division, decided to stay proceedings and to refer five questions for a preliminary ruling to the ECJ. These questions referred to: the interpretation of Article 45 of the Europe Agreement with Bulgaria; the direct effect of the right of establishment; the relationship of Article 45 and the national immigration laws; reliance on these provisions in case of illegal entrance.

1. The Results and Effects of These ECJ Judgments?

The ECJ considered that the right of establishment for the nationals of Poland, the Czech Republic and Bulgaria in the above-mentioned cases implies a right of entry and residence and that these rights, which are based on the non-discrimination provisions of the respective Europe Agreements, may be enforced by national courts.

The objectives in all these four cases were nearly identical: to obtain residence permits for nationals of several candidate countries on the basis of the respective Europe Agreement. The respective nationals sought entry into and residence in the territory of two EU Member States (The United Kingdom and the Netherlands) in order to work there as a self-employed person. Since they did not have such rights of entry and residence under national law, the right of establishment as laid down in the various Europe Agreements were invoked. In identical terms, the various Europe Agreements state that

> each Member State shall grant, from entry into force of this Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of companies and nationals and shall grant in the operation of companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and nationals.

To ilustrate the point, the following excerpts from the *Kondova* case are reproduced:

> Case - Judgment of the Court of 27 September 2001: on the interpretation of Articles 45 and 59 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358, p. 1), (1a)
>
> THE COURT, in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), by order of 18 December 1998, hereby rules:
> 1. Article 45(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, ... is to be construed as establishing, within the scope of application of that Agreement, a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. The direct effect which that provision must therefore be recognised as having means that Bulgarian nationals relying on it have the right to invoke it before the courts of the host Member State, notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment, in accordance with Article 59(1) of that Agreement.
> 2. The right of establishment, as defined by Article 45(1) of the above Association Agreement, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Bulgarian nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a Member State. However, it follows from Article 59(1) of that Agreement that those rights of entry and residence are not absolute privileges, inasmuch as their exercise may, in some circumstances, be limited by the rules of the host Member State governing the entry, stay and establishment of Bulgarian nationals.
> 3. Articles 45(1) and 59(1) of the above Association Agreement, read together, do not in principle preclude a system of prior control which makes the issue by the competent immigration authorities of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into

> employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. Substantive requirements such as those set out in paragraphs 217 and 219 of the United Kingdom Immigration Rules (House of Commons Paper 395) have as their very purpose to enable the competent authorities to carry out such checks and are appropriate for achieving such a purpose.
> 4. Article 59(1) of the above Association Agreement must be construed as meaning that the competent authorities of the host Member State may reject an application made pursuant to Article 45(1) of that Agreement on the sole ground that, when that application was submitted, the Bulgarian national was residing illegally within the territory of that State because of false representations made to those authorities or non-disclosure of material facts for the purpose of obtaining initial leave to enter that Member State on a different basis. Consequently, those authorities may require that national to submit, in due and proper form, a new application for establishment on the basis of that Agreement by applying for an entry visa to the competent authorities in his State of origin or, as the case may be, in another country, provided that such measures do not have the effect of preventing such a national from having his situation reviewed at a later date when he submits that new application.

Ms Kondova's application for leave to remain in the UK was rejected because she had entered the country illegally. She made false representations both to the official who issued her visa in Bulgaria, and to the immigration officer who had questioned her on her arrival in the UK. Such an Europe Agreement national "places herself outside the sphere of protection afforded to her under the Association Agreement" and therefore her application was rejected.

The conclusion is that if you are illegally present in the EU, you do not have the right to receive a residence permit. However, if the national of the candidate country fulfils the substantive criteria the Member States must issue a residence permit.

2. Can Prostitution Be Considered as an Economic Activity of a Self-Employed Person?

The *Jany* case[12] dealt with two Polish and four Czech prostitutes who invoked the Europe Agreements in order to obtain Dutch residence permits. They declared to have established their residence in the Netherlands at various dates between May 1993 and October 1996. All of them work in Amsterdam as 'window prostitutes'. According to Dutch law certain forms of prostitution are permitted, including window prostitution. The women submitted documentation as necessitated by the Dutch Circular on Aliens to apply for a residence permit. They were registered at the Chamber of Commerce, received a certificate from the tax authorities, and ordered accountants or auditing firms to prepare a financial account of their business turnover.

They applied for residence permits to work as self-employed prostitutes. In the first instance these applications were rejected. The District Court of The Hague argued that the right of free movement of self-employed nationals of EU Member States is based on secondary Community law and not directly on the

[12] *See supra* note 11.

treaty itself (i.e. Article 43 EC Treaty). After several appeals against the decisions of the Secretary of State, the District Court of The Hague considered on 1 July 1997 that the Secretary of State recognised prostitution as an economic activity, as the Secretary had granted a residence permit to an Italian prostitute in order to allow her to work in the Netherlands. The meaning of prostitution as self-employed work is different in the Europe Agreements and Article 52 (now Article 43) EC Treaty.

The Secretary of State, ruling afresh in four different Decisions, dismissed the applications again. Finally the District Court (Rechtbank) in The Hague submitted five preliminary questions to the ECJ on the interpretation of these Europe Agreements.

The ECJ recognised that the the right of establishment could be invoked before the Dutch Court. The right of establishment as defined in the respective Polish and Czech Europe Agreements means that the right of entry and the right of residence, as corollaries of the right of establishment, are conferred on Polish and Czech nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen or activities of professions in a Member State.

The Court considered further that "economic activities as self-employed persons" referred to in the Europe Agreements have the same meaning as the "activities as self-employed persons" referred to in Article 52 of the EC Treaty.

The Court considered further that the activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration and is therefore covered by both expressions. Prostitution is an economic activity pursued by a self-employed person as referred to in those provisions. It should be established that it is being carried out by the person providing the service:

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

The national court, in this case the District Court of The Hague, should determine in each case, in the light of the evidence before it, whether those conditions are met.

The national immigration authorities and the national courts have to check in each case if these three 'Jany' criteria have been fulfilled. How do you check in each case if the prostitute is really working "outside any relationship of subordination"? And how do we know if the services are paid "directly and in full" to the provider of the service and not to a procurer?

Since the Europe Agreements grant rights of entry and residence to self-employed nationals only, and not to workers of candidate countries, it is very important to distinguish between the self-employed persons and those in a salaried capacity.

3. Free Movement of Workers

The Europe Agreements do not establish a freedom of movement of workers for nationals of Europe Agreement countries. They only grant a right to equal treatment to those nationals who are already legally residing and working in one of the Member States.

In *Case C-162/00, Land Nordrhein-Westfalen/Beata Pokrzeptowicz-Meyer,* Judgment of the Court of 29 January 2002, [2002] ECR I-1049, it was decided, *inter alia,* that Article 37(1) of the Europe Agreement with Poland should be granted direct effect, so that Polish nationals who assert it, may rely on it before the national courts of the host Member State. Ms Pokrzeptowicz-Meyer, a Polish national who had graduated in Lodz (Poland), transferred her residence to Germany, where she was engaged as a part-time foreign language assistant at the University of Bielefeld. She was employed for a fixed term.

She relied on a judgement of the European Court in *Spotti*, in which the European Court held that the paragraph in question of the Framework Law on Higher Education in Germany was discriminatory to Community nationals. The European Court considered that this Law had also a discriminatory character to nationals of candidate countries and allows therefore that the interpretation of Article 48(2) of the EC Treaty as adopted in the *Spotti* Case (*Case C-272/92 Spotti /Freistaat Bayern,* [1993] ECR I-5185) should be transposed to Article 37(1) of the Europe Agreement. The Court added in this case the fact that provisions of the Europe Agreements can have the same meaning as provisions of the EC Treaty, where such interpretation was given by the ECJ in a previous case.

Article 38(1) of the Association Agreement between the Communities and Slovakia of 19 December 1994, was interpreted on 8 May 2003 by the Court of Justice in *Case C-438/00 Deutscher Handbalbund eV v. Marcos Kolpak* (Judgment of 8 May 2003, [2003] ECR I-4135). The case concerns the limitation on the number of professional players having the nationality of non-member countries who may play on a team in the league of a sports federation: a professional sportsman of Slovak nationality, who is lawfully employed by a club established in a Member State, should be equally treated as an EU national with regard to field in league or club matches.

The final conclusion is that in the Netherlands, according to the Court's judgment in the *Jany Case,* self-employed prostitutes from candidate countries have the same rights as prostitutes from EU Member States. However, the immigration authorities will check beforehand if the Europe Agreement conditions for establishment are met, and if so, the Member States must issue a residence permit. Following the interpretation of Article 37(1) of the Europe Agreement with Poland or Article 38 of the Association Agreement with Slovakia, there is only a right to equal treatment for such nationals if they are already legally employed in the territory of a Member State.

III. Pre-Accession Effects in the Community Legal Order of the EC-Turkey Association Agreement, the Stabilisation and Association Agreements and the Interim Agreements

The legal effects of the provisions of the Europe Agreements are more or less identical to the provisions of the EC Turkey Association Agreement, and the Stabilisation and Association Agreements between Croatia, or Macedonia or Albania and the EU and its Member States. Up until now only Turkish nationals residing in the EU Member States have relied on the direct effect of the EU Association Agreement.

1. Ankara Agreement

The 1963 Association Agreement between Turkey and the EC (the Ankara Agreement), which entered into force on 1 December 1964, is the legal basis for the association between Turkey and the EU. There have been more than 24 cases decided by the ECJ and a number of cases decided by other national courts of Member States with regard to the Ankara Agreement, the Additional Protocol and Association Decisions. The ECJ treats the Association Council Decisions the same way as the Association Agreement and considers these documents as an integral part of the Community legal order and as enjoying primacy over all domestic law of the EU Member States, as well as over conflicting secondary law of the EU Member States.

Unlike most other candidate countries, Turkey's institutional relations with the EU were established as early as 1963. When Turkey entered into an Association Agreement with the EEC, it was already a modern country with a market economy.

According to Article 22(3) of the Ankara Agreement the Association Council shall adopt appropriate decisions after the transitional period has passed. The EC-Turkey Association Council adopted Decision 1/95 on Customs Union, which covers the free movement of goods and related issues. It is composed of 66 Articles, and entered into force on 1 January 1995. The Association Council decisions on the Customs Union should be interpreted in conformity with the relevant decisions of the ECJ.

Article 22(3) further points out that the Turkish judges should take into account the jurisprudence of the ECJ in order to give meaning to the provisions of Decision 1/95 on the completion of the Customs Union between Turkey and the EC in industrial and processed agricultural goods. The association regime entered into its final stage with the introduction of the customs union on 1 January 1996 between Turkey and the EC.

Article 12 of the Ankara Agreement provides for progressively securing the freedom of movement of workers as mentioned by the EC Treaty. Furthermore Article 36 of the Additional Protocol set out the timetable of between 12 and 22 years to secure the freedom of movement of workers. In the *Demirel Case* (C-12/86, [1986] ECR 3719, at 3744 and following) the Court of Justice held that Article 12 of the Ankara Agreement together with the Additional Protocol

were essentially programmatic and not sufficiently precise and unconditional to govern the movement of workers directly. Whilst the Court had not yet examined the specific question of the implication of the expiry of the time frame for the transitional stage, the Advocate General in his opinion in *Demirel* suggested that the expiry of that time frame did not create any binding effect.

Absent from the Ankara Agreement is any reference to rights pertaining to family reunification. The question whether freedom of movement includes a right for the Turkish worker to take with him his spouse and children was also referred to the Court of Justice in *Demirel*. Article 7 of Decision 1/80 deals with the right of access of family members of Turkish workers. The Court of Justice confirmed the direct effect of Article 7 on several occasions (*Case C-355/93 Eroglu/Land Baden-Württemberg* ([1994] ECR I-5113) and *Case C-351/97 Kadiman* ([1997] ECR I -2133).

In all these cases the ECJ explained through interpretation on request of Member States courts what the legal effects are of the Ankara Agreement in the Community legal order.

2. Stabilisation and Association Agreements and Interim Agreements

As mentioned above, there has been no court case in any of the EU Member States involving a Balkan national, which called for a preliminary ruling of the ECJ on the interpretation of provisions in the Stabilisation or Association Agreements. Up until now no national from a Balkan country has tried to enforce his rights in the Community legal order, like, for example, some nationals did from Poland, Bulgaria, Slovak Republic, Czech Republic, Turkey and even Russia.

3. Republic of Albania

Albania signed a Stabilisation and Association Agreement (SAA) with the EU on 12 June 2006. The SAA provides a framework of mutual commitments on a wide range of political, trade and economic issues. This SAA has to be ratified by the 27 EU Member States, before entering into force. Up till now approximately 22 EU Member States have ratified the SAA.

The trade-related parts of the SAA are implemented through an Interim Agreement on Trade and Trade-Related Matters between the European Community and the Republic of Albania. This Agreement entered into force on 1 December 2006 and could therefore already be subject to the Preliminary Rulings procedure before a court of an EU Member State. The revised European Partnership has been approved by Council Decision 2006/54/EC of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Albania.

Although there has not been a case yet before a court in an EU Member State, in which an Albanian national is involved and where a preliminary ruling is requested on the interpretation of the SAA or Interim Agreement provisions, we could imagine that such a case could sooner or later be decided.

Therefore a better understanding of the direct effect of provisions of the Interim Agreement is necessary. If we compare, for example, the internal market provisions of the EC Treaty of 25 March 1957, lastly amended by the Treaty of

Nice (or TEC: Treaty establishing the European Community) with the provisions of the Interim Agreement of 22 May 2006, which entered into force on 1 December 2006,similar legal developments may be expected especially concerning the stand still provisions.

For example, Articles 25 and 28 TEC, prohibiting customs duties and quantitative restrictions between the Member States, have direct effect according to the ECJ. Article 20 of the Interim Agreement (SAA Article 33) similarly regulates that there are standstill provisions and no new customs duties or new quantitative restrictions on imports or exports or charges or measures having equivalent effect shall be introduced, nor shall those already applied be increased in trade between the Community and Albania.

Article 20 of the Interim Agreement as a stand still provision has direct effect, and every person and company established in the EU Member states could bring a case before a national court in one of the 27 EU Member states.

Companies and persons established in Tirana, for example, could make an appeal before the national courts against the payment of customs duties if the Government would not comply with Article 20 Interim Agreement, because the Interim Agreement has direct effect in the Albanian legal order, as Article 122 Para.3 of the Albanian Constitution holds:

> The norms issued by an international organization, have superiority, in case of conflict, over the laws of the country if the agreement ratified by the Republic of Albania for its participation in the organization expressly contemplates their direct applicability.

Albanian courts should deal with cases for non-compliance by the Government of the stand-still provisions in the same way, if a company, be it Albanian or European and established in Albania, disputes the correctness of the respective customs duties or quantitative restrictions.

The second case concerns fiscal discrimination in Article 90 of the EC Treaty:

> No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar products.
>
> Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Article 91 of the EC Treaty states:

> Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly."

There are provisions similar to Article 90 of the EC Treaty in the Interim Agreement. Article 21 Interim Agreement (Article 34 SAA) has the following to say on the prohibition of fiscal discrimination:

> The Parties shall refrain from, and abolish where existing, any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Party and like products originating in the territory of the other Party. [Para. 1]
>
> Products exported to the territory of one of the Parties may not benefit from repayment of internal indirect taxation in excess of the amount of indirect taxation imposed on them. [Para. 2]

Case 168/78 ([1980] ECR 347) deals with the equal fiscal treatment of cognac and whiskey. France applied higher tax rates to spirits which were based on grain, (such as whiskey, rum, gin, vodka), than those based on wine and fruit (such as cognac, calvados, armagnac). The question arose if these are identical or similar products for taxation. The Court of Justice explained that similar products are those which "have similar characteristics and meet the same needs from the point of view of the consumers." However, the higher tax rates did not help nor protect the French cognac producers (which was the reason for the higher tax rates!), since the consumers preferred to buy a more expensive alcoholic drink, like whisky.

Article 90 EC can be compared with Article 21 Interim Agreement. One could imagine two instances in which an Albanian court would deal with the discriminatory application of fiscal regulations and non-compliance with Article 21 of the Interim Agreement. In the first case the taxed product could be Raki, and in the second case it could be beer.

In the first case on Raki, it would be interesting for the Albanian Taxation Department to investigate if Albanian Law No.8976 of 12 December 2002 on Excise Duties is in compliance with Article 21 Interim Agreement as regards the excise duty on Raki. Under CN Code 22 08 the excise rate for Raki was fixed at 80 lek per litre whereas other alcoholic drinks, for example grappa, have an excise duty of 100 lek per litre. As such this is not an equal fiscal treatment of Raki and Grappa.

In the second case on beer reference could be made to a memorandum of Greece of 6 June 2007, which dealt with increased excise duty on Greek beer if certain limits of production or import were exceeded. The question could arise whether there has been an equal treatment of Albanian beer and imported Greek beer with regard to the increased excise duty?

The examples of alcoholic drinks, like Raki and beer, show that the Albanian Administration in dealing with such cases will probably also be confronted with court cases requesting preliminary rulings from the ECJ. This could be the case if, for example, the Italian producers of Grappa would sue the Albanian Tax Administration before an Italian court and that court would ask for a preliminary ruling from the ECJ.

a. The Pre-accession Effect for Albanian Nationals of the Entry into Force of the Stabilisation and Association Agreement (SAA)

As soon as the SAA will be ratified by all EU Member States, the SAA will enter into force. As a result, Article 46 SAA, in Title V, Chapter I - Movement of Workers, will be applicable. This Article holds the following:

> 1. Subject to the conditions and modalities applicable in each Member State:
> - treatment accorded to workers who are Albanian nationals and who are legally employed in the territory of a Member State shall be free of any discrimination based on nationality, as regards working conditions, remuneration or dismissal, compared to its own nationals:
> - the legally resident spouse and children of a worker legally employed in the territory of a Member State, with the exception of seasonal workers and of workers coming under bilateral Agreements within the meaning of Article 47, unless otherwise provided by such Agreements, shall have access to the labour market of that Member State, during the period of that worker's authorized stay of employment. ...

In order to apply this Article, one should be legally employed. This Article does not give a right to legal employment. However, there will be an important impact after the entry into force of Article 46 SAA. Nearly one million Albanian nationals, who are legally employed in the EU Member States, may enforce their rights and the rights of their spouse and children on equal treatment deriving from Article 46 SAA, before one of the courts of the 27 EU Member States. These are identical rights as those which were derived from Article 38, respectively Article 37. of the Europe Agreement with Poland, respectively the Slovak Republic, where Polish and Slovak nationals enforced their rights on the free movement of workers and which Articles have nearly identical wording as Article 46 SAA.

IV. Legal Effects in the Community Legal Order of the Partnership and Cooperation Agreement between Russia, the EU and its Member States

The Partnership and Cooperation Agreements (PCAs) are the instruments linking the EC and its Member States with most countries from the former Soviet Union, the so-called Newly Independent States (NIS). These agreements were signed and concluded between 1994 and 1998. The Preambles to the PCAs intentionally omit any reference to certain phrases that can be found in the Europe Agreements (EAs), such as the "process of European integration." Eleven PCAs were signed and only nine are in force. Due to the political situations in Belarus and Turkmenistan, the PCA with these countries, which were signed in 1998, have not entered into force. The Agreement with Russia, which is the most extensive PCA, came into force in 1997. As this Agreement is the most elaborate and most important Agreement we will focus in the following on the legal effects of this Agreement only.

On 12 April 2005 the ECJ delivered for the first time in its history a judgment concerning the direct effect of the Agreement on Partnership and Cooperation between the European Communities and their Member States, on the one hand, and the Russian Federation, on the other. This so-called *Simutenkow* judgment shows that the EU-Russia Partnership and Cooperation Agreement (PCA), signed in Corfu in 1994, is not just a piece of paper or political document; it establishes a

legal order in which rights, derived from the PCA for equal treatment of Russian citizens and Russian companies can be enforced before the courts of the EU Member States. The ECJ followed the Opinion of the Advocate General of the ECJ, Mrs Stix-Hackl, delivered on 11 January 2005.[13]

The facts of the case were as follows. Igor Simutenkov is a Russian national who holds a residence card and a work permit in the Kingdom of Spain. He works as a professional footballer under an employment contract with the club Deportivo Tenerife and holds the Royal Spanish Football Assocation (RFEF) licence for players from outside the Community and the EEA. In January 2001 he applied through his club to the RFEF for his licence to be converted, on the basis of the EU-Russia PCA into a Community player's licence. The application was rejected by the RFEF pursuant to Article 173 *et seq.* of the RFEF General Regulations and the agreement of 28 May 1999 between the RFEF and the Liga National de Futbol Profesional. Simutenkov thereupon brought an action before the Social Court of Tenerife against the RFEF, seeking protection of his fundamental right not to be discriminated against on the ground of his Russian nationality. The Social Court accorded Simutenkov's right to be treated in the same way as community nationals in all matters relating to working conditions. As the judgment was not final because of a claim relating to conflict of jurisdiction, the Central Court for Contentious Administrative Proceedings dismissed Simutenkov's action by judgment of 22 October 2002. Simutenkov appealed against that judgment to the National High Court, which decided to ask the ECJ a preliminary ruling on the following:

> Is it contrary to Article 23 of the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (PCA), concluded in Corfu on 24 June 1994, for a sports federation to apply to a professional sportsman of Russian nationality who is lawfully employed by a Spanish football club, as in the main proceedings, a rule which provides that clubs may use in competitions at national level only a limited number of players from countries outside the European Economic Area?

According to established case-law, a provision in an agreement between the Community and a non-member country is directly applicable when the provision contains a clear and precise obligation which is not subject, in its implementation or effect, to the adoption of any subsequent measure.

Interesting to note is that the Judgment and the Opinion of the Advocate General do not refer to a previous judgment in Spain before the Madrid Social Court No. 15 on 23 November 2000, where Mr Karpin, another Russian football player playing for Celta Vigo, won a case against the Spanish Football Association with reference to Article 23(1) of the same Partnership and Association Agreement. Although in that case there was no preliminary question referred to the ECJ.

In the *Simutenkov* case, however, it is for the first time that the ECJ and the Advocate General of the ECJ delivered a judgment respectively gave an opinion on the interpretation of the EU-Russia PCA. The outcome of the analysis of Article

[13] *See* the periodical of the EC Delegation in Moscow, EVROPA, No. 4 April 2005, at 8 –11.

23(1) of the Agreement was that the English original text and the majority of the language versions, including the Russian version, as well as the intention of the negotiating parties indicate that a clear obligation is imposed on the Community and the Member States and thus that this provision has direct effect.

Up until now direct effect was only recognized by the ECJ in cases concerning provisions of the Europe Agreements between the European Communities and the EU candidate countries.

However, in this case the ECJ analyzed, for the first time, the possible direct effect of the PCA and considered in its considerations nos. 28 and 29 that:

> The fact that the Agreement is thus limited to establishing a partnership between the parties, without providing for an association of future accession of the Russian Federation to the Communities, is not such as to prevent certain of its provisions from having direct effect. It is clear from the Court's case-law that when an agreement establishes cooperation between the parties, some of the provisions of that agreement may, under the conditions set out in paragraph 21 of the present judgment, directly govern the legal position of individuals ...

In the light of the above, it must be held firstly that Article 23(1) of the EU-Russia PCA has direct effect, with the result that individuals, to whom that provision applies, are entitled to rely on it before the court of the Member States.

Secondly, the ECJ analyzed the scope of the principle of non-discrimination set out in Article 23(1) of the EU-Russia PCA. The ECJ concluded that the wording of Article 23(1) of the PCA lays down in clear, precise and unconditional terms, a prohibition of discrimination on grounds of nationality. It therefore precludes the application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that State which provides that clubs may field in competitions organized at national level only a limited number of players from countries outside the European Economic Area.

As there are many other provisions in the EU-Russia PCA that may have direct effect, we could expect many court cases in which Russian citizens and companies will enforce their rights derived from the PCA Articles for equal treatment before the courts in the EU Member States. These provisions could include for example: labor conditions (Article 23); establishment (Article 28); cross-border supply of services (Article 36); movement of capital (Article 52(5)); competition (Article 53).

C. Legal Effects of the Europe Agreements in the National Legal Order of Non-Member States

The judiciary of candidate countries will have to answer the question whether provisions of the Europe Agreements have direct effect in their national legal order. The judiciary has to interpret the respective national constitutional provisions,

especially those provisions which concern the relationship of international law with national law, as the candidate countries do not form an integral part of the Community legal order yet.

In order to give identical effect to and have identical legal protection of the Europe Agreements in the national legal orders of the candidate countries approximation and adaptation of the constitutional provisions concerning the relationship of the community legal order with the national legal order is necessary as well as identical interpretation of national constitutional law.

In the following we will address the legal effect of Europe Agreements in the national legal orders in Poland, Bulgaria, Slovak Republic, Slovenia, and Romania.[14] We will focus on the constitutional provisions that are regulating these possible effects and the respective national court cases.

I. Poland

The Europe Agreement between Poland and the EC and its Member States was concluded on 16 December 1991and entered into force on 1 February 1994.[15]

The practice of the Polish courts shows that international law and international treaties in particular are becoming increasingly important in domestic litigation as follows below.

1. Constitutional Provisions

Article 9 of the 1997 Constitution of Poland stresses that "the Republic of Poland shall respect the provisions of international law by which it is bound," and Articles 87 and 91 generally define the status of international agreements within the Polish national legal order. The list in Article 87 reflects the hierarchy of the sources of law:

> Article 87 (1)
>
> The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements and regulations.

[14] A. E. Kellermann, *et al.* (Eds), The Impact of EU Accession on the Legal Orders of New Member States and (Pre-)Candidate Countries – Hopes and Fears (2006). *See also* A. Ott & K. Inglis (Eds.), Handbook on European Enlargement (2002).

[15] *See also* K. Wojtowicz, *Proposed Changes in the Polish Contsitution of 1997 ahead of Poland's Accession to the European Union, in* W. Czaplinski (Ed.) Poland's Way to the European Union, Legal Aspects, 35 (2002). Professor Dr. Stanislaw Biernat, from the Jagiellonian University in Cracow on the other hand speaks about 'transfer' of the powers in *Constitutional Aspects of Poland's Future membership in the European Union*, 36(4) Archiv des Volkerrechts 398-424 (1998). The Resolution of the 7 Judges of the Polish Supreme Court, Administrative, Labour and Social Insurance Chamber of 27 April 1995, (IIIAZP 4/95), published in the Jurisprudence of the Supreme Court, Official Collection, No 19/1995 (Polish Yearbook of International Law 1995-1996, at 201-207. In virtue of Article 3 al.1 of the Law of 28 October 1950 on the profession of Physician (Dziennik Ustaw, No 50, Item 458) the Minister of Health and Social Protection in cooperation with the Supreme Council of Physicians can either authorize the foreigner to practise a profession of a medical doctor within the Polish Republic, and furthermore – to be employed in the public institution of health protection or refuse to deliver these permissions.

Article 90(1) of the Constitution provides the legal framework for Accession:

> the Republic of Poland may by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters....

The second constitutional issue relating to accession to the EU is based on Article 91(1) and Article 91(3).

> Article 91
>
> 1. After promulgation thereof in the journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
> 2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.
> 3. If an agreement, ratified by the Republic of Poland, establishing an international organization, so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

The effect of international treaties ratified before the entry into force of the Constitution is addressed in Article 241(1), which provides:

> International agreements, previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), shall be considered as agreements ratified with prior consent granted by statute, and shall be subject to the provisions of Article 91 of the Constitution if their connection with the categories of matters mentioned in Article 89(1) of the Constitution derives from the terms of an international agreement.

Article 89(1) of the Constitution states:

> Ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute - if such agreement concerns: 1) peace, alliances, political or military treaties; 2) freedoms, rights or obligations of citizens, as specified in the Constitution; 3) the Republic of Poland's membership in an international organization; 4) considerable financial responsibilities imposed on the State; 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute.

2. Polish Courts and Direct Application of International Agreements

The High Administrative Court expressed its view as to the binding force of international agreements in its judgment in *Case SA/Po 3057/98*.[16] The Court ruled that the fact that an international agreement is binding from the international public law perspective does not suffice for its application by a Polish court. Article 91 of the Constitution establishes the conditions for direct application of international agreements. One of these conditions is publication of an international agreement in the Journal of Laws of the Republic of Poland. From the public international

[16] 1999.12.29 wyrok NSA U N I SA/Po 3057/98 ONSA 2001/1/34.

law perspective an international agreement enters into force at the time specified in it. However, publication of an international agreement in the Journal of Laws of the Republic of Poland, rather than the provisions of the agreement itself, is decisive for applying this agreement as part of Polish legislation. The Europe Agreement is an international agreement ratified upon prior consent granted by statute.[17] Moreover, it concerns matters enumerated in Article 89(1). Consequently, it shall constitute part of the domestic legal order and shall be directly applicable. Furthermore, it shall have precedence of statutes if such an agreement cannot be reconciled with the provisions of such statutes.

After accession the Polish Judge has to apply community law as Poland will then be part of the Community legal order. If there is no Polish translation of the community text involved, he will refer to the English, French or German texts as he did before accession in the cases mentioned below.

3. Constitutional Tribunal Cases

a. Women Discrimination Cases

Case K. 15/97[18]

The Constitutional Tribunal first addressed the question of application of the Europe Agreement under the old Constitution in its judgment in *Case K. 15/97* of 29 September 1997. In this case the Ombudsman challenged the constitutionality of Article 44(2)(1) of the Act on Public Service concerning the retirement age for public servants. The contested provision made retirement obligatory for a public servant after he or she reached the retirement age. The retirement age was established in Article 24(1) of the Act on Retirement Pensions and Disability Payments from the Social Security Fund[19] and it was different for men (65) and women (60).

The Ombudsman argued that this provision of the Act on Public Service could not be reconciled with Articles 67(2), 78(1) and 78(2) of the 1952 Constitution that remained in force under Article 77 of the Constitutional Act of 1992, as they amount to discrimination on ground of sex. He also argued that the contested provision could not be reconciled with the case law of the ECJ. As to the EC law argument the Constitutional Tribunal stated that Article 119 (now Article 141) of the EC Treaty established the principle of equal treatment of men and women. Furthermore, it stems from Article 5 of Directive 207/76/EEC, which was adopted under this Article in order to ensure effectiveness of the principle of equal treatment of men and women, that a different retirement age for men and women constitutes discrimination on ground of sex and is not reconcilable with the Directive. The Constitutional Tribunal took into account the quoted provisions of EC law and ECJ cases,[20] stating, however, that it was not binding for

[17] Law of 4 July 1992, Dz.U. 1992.60.302.

[18] 29.09.1997 wyrok TK U K 15/97 OTK 1997/34/37.

[19] Dz.U.1998.162.1118.

[20] Case 154/82 M.H. Marshall v Southampton and West Hampshire Area Health Authority and Case 262/84 Vera Mia Beets v F. van Lanschot Bankiers n.V.

Poland. Nevertheless, it stressed that Articles 66 and 68 of the Europe Agreement place Poland under an obligation to "use its best endeavours to ensure that future legislation is compatible with Community legislation." The Constitutional Tribunal ruled that this obligation (addressed to Government and Parliament) implies that Polish Courts are obliged to employ the interpretation of the existing law in order to bring it in compliance with EC law.

Case K.27/99[21]

The Constitutional Tribunal addressed the question of application of the Europe Agreement on the basis of the 1997 Constitution in its judgment in *Case K.27/99* of 28 March 2000. In this case the Ombudsman challenged the constitutionality of Article 23(1)(4) of the Teacher's Charter (law regulating status of a teacher) concerning the retirement age for teachers. The contested provision made retirement obligatory for a teacher after he or she reached the retirement age. The retirement age was established in Article 24(1) of the Act on Retirement Pensions and Disability Payments from the Social Security Fund[22] and it was different for men (65) and women (60). The Ombudsman argued that this provision of Teacher's Charter could not be reconciled with Articles 32 (prohibiting discrimination) and 33 (equal treatment of men and women) of the Constitution. He also argued that the contested provision could not be reconciled with international obligations undertaken by the Polish State, i.e. Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women and Articles 66 and 68 of the Europe Agreement. The Ombudsman submitted that under these provisions Poland is obliged to bring its legislation in line with the European Community legal standards. One of the important legal standards is the principle of equal pay for men and women established in Article 119 (now Article 141) of the EC Treaty. He also relied on Article 5 of Directive 207/76/EEC and relevant ECJ case law. The Constitutional Tribunal took into account EC law and as a ground for it repeated the reasoning applied in *Case K. 15/97* quoted above.

It could be inferred from these judgments that the position as to the effect and interpretation of the Europe Agreement and EC law did not change under the new Constitution of 1997. The Constitutional Tribunal upheld its position in similar cases (also concerning discrimination of women in retirement age provisions) in its judgments in *Case K. 15/99*[23] and *Case K. 35/99*.[24]

b. Case on Independence of National Bank of Poland

Case K. 25/99

This case concerned the constitutionality of provisions of the Act on the National Bank of Poland. In order to support the position that the contested provisions were reconcilable with the Constitution, the President of the National Bank of

[21] 2000.03.28 wyrok TK U K 27/99 OTK 2000/2/62.
[22] Dz.U.1998.162.1118.
[23] 2000.06.13 wyrok TK U K 15/99 OTK 2000/5/137.
[24] 2000.12.05 wyrok TK U K 35/99 OTK 2000/8/295.

Poland argued that these provisions, which concerned the independence of the central bank, should be interpreted in the context of the obligations stemming from the Europe Agreement. According to Article 83 thereof the Parties agreed to cooperate on the adoption of a common set of rules and standards, *inter alia* for accounting and for supervisory and regulatory systems of the banking and financial sector. Under Article 84 the Parties agreed to co-operate in the field of monetary policy and Poland had to undertake a gradual approximation of its policies to those of the European Monetary System. The European standard in this field, the central bank's independence, is established in Articles 107 and 108 (now Articles 108 and 109) of the EC Treaty. Thus, taking into account that, as provided for in the Europe Agreement, the ultimate aim of Poland is to join the European Community, it should be ensured that the National Bank of Poland is independent and that it has means to fulfil the obligations of a national central bank under the EC Treaty.

Unfortunately, the Constitutional Tribunal did not consider these arguments in its judgment, relying solely on the interpretation of the Constitution of 1997 to assess the constitutionality of the contested provision.

c. Competition Law Cases

Case XVII Amr 65/96[25]

The case concerned the refusal to supply public transport tickets by a public transport undertaking to a newsagent. The Antimonopoly Office investigated the case and issued a decision that the refusal to supply amounted to abuse of a dominant position. The decision was appealed to the Antimonopoly Court that annulled the decision on procedural grounds. The Court also expressed the opinion that the situation in question should rather be assessed under Article 6 of the Antimonopoly Act, prohibiting agreements, which have as their object or effect the prevention, restriction or distortion of competition. Furthermore, the Court stated that, taking into account the provisions of the Europe Agreement, the interpretation of this provision should bring Polish law in line with European competition law. The Court referred to Article 85(3) (now Article 81(1)) of the EC Treaty and to relevant EC regulations granting block exemptions. The Court concluded that, since there are no specific provisions regulating this issue in Polish law, there was no reason why EC competition law could not be taken into account in order to fill this lacuna.

Case VII Ama 39/97[26]

In this case an appeal from a decision of the Antimonopoly Office prohibiting a merger between a Polish company publishing books and periodicals on agriculture and a Dutch company was considered. The Antimonopoly Office prohibited the merger on the ground that the Dutch company, a company of international significance and with big investment capacity, could, after taking over the Polish

[25] 1997.01.08 wyrok s. antym. XVII Amr 65/96 Wokanda 1998/1/60.
[26] 1997.10.08 wyrok s antymon VII Ama 39/97 Wokanda 1998/9/48.

publisher, dominate the Polish market. The Antimonopoly Court ruled that under Article 11a (4)(1) of the Antimonopoly Act a merger could be prohibited if it results in the creation or strengthening of a dominant position in the relevant market. The Court stated that an enterprise enjoys a dominant position in the relevant market, when it can act independently of its competitors. The Court declared it could not see the grounds to assume that this would ensue in the analyzed case. The Court also said that this situation should be also assessed in light of Articles 1 (promoting the expansion of trade and the harmonious economic relations between Poland and the Community), 7 (establishment of a free trade area) and 65 (ensuring that competition is not distorted) of the Europe Agreement. The Court stated that trying to limit the access of Community investors to the Polish market does no contribute to the realisation of the objectives set in these Articles of the Europe Agreement.

Case SN N I CKN 1217/98[27]

The case concerned the application of competition law to the activities of the Polish Bar. The Bar argued that barristers were not involved in 'economic activities' and that they were not undertakings for the purpose of competition law. The Supreme Court relied on the Europe Agreement[28] definition of 'economic activities' as including also activities of the professions. The Supreme Court also relied on Council Directive 77/249/EEC of 22 March 1977 facilitating the effective exercise by lawyers to provide services, to conclude that individual barristers should be considered undertakings for the purpose of competition law. The Court also stated that Articles 68 and 69 of the Europe Agreement oblige Poland to the approximation of Polish existing and future legislation to that of the Community, also in the competition law field. The Supreme Court furthermore stated that this obligation could be fulfilled either by passing new, harmonised legal acts by Parliament or by applying existing law in line with EC law. The Court stressed the importance of the latter way of achieving compliance of Polish law with Community law. It stated that it could be inferred from the Europe Agreement that the interpretation of Polish regulation on lawyer profession and completion law should be aimed at achieving its harmonisation with EC law.

d. Customs Duties Cases

Case NSA I SA/Ld 777/97[29]

The High Administrative Court applied directly Article 27 Protocol 4 of the Europe Agreement. It stated that according to this Article the notion of 'products originating in the Community' should be interpreted as meaning that the results of verification of the certificate of origin are binding for the Customs Office of the importing state.

---

[27] 2001.05.29 wyrok SN N I CKN 1217/98 OSNAP 2002/1/13.

[28] Art. 44 (4).

[29] 1999.09.09 wyrok NSA I SA/Ld 777/97 Pr.Gosp. 1999/1/40.

Case NSA I SA/Po 3057/98[30]

In this case the High Administrative Court refused to apply provisions amending Protocol 4 of the Europe Agreement. The amending provisions entered into force at the material time for the assessment of this situation. They were, however, not published in the Journal of Laws of the Republic of Poland, which, according to the Court, was decisive for making this agreement a part of the Polish legal system.

Case NSA V SA 1135/00[31]

This case concerned the question whether under Article 253(3)(2) of the Customs Code a Community company could appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules, in particular whether a Community company could appoint a representative to make custom declarations. The General Customs Office decided that it was not possible, as according to Article 66(3) of the Customs Code only Polish companies are entitled to make customs declarations. The General Customs Office was furthermore of the opinion that if a Community company cannot act on its own, it is also not entitled to appoint a Polish company as its representative. The General Customs Office argued further that the same principle is established by Article 64 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code. The High Administrative Court did not support this position. It noted that Article 252 of the Polish Customs Code mirrors Article 5 and Article 66 mirrors Article 64 of the said EC Regulation. It stated that Article 64 of the Community Custom Code could not be interpreted as introducing restrictions as to the persons entitled to make customs declarations. The Court also relied on Article 7 of the Europe Agreement under which Poland and the Community agreed to gradually establish a free trade area. The Court concluded that neither the Customs Code nor international agreements ratified by Poland could be interpreted as limiting the power of a Community undertaking to appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules.

For the impact of the Europe Agreement in Polish Court practice, I finally refer to the following considerations of the Polish Supreme Court Judgment of 27 April 1995. In this case the Supreme Court discussed the conditions, which have to be fulfilled by a foreigner in order to obtain permission to practice medicine in Poland. If a foreigner has practiced as a medical doctor abroad, his qualifications should be evaluated according to the law in force in the country where he has practised medicine. In this respect it is useful to note that Poland has entered into several conventions on the recognition of the diplomas.

On the other hand, the Supreme Court has made reference to the Association Agreement concluded by Poland on the one side and the European Communities together with their Members on the other on 16 December 1991 which has entered

[30] 1999.12.29 wyrok NSA U N I SA/Po 3057/98 ONSA 2001/1/34.

[31] 2001.06.20 wyrok NSA V SA 1135/00 M.Podat. 2002/2/44.

into force on 1 January 1994.[32] After analyzing this agreement, the Supreme Court stated that even if one accepts that foreigners can practice medicine in Poland in all the forms which are open to Polish citizens, it does not mean that they must be treated on equal footing with Polish doctors. Therefore, all the restrictions existing in Polish law related to practising medicine in Poland by medical doctors from EU Member States cannot give grounds to any judicial proceeding before Polish courts. This conclusion is based on the fact that the rule of equal national treatment, being the fundamental principle of the Europe Agreement, does not apply to the free movement of workers.

4. Conclusion

It could be inferred from the above-mentioned case law that Polish courts are very eager to refer to the provisions of the Europe Agreement directly and to recognize supremacy of its provisions over national law. This has been done, *inter alia*, by the Constitutional Tribunal, the Supreme Court, the Supreme Administrative Court, and the Anti-Monopoly Court (now renamed the Competition and Consumer Protection Court).

According to Article 91(3) of the Polish Constitution the Europe Agreement forms part of the Polish legal order. This stimulates the Polish courts to refer to provisions of this Agreement, although some of these provisions have no direct effect as they are directed to the Member States. They take into account EC law based specifically on the Polish obligation to approximate the national legal system to the Community legal system. Articles 66 and 68 of the Europe Agreement hold "to use its best endeavours to ensure that future legislation is compatible with Community legislation." In principle, the Polish Judges use in their reasoning the Articles of the Europe Agreement and its objectives in order to interpret Polish law in the light of the relevant EC law provisions, except in the field of taxation.

II. Bulgaria

The main objective of the Europe Agreement between the EC with its Member States and Bulgaria, concluded on 8 March 1993, was to establish cooperation between the European Communities and Bulgaria in order to facilitate the country's accession to the EU. The Europe Agreement entered into force on 1 February 2005.[33]

The Association Agreement with Bulgaria has been ratified by the Bulgarian Parliament. Decisions of the Associations Council are applied on the same basis as provisions of international treaties to which Bulgaria is a party, also by the

---

[32] For a Polish text *see* DZ. U. 1994 No.11, Item 38.

[33] E. Tanchev, *Constitutional amendments due to Bulgarian Full EU Membership*, *in* A. E. Kellermann, *et al.* (Eds), EU Enlargement: The Constitutional Impact at EU and National Level, 301 (2001), Annex II, at 526 (?); E. Evtimov, *Integration of the International Agreements into Bulgarian Law*, *in* A. Ott & K. Inglis (Eds), Handbook on European Enlargement, 221 (2002).

courts. The Supreme Administrative Court in its Decision No. 3420 of 9 April 2002 specifically ruled that the decision in question of the Association Council had become part of Bulgarian legislation and had to be complied with.

Because the appropriate constitutional framework is missing EU law cannot have supremacy and direct effect with regard to Bulgaria. Nevertheless there are two ways in which EU law influences legal practice. Firstly EU law is regarded as offering guidelines for the interpretation and application of the provisions of harmonized legislation. Secondly, EU law can be applied by means of Association Council Decisions.

The Supreme Administrative Court takes EC law as its guideline when interpreting the provisions of harmonized legislation. This approach is further considered to be in compliance with Articles 69 and 70 of the Association Agreement which establish the obligation to harmonize both legislation and administrative practices in the field of unfair competition.

III. Slovak Republic

1. Overview

The Europe Agreement establishing an association between the European Communities and their Member States on the one part and the Slovak Republic on the other part was signed in 1993 and entered into force on 1 February 1995, but was not promulgated until 1997. No case law is available in the Slovak Republic regarding the application of the Europe Agreement, only a Preliminary Ruling by the ECJ concerning a Slovak national in *Case C-438/00 Deutscher Handballbund eV v. Maros Kolpak*, Judgment of the Court of Justice of 8 May 2003.

Only several Association Council Decisions have been adopted. The first group comprises decisions concerning the protocols that form part of the Agreement. The second group covers decisions concerning the participation of the Slovak Republic in Community programmes.

Under Article 144, para.1 of the Constitution, Slovak Courts have to recognize all the provisions of the Treaty on Accession and the Founding Treaties. Supremacy of these Treaties only means that they have precedence in the application of legal rules (Article 7 par. 5), not that they rank higher than the Constitution.

> Article 7
>
> (1) The Slovak Republic may, by its own discretion, enter into a state union with other states. A constitutional law, which shall be confirmed by a referendum, shall decide on the entry into a state union, or on the secession from such union.
> (2) The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Art. 120, para. 2.

> (3) The Slovak Republic may for purpose of maintaining peace, security and democratic order, under conditions established by an international treaty, join an organization of mutual collective security.
> (4) The validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons, require the approval of the National Council of the Slovak Republic before ratification.
> (5) International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.

2. Judiciary and Preliminary Rulings

Generally speaking, it is true that European judges are in fact national judges. The scope of Article 144 of the Constitution, which regulates the possibility of a preliminary ruling within the Slovak judiciary, should be extended. This means that the possibility for courts or tribunals in the Slovak Republic to submit preliminary questions according to Article 234 EC to the ECJ is based on the Constitution.

Article 125 deals with another important issue:

> The Constitutional Court shall decide on the conformity of a) laws with the Constitution, constitutional laws and international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law

The Slovak judiciary may interpret this provision to mean that the sequence "1. constitution, 2. constitutional laws, 3. international treaties" creates also the rank of legal capacity of these normative acts. Furthermore, the wording of Article 7 para. 2, that the "Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic", does not necessarily mean the precedence over the Constitution.

A dispute might arise in two areas.

- How does the Constitution deal with *ultra vires* Community legislation or ECJ decision? The wording of the Constitution might mean that the German doctrine of '*ausbrechender Rechtsakt*' is of use also in the Slovak Republic. The *ultra vires* act might thus be considered as subject to constitutional review pursuant to Article 125. This Article in the Constitution is a ground on which the Slovak version of a so-called Maastricht decision may be built.
- The legal power of government regulations filed pursuant to Article 120(2) is also questionable. This Article deals with the implementation of EC Directives

into the national legal order. The Act[34] governing the issue of such regulations of approximation[35] does not solve the problem explicitly.

Such an outcome is in contradiction with the rule of law, and gives another argument for the Constitutional Court against compatibility of the EC Treaty with the Slovak internal legal order, when deciding upon it in a proceeding according to Article 125.

The accession to the European Union means a transfer of the exercise of state powers or sovereignty. Slovak MPs recently modified the Constitution in order to make such a shift possible. Still, in some fields a further approximation to the *acquis communautaire* is necessary.

IV. Slovenia

Due to certain complications with ratification, the Europe Agreement entered into force no sooner than 1 January 1999, although it was concluded already on 10 June 1996.[36]

Due to the provisions of the Europe Agreement that relate to the right of legal persons from the European Communities to purchase real estate in the Republic of Slovenia, the Republic of Slovenia had to change Article 68 of its Constitution before ratifying the Agreement. On 5 June 1997 the Constitutional Court gave its Opinion on the constitutionality of the Europe Agreement.

Before signing the Accession treaty the Republic of Slovenia will have to amend and supplement its Constitution. The existing text of the Constitution of the Republic of Slovenia does not allow a transfer of sovereign powers executed by the state authorities to the institutions of supra-national institutions.

In the Slovene constitutional system international treaties have precedence of statutory provisions in the hierarchy of laws. According to Article 8 of the Constitution, statutes and other legislative measures shall be in accordance with international treaties that bind Slovenia.

In Article 112 Europe Agreement the Association Council issues decisions and recommendations. These decisions only bind parties, as the Slovene constitutional order still insists on ratification of every piece of foreign legislation including Decisions of the Association Council (which are deemed as such, although co-signed by Slovene Members). Such decisions are denied direct applicability.

In theory there is no constitutional obstacle for the Slovene courts to directly apply provisions of the Europe Agreement, although no Slovene Court has done so yet.

---

[34] Act n. 19/2002 Z.z. valid only from early 2002.

[35] We have to distinguish EC regulations (Art. 234 EC Treaty), ordinary governmental regulations (pursuant to Art 120(1) of the Constitution, and governmental regulations of approximation according to Art 120(2) of the Constitution and Act n. 19/2002).

[36] F. Grad, *et al.* (Eds.), Constitutional System of the Republic of Slovenia, 316 *et seq.* (**Year?**).

V. Romania

The Europe Agreement signed with Romania on 1 February 1993, was s ratified by the Romanian Parliament on 6 April 1993.

The Romanian legal order lies between the monist and dualist systems, granting international treaties different binding force depending on their nature. No specific binding force has been given to the Europe Agreement Romania and therefore its binding force is equivalent to the general binding force of international treaties.

The relationship between international law and national law is governed by Article 11(1) and (2) of the Romanian Constitution of 1991. It declares that international treaties are part of national law. As the treaties are ratified through law, the treaty provisions have the same force as the act that adopted them.

However, Article 20 of the Constitution, which regulates the status of international treaties on human rights, includes a special clause regarding the priority of such treaties.

The Constitutional Court ruled several times on the binding force of international agreements on human rights by interpreting Articles 11 and 20 of the Constitution. However, as yet, there has been no decision on the enforcement of the Europe Agreement.

The Romanian Constitution of 1991 must be adapted in order to comply with the European law principles of direct applicability, supremacy as well as the possibility to transfer state powers to an international organization.

It must further be observed that the Romanian Constitution is relatively rigid because it allows only revision through a technically complicated procedure. There are certain express restrictions as to who can start proceedings to revise the Romanian Constitution. The revision procedure is regulated in Article 147b and Article 148 provides certain restrictions.

The Romanian Government took the first steps to study the compatibility between the Constitution and the *acquis communautaire* in the light of accession to the European Union in December 2000. (Government Decision no. 1367/20 December 2000.)

The Law for the Revision of the Constitution of Romania was published in the Official Gazette of Romania no. 669 of 22 September 2003.The Constitutional Court pronounced the constitutionality of this Law in Decision No. 356/2003, published in the Official Gazette of Romania, Part I, No. 686 of 30 September 2003. Law 429/2003 was approved by Referendum of 18/19 October 2003.

No case regarding the application of the Europe Agreement has been brought before the Romanian courts so far. It is interesting to note that according to the Europe Agreement the national judge is not obliged to follow the provisions inspired by Community law and the interpretation given by the ECJ to equivalent provisions. However, in applying national law transposing the *acquis* the Romanian judges are *de facto* applying Community law.

D. The Legal Effects of the Other Association Agreements, in the of National Legal Orders Non-Member States

I. Croatia

The Stabilisation and Association Agreement (SAA) was signed on 29 October 2001 but only entered into force on 1 February 2005, missing ratification by a few Member States. An Interim Agreement was signed with Croatia in order to put into effect those parts of the SAA for which the European Community is competent. The Interim Agreement has been applied as of 1 January 2002 and entered into force on 1 March 2002. It gave effect to those parts of the SAA regulating trade issues.

The Interim Agreement has been in force for more than six years., however no Croatian court cases were found. Courts could refer to the Interim Agreement both directly and/or indirectly. However, we have no information that any Croatian court has referred so far to the Interim Agreement. We also do not have the information whether there is such a dispute pending. The Ministry of European Integration in Zagreb was also not aware of such a dispute. The failure of the courts to refer to the Agreement might arise out of two possible reasons: firstly, that no dispute involving the Agreement has arisen in practice and reached the courts; or secondly, the dispute has reached the court, but the court solved it without applying the Agreement.

The Croatian Constitution of 1990 made a provision for the direct applicability of international treaties in the national legal order which persisted up to the day in almost unchanged form. According to the relevant constitutional provisions, international treaties that are ratified and published form part of the Croatian internal legal order and have legal force superior to ordinary laws. As far as other sources of international law are concerned, the Constitution refers to international law in four instances. Article 2(3) refers to territorial jurisdiction on sea "in accordance with international law," Article 31 refers to the principle of legality of criminal offences by reference to international law, Article 33 regulates right of asylum "in accordance with fundamental principles of international law, and finally, Article 138 provides for ratification of international treaties in accordance with rules of international law. However, there is no general Constitutional provision referring to legal rules of international law such as Article 25 of the German Basic Law. Accordingly, there is no provision envisaging jurisdiction of the Constitutional Court comparable to Article 100(2) of the Basic Law.

International treaties, being part of the national legal order pursuant to Article 140 of the Constitution, are to be applied by Croatian courts, and may, at least in theory, create individual rights. However, the Constitution in Article 117 mentions only the Constitution and laws as sources of authority for the judiciary, which is contradictory to Article 140. However, it does not seem that the Constitutional intention was to exclude international law as a source of legal authority. Relevant reference that supports this view can be found in the Judiciary Act of 1994, under

which Croatian Courts, in addition to applying the Constitution and laws, can also apply international treaties as well as regulations enacted pursuant to the Constitution, international treaties or Croatian law.

There are no provisions in the Croatian Constitution, which are openly, *prima facie*, inconsistent with Membership in the EU. Therefore, the EC/Euratom Treaties may be ratified without formal amendments of the Constitution. However, certain constitutional provisions, due to their open wording, do not exclude an interpretation that may create an obstacle for membership in the EC/Euratom.

It would, therefore, be useful to amend such constitutional provisions in order to exclude explicitly an interpretation contrary to Community law. Some of these changes are necessary right at this moment, as part of the implementation of the Stabilisation and Association Agreement, and some are essential in view of full EU membership.

II. Republic of Albania

1. Legal Framework

On 12 June 2006, Albania signed a Stabilisation and Association Agreement with the EU and its Member States. Signing this Agreement represented an important step forward on Albania's path to EU membership. Being a strategic document, this Agreement has contributed towards economic and political stability of Albania and the region.[37]

We should however realize that since 1 December 2006 only the trade related provisions of this Agreement are in force via the Interim Agreement between the European Community and Albania.

The other provisions of the Stabilisation and Association Agreement will only enter into force after the Agreement has been ratified by the parliaments of all the EU Member States. In July 2008 approximately 22 Member States have ratified.

The Albanian Constitution, which is a modern constitution, as approved by the Albanian Parliament on 21 October 1998, holds Articles on ratification of international agreements, their effect in the Albanian legal order and the transfer to international organizations of state powers for specific issues.

Pursuant to the Constitution of Albania international law and international treaties are part of the national legal order. They have to be applied by Albanian Courts, and may, at least in theory, create individual rights.

Article 122

[37] A. E. Kellermann, *Impact of EU Accession on the Legal Order of Albania*, 2007(1) E drejta parlamentare dhe politikat ligjore No. 35 (published in Albanian). A. E. Kellermann, *European Experiences of Good Governance*, 2007(3) E drejta parlamentare dhe politikat ligjore, No. 37 (published in Albanian). A. E. Kellermann, *Report on Guidelines for an Effective Approximation of Albanian Legislation with the Acquis Communautaire*, 2007(4) E drejta parlamentare dhe politikat ligjore No. 38. A. E. Kellermann, Guidelines on the Quality of EU Legislation and its Impact on Albania, 10 European Journal of Law Reform 183 (2008). *See also* S. Blockmans, Tough Love: The European Union's Relations with the Western Balkans (2007).

> Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. The amendment, supplementing and repeal of laws approved by the majority of all members of the Assembly, for the effect of ratifying an international agreement is done with same majority.
> Any international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it.
> The norms issued by an international organization have superiority, in case of conflict, over the laws of the country if the agreement ratified by the Republic of Albania for its participation in the organization expressly contemplates their direct applicability.
>
> Article 123
>
> The Republic of Albania, on the basis of international agreements, delegates to international organizations state powers for specific issues.
> The law that ratifies an international agreement as provided in paragraph 1 of this article is approved by a majority of all members of the Assembly
> The Assembly may decide that the ratification of such an agreement be done through a referendum.

During the ratification procedure of the SAA the issue whether regulatory powers have to be transferred to the Stabilisation and Association Council will arise. Article 123 of the Albanian Constitution sets out the transfer of legislative powers to supranational organizations, although there has been no confirmation in the constitutional practice so far. The question still remains whether it would be better to introduce an explicit specific legal basis for the membership in the EU into Article 123 of the Constitution, which would provide for the transfer of powers to the Community institutions, and at the same time make it clear that the legal norms they adopt have direct effect in the Albanian legal order and take precedence of national law.

The legal status of Community law, both primary and secondary, in the Albanian legal system is not defined. There is no differentiation between international law and Community law. This is at this stage understandable, as Albania is not a member of the EU.

There is also a clear need to make Community law an integral part of national law and to distinguish between Community law and international treaties and general rules of international law. Certainly, such a differentiation should recognize the specific legal nature of Community law, and does not necessarily have to change the position of international law in the Albanian legal order. In other words, legal rules of Community Law, both primary and secondary, should be explicitly given legal authority and their supremacy and possibility of direct effect should be explicitly mentioned. This can be regulated either by the same Article providing the legal basis for EU membership mentioned above or by a separate provision regulating sources of law.

The Zela Law of 8 July 2004 gives special rules on the role of the Assembly as the highest legislative body in the Stabilisation and Association Process, aiming at designing a comprehensive legal system, supporting and observing

the Albanian integration process towards the EU. According to Article 3 the Council of Ministers will send regularly information to the Parliament on the work done at the institutions of the EU and its assessments especially regarding draft agreements, draft acts related to EU obligations etc.

However, the need for the government to take part in the decision-making at the EU level, calls for a change. It is desirable to provide for direct constitutional authority that would give the government the constitutional basis for making such decisions, and for implementing them in national law, if required by Community law. This would preferably be accompanied by a simultaneous obligation to inform the Parliament regularly about such regulatory activities. For example, this could be the case with the Joint Committee Decisions of the Interim Agreements.

2. Role of the Judiciary (National Courts)

At the time of the preparation of this paper the Stabilisation and Association Agreement (SAA) was not yet in force, as it has not been ratified by all 27 EU Member States. However, as in the cases of the countries that had signed Europe Agreements, while waiting for the entry into force of the SAA, the Interim Agreement (IA) was signed with Albania in order to put into effect those parts of the SAA for which the European Community is competent. The IA entered into force on 1 December 2006. This Agreement allows the trade provisions of the SAA to enter already into force. Under the IA Albania also commits to aligning with EU standards in several trade-related fields. The EC expects that Albania will consequently profit from an unlimited duty free access to the EU market.

As the SAA is not yet in force, the courts can not apply it directly. However, the courts can apply the IA and the Joint Decisions taken by the Joint Committee in implementing the IA, since this Agreement has now been in force for more than two years and real situations could arise in which Albanian court could be involved. The Albanian courts could apply the IA both directly and/or indirectly. However, we have no information that an Albanian court has referred so far to the IA. We also do not have information whether such a dispute is pending. However, we could imagine that court cases concerning the stand still provisions could emerge. For example, we found that the excise duty of Raki is lower than the excise duty on Grappa. This conflicts with Article 21 IA on the prohibition of fiscal discrimination. One could imagine that an importer of grappa could make a court case out of it.

Another question may arise in case of infringement of Article 8 IA (Article 21 SAA). This could happen in a case when the Albanian Government would issue a Decree to raise customs duties on goods to be imported in Albania. The Albanian citizen will then have the possibility to sue the Albanian Government for non compliance with Article 8 of the IA, which has direct effect. According to Article 122 of the Albanian Constitution, Article 8 takes precedence over a Decree of the Government raising the customs duties.

An indication of the possible attitude towards supremacy and direct effect of primary EU law, may be the judicial application of the European Convention on Human Rights and Fundamental Freedoms (European Convention), to which

Albania is a party. The Constitutional Court has developed a practice of applying the European Convention as a basis for invalidating Albanian Laws which were contrary to the European Convention's provisions. The Court also used the European Convention as an interpretative tool, and quoted the case law of the European Court of Human Rights. Supremacy of the European Convention in relation to Albanian Laws did not prove problematic, as the Constitution expressly envisages supremacy of international treaties in relation to ordinary laws. The Constitutional Court has developed a well-established practice that non-conformity of Albanian laws with an international treaty represents a breach of the principle of the rule of law and is contrary to the Constitution.

Under the present law, Albanian judges would not have the power to disregard Albanian laws which are contrary to Community law based on two assumptions: i.) that the review of conformity with international treaties is assimilated into the review of conformity with the Constitution; and ii.) that the EU/EC law is understood as an international treaty for this purpose. As this would be contrary to the principles of direct effect and supremacy as interpreted by the ECJ, the status of European law in Albanian legal order should be distinguished from the status of international law, in general.

Although at the moment of accession the courts will be empowered by Community law itself to disregard internal laws, it is probably a better solution to enable courts to follow the Simmenthal rule by internal law, too. This would make EU obligations more transparent to Albanian judges, and could result in the more effective application of Community law in practice.

As far as differentiation between primary and secondary EU law is concerned, there have been some developments which may lead the courts to start making a difference. The Albanian Parliament adopted, at the initiative of the Albanian Government, the Law on Implementation of the SAA and Interim Agreement. This Law accepted radical dualist approach, which is possibly unconstitutional, but its constitutionality has not been questioned yet. The Law leaves to the courts no choice but to differentiate between primary and secondary association law. The Law envisages that decisions of the Stabilisation and Association Council have to be either ratified by the Parliament, or enacted in the form of an internal Law (statute), or transformed into an act of Government in order to have effect in the Albanian legal order. The same could be said about the Joint Committee Decisions of the EU-Albania Interim Agreement. In other words, they are not directly applicable, although, on the basis of the SAA itself, acts of the Association Council are, as such, published in the Albanian Official Journal. Thus, on the basis of the Constitution, the courts have authority to apply the SAA (and Interim Agreement) directly, whereas the Law on Implementation of the SAA instructs them not to apply the decisions of the Association Council directly but the act by which they were transferred into Albanian law.

For the Joint Committee Decisions we could also refer to Article 7 of the European Economic Area (EEA) Agreement which clearly states the status of EC law in non-EC Member States :

> Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:
>
> an act corresponding to an EEC regulation shall as such be made part of the internal order of the contracting order of the Contracting Parties;
>
> an act corresponding to an EEC directive shall leave to the authorities of the contracting Parties the choice of form and method of interpretation.

In this matter several questions may rise, such as: what happens if the competent authority does not transform the Joint Committee Decision of the Interim Agreement or transforms it but wrongly; can, or even should, then the courts apply directly the Joint Committee Decision, similarly to their obligations in relation to Directives once Albania becomes an EU Member.

In my opinion the SAA itself, if interpreted in light of its object and purpose – which is closer integration with the EU and potentially membership of the EU – authorizes Albanian courts to directly apply secondary association law that is capable of creating direct effects subject to criteria developed by the ECJ. This is supported by the 'higher law' status of the SAA or Interim Agreement in the Albanian legal order and the fact that secondary association law has to be published in the Albanian Official Journal. It is questionable whether Albanian courts will accept such an interpretation.

The ECJ recognized that acts enacted by the bodies set up by the agreement to which the EC is a party, are part of Community legal order, and may be directly applicable, providing that the conditions for direct effect are satisfied.

Both the SAA and the conditions for joining the EU, require Albania to adjust to the *acquis communautaire*. This adjustment is not accomplished by mere adoption of compatible legal norms, but by conforming to the same application of legal norms in practice. Thus, interpretation of Albanian Laws and other acts in the light of Community law to which Albanian law was thus adjusted can be interpreted as one of the obligations undertaken under the SAA; an obligation, which binds Albania in all its appearances, including the courts. Thus, one possible interpretation is that non-adherence to the principle of indirect effect in such a case represents a breach of the SAA by courts. It is, therefore, imperative, that the courts' attitude towards interpretation of law changes.

Membership in the EU itself will not cause any changes in the organization of the judiciary in Albania. It is clear from the case law of the ECJ that EU law does not interfere with the organization of the judiciary in Member States, providing that there is always a competent court that can hear a case based on Community law, and providing that the judicial protection it is empowered to offer is effective according to European standards.

Although an organizational change will not be necessary, the requirement for effectiveness of judicial protection will invoke changes in the procedural sphere, as well as in the practice of the courts. For becoming 'European judges', the national judges need to be familiar with Community law, understood not only as a set of written rules, but including also case law interpreting these rules as well as principles of Community law which relate to their application and interpretation. For this to be achieved, it is necessary to educate all the judges – present and

future – in Community law. Up until now, the number of Albanian judges who did get some education in Community law is small, however, the Magistrates' School has expanded its training programmes in this field.

III. Turkey

In order for Turkish law to be in complete harmony with the Copenhagen criteria of 1993, several provisions of the Constitution have been amended in recent years. To date, there have been eight reform packages adopted by Parliament.

As Turkey adopts a monist approach to international law, there is no need for an international treaty to be transformed into national law once the procedure of ratification is completed.

Article 6 of the Turkish Constitution holds that

> Sovereignty is vested fully and unconditionally in the nation. The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution.
>
> The right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any state authority which does not emanate from the Constitution"

Article 7 states that "legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated."

Even though Turkey has adopted a monist approach to international law, the incorporation of international treaties into the domestic legal order is not automatic and ratification is necessary.

Article 90 of the 1982 Turkish Constitution, composed of five paragraphs sets out the ratification process and legal effect of treaties:

> Article 90
>
> (1) The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand Assembly by a law approving the ratification.
> (2) Treaties regulating economic, commercial and technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the state, and provided they do not infringe upon the status of individuals or upon the property of Turkish citizens abroad. In such cases these treaties must be brought to the knowledge of the Turkish Grand National, within two months of their promulgation.
> (3) ...
> (4) All kinds of treaties resulting in amendments to Turkish laws, shall be subject to the provisions of the first paragraph.
> (5) International treaties put into effect have the force of law. No appeal to the Constitutional Court can be made with regard to these treaties, on the ground that they are unconstitutional.

The direct effect of Decision 1/80 of the Association Council for Turkish nationals, has been interpreted by the European Court of Justice and addressed in the section on the Ankara Agreement above (B.III.1.).

IV. Russian Federation

1. Article 15(4) Russian Constitution

If Russian citizens and companies can enforce their rights of equal treatment derived from the PCA before national courts in the EU Member States, as demonstrated above in the *Simutenkov* Case, then the question will arise if EU citizens and companies can also enforce their rights of equal treatment before the national courts of the Russian Federation.[38]

To answer this question we have to wait for the first EU nationals and companies that will initiate court proceedings to enforce their respective rights. The outcome would depend on the application of the PCA by Russian courts. Article 15(4) holds:

> The generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal system. If an international treaty of the Russian Federation establishes other rules than those stipulated by the law, the rules of the international treaty shall apply.

Although the Article recognizes that international agreements take precedence over Russian laws, it has up until now seldom been applied by the Russian courts. Article 15(4) shows that there is no legal and constitutional obstacle for Russian judges to apply the provisions of the PCA, as according to this Article the PCA is part of the Russian legal order.

In my opinion Article 15(4) has been seldom applied because Russian judges are not trained in applying international law and European law. Raising awareness among the Russian legal society and judiciary to be more active in applying international law in the Russian legal order, would improve legal protection.

Perhaps the so-called *Simutenkov* Judgment of the ECJ will raise greater awareness within Russian legal society that national courts can play an important role in applying European and international law. The *Simutenkov* Judgment might have an identical impact on the development of the legal order between Russia – EU as the *Van Gend & Loos* Case had on the development of the community legal order. Another impact might be political. In the legal reasoning of this ECJ Judgment the legal effect of the PCA has been compared with the legal effect of the Europe Agreements.

Some features of this extremely important constitutional norm are worth mentioning. Article 15(4) states that all international law is part of the Russian

---

[38] A. Kellermann, *The Impact of EU Enlargement on the Russian Federation*, published in English *in* 2004 (October) Romanian Journal of European Affairs 5; in Russian language *in* 2005(1) Law and Politics 94. (Pravo and Politika is a free tribune of exchanges of views of Russian and foreign scientists on politics, law and social psychology); *in* A. Wentkowskiej (Ed.), Fundamenty Nowego Porzadku Konstytucyjnego UE, 53 (2005). A. Kellermann, *Membership of the European Internal Market Without Being an EU Member State. A Comparison of EU-Norway, EU-Switzerland and EU-Russia Relations. What Will Be the Best Way Forward for the Russian Federation?*, 3 (in English) and 52 (in Russian), 2005 (April) Evropa 8 (the Journal of EC Delegation in Moscow), on the Simutenkov Case (Direct effect of Art. 23(1) of the Partnership and Cooperation Agreement between Russia, the EU and its Member States).

domestic legal system. Thus both treaty law and the "generally recognized principles and norms of international law." The Article embraces not only the principles and norms that are binding on Russia at this moment, but also principles and norms that Russia might accept in future treaties. The Article does not distinguish between self-executing (or directly applicable) and non-self-executing (or not directly applicable) international principles and norms. Individuals may therefore invoke all kinds of norms of international law, as part of the legal system, before any national administrative agency, court or tribunal. Finally, the Article establishes a higher normative status for treaty rules than for domestic laws. Consequently, legal regulations in force within Russia shall not apply if their application would be incompatible with treaty provisions. National tribunals must give precedence to treaty norms over domestic law, be it antecedent, posterior, federal or provincial. Article 15(4) does not, however, confer such status on the "generally recognized principles." With the exception of the European Convention on the Protection of Human Rights, we did not discover court decisions in which the Russian judge gives priority to international norms. Nor does it place international treaties above the federal Constitution itself. The new Constitution envisages the Constitutional Court as the principal domestic forum for resolving constitutional disputes.

In many EU candidate countries accession to the EU contributed to the constitutional modernization of the country. However,the Russian Constitution of 1993, according to its Article 15(4), was already more advanced than many national constitutions in applicant countries, as the principle of primacy of international law was recognized. This is also the case with the modern Albanian Constitution of 1998, which could also be used as an example for many candidate countries. However, to reach a satisfactory system of legal protection in Russia not only the texts of the constitutions are decisive but also the interpretations given by the national courts when interpreting the constitutions and constitutional laws ('living constitutions'). Application by Russian courts of the principle of primacy (Article 15(4) of the Russian Constitution) for other issues than the European Convention on the Protection of Human Rights and Fundamental Freedoms could only incidentally be discovered.

2. Russian Courts and PCA

Companies based in the Member States of the EU will be allowed, in accordance with the PCA, to set up subsidiaries in Russia on terms, which are no less favourable than those accorded to Russian companies. The same treatment will be granted to Russian companies setting up subsidiaries in the EU. In the PCA, there are negative obligations for Russia after a transitional period of five years as from the entry into force of the PCA, that is 1 December 2002. For example, Article 52(5) states that "the Parties shall not introduce any new restrictions on the movement of capital and current payments connected therewith between residents of the Community and Russia and shall not make the existing arrangements more restrictive." In order to understand the legal protection of EU and Russian

companies we must distinguish between the legal protection in three legal orders: the Russian legal order, the Community legal order and the national legal order of the EU Member States.

According to Article 15(4) of the new Russian Constitution, the PCA and its provisions form part of the Russian legal order and may therefore under this Article be invoked before any Russian Court[39] in case that the legislative measure concerned is in conflict and does not comply with the negative obligation of Article 52(5) of the PCA. The Russian Court may decide not to apply the Legislative Measure from the Duma and/or the Government, in case the latter introduces new restrictions on the movement of capital or current payments.

---

[39] Application of the PCA's provisions by Russian courts: 1. Special Opinion of judge Konovalov to the Judgment of the Constitutional Court of the Russian Federation Case No 16-П of 11 November 1997 Checking a convergence between Constitutional provisions and provisions of Article 11-1 Law of Russia on state border Term and conditions of "border duties" Link to provisions of the PCA (perhaps Articles 38 to 40); 2. Judgment of the Federal Arbitration Court of Volgo-Vyatskiy Region (second instance) Case N A17-151A/5-2004 of 19 January 2005 Repeal of administrative penalty to OOO "Ivanovkaya Alternative" Most Favoured Nation treatment for Estonia Applicaton of the Protocol to the PCA on enlargement; 3. Judgment of the Federal Arbitration Court of Far East Region (second instance) Case N Ф03-A73/01-2/2609 of 19 December 2001 Repeal of administrative penalty to Company "Primorye"Definition "export services" in Russian law Analogy of law; analogy with Section IV, Chapters III and IV of the PCA; 4. Judgment of the Federal Arbitration Court of Far East Region (second instance) Case N Ф03-A59/01-2/1791 of 24 September 2001 Repeal of administrative penalty to Company "Sakhalinmorneftegas-Shelf" Definition "export services" in Russian law Analogy of law; analogy with Section IV, Chapters III and IV of the PCA ; 5. Judgment of the Federal Arbitration Court of Moscow Region (second instance) Case N KA-A40/5556-01 of 5 October 2001 Paying taxes on benefit of AO "Ansaldo-VEI" Definition 'subsidiary' Application of Article 30 (b) of the PCA; 6. Judgment of the Federal Arbitration Court of Moscow Region (second instance) Case N KA-A40/8111-05 of 31 August 2005 Appeal on Decision of Russian Patent Chamber refusing in registration of name "compromat.ru" Condition of intellectual property protection. Application of "principle Cassis" through the Protocol 10 to the PCA; 7. Judgment of the Federal Arbitry Court of Moscow Region (second instance) Case N KA-A40/5565-05 of 29 June 2005 Appeal of "Volvo Car Corporation (Volvo Personvagnar)" on Decision of Russian Patent Chamber Condition of intellectual property protection Application of "principle Cassis" through the Protocol 10 to the PCA; 8. Judgment of the Federal Arbitration Court of Moscow Region (second instance) Case N KA-A40/824-99 of 7 April 1999 Repeal of administrative penalty to OOO "Popelenskiy and partners". Definition "export services" in Russian law Analogy of law; analogy with Section IV, Chapters III and IV of the PCA (perhaps 51); 9. Judgment of the Federal Arbitration Court of North-West Region (second instance) Case N A56-11044/98 of 8 October 1998; Repeal of tax penalty to OOO "Master Shipping" Most Favoured Nation treatment for transborder services;Application of Article 36 of the PCA; 10. Judgment of the Federal Arbitration Court of North-West Region (second instance) Case N A44-1814/03-C9 of 11 December 2003 Paying taxes on benefit of OOO "Amkor Ranch Novgorod"; Establishing a subsidiary in Russia is not an evidence of economic activities in Russia Application of Article 28 of the PCA; 11. Judgment of the High Court of Russia (second instance) Case N 5-Г02-64 of 7 June 2002 Enforcement of Judgment of the High Court of Justice in Russia on case "Moscovskiy Narodny Bank ltd. v. GU MNTK "Microkhirurgia glaza"; Access to judgment of European companies in Russia Application of Articles 98 and 110 of the PCA; 12. Judgment of the High Court of Russia (first instance); Case N ГКПИ 03-482 of 4 June 2003 Appeal of OOO "Lukos Company" on Government Regulation Application Article XIII GATT through the provisions of the PCA;Link to the PCA.

As the Russian Constitution does not distinguish between directly and non-directly applicable international principles and norms, non-compliance with these principles and norms is already a condition for direct effect and, as a consequence, has the possibility to be invoked for the national court. It is not necessary that the international obligation is directly applicable. In this way the Russian Constitution is even more internationally minded, than for example the Dutch Constitution, which limits the precedence of international law to direct applicable norms.

E. Conclusions: The Legal Effects of EU Association Agreements for Non-Member State Nationals

I. Community Legal Order

As a consequence of the direct effect of provisions of EU Association Agreements every non-EU Member State national can enforce its rights derived from that Agreement before any court in the 27 EU Member States. The basic conditions for direct effect of EU Association Agreements in the Community legal order are formulated by the ECJ in the *Demirel* Case:

> A provision in an international agreement concluded by the Community with non-member-countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject in its implementation or effects, to the adoption of any subsequent measure.

The legal effects of the EU Association agreements in the community legal order are further interpreted in many European Court of Justice Preliminary Rulings, concerning Non-Member State nationals. The Court of Justice explained that the respective provisions on freedom of establishment and free movement of workers create rights for the nationals of the countries that entered into an EU Association Agreement, which rights could be enforced before the national courts. The cases concerned nationals from Poland, Czech Republic, Slovak Republic, Bulgaria and Russia. These nationals were involved in court cases in the EU Member States in which the respective national court in the respective EU Member State has asked for a preliminary ruling to the European Court of Justice.

II. Non-EU Member State National Legal Orders

The EU Association agreements have in the national legal order of non-EU Member States an indirect legal effect. These effects depend in the first place on the interpretation by the national courts of the respective national constitutions on the priority of the provisions of the EU Association Agreements within their national legal order. Secondly, they depend on the interpretation given by the national judges to the objectives of the EU Association agreements. For example,

the national courts could refer to the general Articles on approximation of laws in the EU Association Agreements, like the Polish courts did in the pre-accession period.

The applicant State "shall endeavour to ensure that its existing laws and future legislation shall be gradually made compatible with the Community *acquis*." The reference to this Article will influence the national court in such a way that it will interpret the existing laws as far as possible in compliance with EC law.

Depending on the interpretation of the national constitutions by the national court, not only negative obligations or stand still provisions in EU Association Agreements can be enforced before national courts but also provisions concerning unequal treatment or (fiscal) discrimination. An example of a negative obligation is:

> 1. No new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and ... from the date of entry into force of this Agreement.

If, for example, in an imaginary case a non-Member State would raise customs duties in a Decree after the deadline, it might be possible for a company, established in a non-member state, to sue the government before the national court for not complying with this negative obligation. Raising customs duties would result in damages for the company. Another legal option is to ask the national court not to apply the Government Decree which is in conflict with the negative obligation of the Association Agreement. Finally it might also be possible for the European Commission to summon the State concerned for not complying with obligations arising out of this EU Association Agreement.

This negative obligation could lead to a similar situation as in the *Van Gend & Loos Case*, which has been mentioned earlier. However, in this imaginary case, the answer will be given in the first place by considerations of national constitutional law and not by considerations of Community law as Albania is not yet a Member State.