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## The Case Law of the European Court of Justice and Nationals of Non-European Community Member States

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# The Case Law of the European Court of Justice and Nationals of Non-European Community Member States

Melchoir Wathelet

## **Abstract**

This essay endeavors to identify, in light of the European Court of Justice ("ECJ") case law, the key concepts of the legal protection which European Community ("EC") law, as it stands, affords to nationals of non-member countries. This Essay distinguishes between the rights deriving from internal EC law, forming the first part of this Essay, and those ensuing from external agreements concluded by the European Community with non-member countries, constituting the second part of this Essay.

## ESSAYS

# THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE AND NATIONALS OF NON-EUROPEAN COMMUNITY MEMBER STATES

*Melchior Wathelet\**

### INTRODUCTION

The drafters of the EC Foundation Treaties seem to have been uninterested in the status of nationals of non-member countries in the European Community as they did not confer any specific powers on the European Community in this sphere, apart from minor exceptions. This, however, does not mean that the legal position of nationals of non-member countries falls totally outside the scope of the EC legal system. On the contrary, it grants them certain rights today under the decisive influence of the case law of the Court of Justice of the European Communities ("ECJ"). Nor can one underestimate the repercussions of the dynamics of EC integration on the status of EC residents, whatever their nationality. This essay endeavours to identify, in light of ECJ case law, the key concepts of the legal protection which EC law, as it stands, affords to nationals of non-member countries. This Essay distinguishes between the rights deriving from internal EC law, forming the first part of this Essay, and those ensuing from external agreements concluded by the European Community with non-member countries, constituting the second part of this Essay.

### I. NATIONALS OF NON-MEMBER COUNTRIES AND INTERNAL EUROPEAN COMMUNITY LAW

With regard specifically to nationals of non-member coun-

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tries, the Treaty Establishing the European Community ("EC Treaty") remains silent.<sup>1</sup> This seems to be due in particular to the wish not to interfere with the competence reserved for the Member States as regards immigration and the status of nationals of non-member countries within their national territory. The inclusion of "immigration policy" and "the policy regarding nationals of third countries" among the matters making up the third pillar, cooperation in legal and home affairs, of the Treaty on European Union<sup>2</sup> ("TEU") is, obviously, not likely to encourage genuine EC action in this domain. Nevertheless, secondary EC legislation does recognize some social rights for nationals of non-member countries, although as a rule this follows from the fact that they belong to a category of persons that comprises EC nationals as well as nationals of non-member countries.

The EC Treaty contains several provisions that are likely to affect the interests of nationals of non-member countries without specifically mentioning them in these provisions. This Essay focuses, in particular, on the six following areas: freedom of movement of persons; cooperation between the Member States in the social field; equality of treatment between men and women; the health and safety of workers; social policy; and visas.

#### A. *Freedom of Movement for Persons*

The freedom of movement for persons will receive the most attention in this Essay. Looking at the EC Treaty, on a first analysis the word "persons" used in Article 3(c), where the principle of freedom of movement is enshrined, encompasses nationals of the Member States as well as nationals of non-member countries. The fact is, however, that the chapters of Title III of the EC Treaty concerning freedom of movement for persons do not,

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1. Article 100c of the EC Treaty, concerning visas, is the only exception. Treaty Establishing the European Community, Feb. 7, 1992, art. 100c, [1992] 1 C.M.L.R. 573, 634 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

2. TEU, *supra* note 1, art. K.1(3), O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 735.

apart from some exceptions, refer expressly to nationals of non-member countries. On the one hand, Chapter 1 concerning the freedom of movement for workers uses the ambivalent term "workers." While it is true that some writers on the subject have for this reason found in Articles 48 and 49 of the EC Treaty the bases for a possible EC policy *vis-à-vis* nationals of non-member countries, this position disregards the ECJ's case law where the rule on non-discrimination laid down in Article 48(2) is construed as prohibiting discrimination on grounds of nationality between nationals of the Member States.<sup>3</sup> On the other hand, Chapters 2 and 3 of Title III concerning the right of establishment and provision of services do not leave any room for ambiguity in this regard as they exclusively concern EC nationals, although under Article 59(2) the Council of the European Communities ("Council") may extend the freedom to provide services to nationals of non-member countries. As yet, however, the Council has not made use of this possibility.

As regards the secondary legislation designed to ensure the freedom of movement for workers, both the provisions adopted on the basis of Article 49 of the EC Treaty, more directly focusing on this freedom of movement,<sup>4</sup> and those based on Article 51, designed to coordinate national social security schemes in order to remove the obstacles to free movement arising from disparities between national schemes,<sup>5</sup> are applicable solely to workers who are nationals of the Member States. Secondary legislation has also extended the benefits of EC laws to those nationals of third countries who are the spouse or family member of such workers. For example, Council Regulation 1612/68 confers significant rights upon members of a worker's family, irrespective of their nationality, that are intended to ensure their integration in the host country and, thereby, avert adverse repercussions on the freedom of movement.

Council Regulation 1612/68 grants several rights. One such right is the right of the spouse of a migrant worker, their children, and their dependent relatives in the ascending line,

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3. See, e.g., *Commission v. France*, Case 167/73, [1974] E.C.R. 359, 373, ¶44, [1974] 2 C.M.L.R. 216, 230 (abolishing discrimination based on neutrality).

4. Council Regulation No. 1612/68, J.O. L 257/2 (1968), O.J. Eng. Spec. Ed. (II) 1968-1969, at 2 (on freedom of movement for workers within European Community).

5. Council Regulation No. 1408/71, J.O. L 149/2 (1971), O.J. Eng. Spec. Ed. (II) 1971, at 416.

regardless of their nationality, to install themselves with the worker in the host country.<sup>6</sup> Another is the right for the worker to benefit from the rule of equality of treatment as regards to social and tax advantages, including those which could be granted to the members of the family.<sup>7</sup> Non-EC nationals also have the right to take up any activity as an employed person in the host country<sup>8</sup> and the right to unrestricted admission to educational and vocational training courses under the same conditions as nationals of the host country.<sup>9</sup> The scope of these different provisions has been clarified by the ECJ's abundant case law, the subject matter of which exceeds the scope of this Essay.<sup>10</sup>

With regard to natural persons, the same observation can be made concerning the freedom of establishment and the freedom to provide services as on the freedom of movement for workers. EC law principally benefits only self-employed persons who are EC nationals, whereas nationals of non-member countries enjoy certain rights under EC law only in their capacity as members of the family. Additionally, in the field of the freedom to provide services, workers who are nationals of a non-member country and are employed by a EC company have the right to enter and reside in a Member State other than the one in which they have obtained the right to work and reside, if they have to work there for that undertaking as part of the provision of services by this undertaking.

In *Vander Elst v. Office des Migrations Internationales*,<sup>11</sup> the ECJ ruled that the freedom to provide services precludes a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for

6. Council Regulation No. 1612/68, *supra* note 4, art. 10, J.O. L 257/2, at 5 (1968).

7. *Id.* art. 7(2), J.O. L 257/2, at 4 (1968).

8. *Id.* art. 11, J.O. L 257/2, at 5 (1968).

9. *Id.* art. 12, J.O. L 257/2, at 5 (1968).

10. See Haris R. Tagaras, *Le champ d'application personnel du regroupement familial et de l'égalité de traitement des membres de la famille des travailleurs dans le cadre du règlement 1612/68*, in *CAHIERS DE DROIT EUROPEEN* 329-41 (1988) (discussing treatment of workers' families under Regulation 1612/68); Jean-Claude Seche, *La libre circulation des personnes et services*, in *3 COMMENTAIRE MÉGRET, LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE* 10 (2d Ed. 1990) (discussing freedom of movement of workers).

11. *Vander Elst v. Office des Migrations Internationales*, Case C-43/93, [1994] E.C.R. I-3803, [1995] 1 C.M.L.R. 513.

those workers from a national immigration authority and to pay the attendant costs.<sup>12</sup> In *Vander Elst*, legal proceedings had been instituted in France against a demolition company established in Belgium which for several years without interruption had been employing Moroccans, who were legal residents in Belgium and holders of Belgian work permits. The action arose on account of the fact that the Belgian company had posted these nationals of third countries to a site in Reims, France to provide services there, without the French authorities having issued a work permit for this purpose. Be that as it may, while the freedom to provide services prevents the host country from requiring that such posted workers, who are nationals of third countries, obtain a work permit, EC law does not preclude the Member States from extending their legislation or collective labor agreements concluded by both sides of industry (relating, in the cases quoted hereafter, to minimum wages) to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.<sup>13</sup>

#### B. Cooperation Between Member States in the Social Field

Under Article 118 of the EC Treaty, the Commission has the task of promoting close cooperation between Member States in the social field.<sup>14</sup> Several domains are listed as examples: employment, labour law, working conditions, basic and advanced vocational training, social security, and the like. In its judgment of July 9, 1987,<sup>15</sup> the ECJ ruled that migration policy *vis-à-vis* non-member countries comes, in its entirety, within the meaning of Article 118, as the living and working conditions within the European Community are likely to be affected by the policy pursued by the Member States in respect to workers from non-member countries. This judgment is, thus, highly instructive as regards to the competence of the European Community to deal with questions of migration policy, especially in the social field, *vis-à-vis* non-member countries, a competence which today

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12. *Id.* at I-3823-824, ¶¶14-17, [1995] 1 C.M.L.R. at 529-30.

13. *Id.* at I-3826, ¶23, [1995] 1 C.M.L.R. at 530; *Rush Portuguesa Lda v. Office national d'immigration*, Case C-113/89, [1990] E.C.R. I-1417, I-1445, ¶18, [1991] 2 C.M.L.R. 818, 842-843.

14. EC Treaty, *supra* note 1, art. 118, [1992] 1 C.M.L.R. at 657-58.

15. *Germany v. Commission*, Joined Cases 281/85, 283-285/85, & 287/85, [1987] E.C.R. 3203, [1988] 1 C.M.L.R. 11.

is strongly decried by certain Member States. Nevertheless, the Commission did not make use of this judgment in order to regulate at the EC level, especially in the social field, the status of nationals of third countries.

### C. *Equality of Treatment Between Men and Women*

Article 119 of the EC Treaty, which enshrines the principle of equal pay for men and women, does not make any reservation *vis-à-vis* nationals of third countries. Article 119 and the ECJ's abundant case law devoted to it, therefore, apply in full to nationals of third countries. The same applies to the various directives adopted to achieve equality between the sexes in access to employment, vocational training and promotion, working conditions, social security, and the health and safety of working women who are pregnant, have given birth, or are breast-feeding.

### D. *Health and Safety of Workers*

Article 100a of the EC Treaty, which constitutes the legal basis *par excellence* for the adoption by the Council of measures towards attaining the internal market, some of which are intended to remove the technical obstacles to trade in fields concerning health and safety at work, and in particular Article 118a, giving the Council the power to adopt directives laying down minimum requirements for the protection of workers' health and safety in the working environment, are designed to cover all workers occupied within the territory of the European Community, regardless of their nationality, including nationals of non-member countries.

### E. *Protocol and Agreement on Social Policy*

The principal contribution of the TEU in the social sphere is its Protocol and Agreement on social policy.<sup>16</sup> The Protocol authorizes the fourteen Member States, other than the United Kingdom, to adopt between them and through the EC institutions such acts as are necessary to go beyond the social provi-

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16. TEU, *supra* note 1, Protocol on Social Policy, O.J. C 224/1, at 126 (1992), [1992] 1 C.M.L.R. at 776; Agreement on Social Policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, O.J. C 224/1, at 127-29 (1992), [1992] 1 C.M.L.R. at 76-80.



sions in force in the fifteen Member States. To this end, the fourteen Member States have concluded an Agreement on social policy, attached to the Protocol. The objective of this Agreement is to extend the range of fields that are subject to a qualified majority, with certain other sectors still requiring unanimous agreement, such as social security. But above all, it strengthens the role played by the two sides of industry in the social dialogue established by it. All social action undertaken on this basis should also concern all those in employment, irrespective of their nationality.

#### F. Visas

Article 100c(1) and (3) of the EC Treaty imposes upon the Council the obligation to determine the third countries whose nationals must hold a visa when crossing the external borders of the Member States and to adopt from January 1, 1996 measures relating to a uniform format for visas.<sup>17</sup> The Member States retain competence to lay down the basic conditions for the acquisition of the visa. Article 100c, inserted by the TEU, assigns for the first time a specific competence to the European Community with regard to immigration. At the same time, it forms a link between the EC Treaty and the third pillar of the TEU in that the Council, acting unanimously, may decide to apply it to action in areas referred to in Article K.1(1) to (6) of the TEU,<sup>18</sup> after national ratification.<sup>19</sup>

#### G. Overview

From this brief overview of the EC Treaty, we may conclude that its social provisions are intended to cover the entire population of the European Communities, regardless of nationality.

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17. This has been achieved through Council Regulation No. 1683/95 of May 29, 1995, laying down a uniform format for visas and Council Regulation No. 2317/95 of September 25, 1995, determining the third countries whose nationals must be in possession of a visa when crossing the external borders of EU Member States. See Council Regulation No. 1683/95, O.J. L 164/1 (1995); Council Regulation No. 2317/95, O.J. L 234/1 (1995).

18. See TEU, *supra* note 1, art. K.(1)-(6), O.J. C 224/1, at 97-98 (1992), [1992] 1 C.M.L.R. at 735. In particular, these areas include asylum policy, rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon, immigration policy, and the policy regarding nationals of third countries. *Id.*

19. *Id.*

Such a reference to the status of EC nationals in actual fact exists only with regard to the freedom of movement for persons. Even in this domain, however, secondary legislation recognizes certain rights to family members of employed or self-employed EC nationals. It has also been possible to recognize certain rights for them in their own capacity through the conclusion of external agreements by the European Community with certain non-member countries.

II. *NATIONALS OF NON-EUROPEAN COMMUNITY MEMBER COUNTRIES AND THE EXTERNAL AGREEMENTS CONCLUDED BY THE EUROPEAN COMMUNITY WITH NON-MEMBER COUNTRIES*

The overview of EC law applicable to nationals of non-member countries would not be complete if no mention were made of the external agreements which the European Community has concluded with non-member countries, especially the association, cooperation, and "European" agreements concluded according to Article 238 of the EC Treaty,<sup>20</sup> and also the acts adopted in this field by the various bodies set up by these agreements. These agreements are meant to cover, with some permanence, all economic relations between the European Community and a non-Member State. According to the ECJ, they create "special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system."<sup>21</sup> They entail relatively sophisticated institutional machinery, with an association council, sometimes called "cooperation council," assisted by a joint committee and sometimes a parliamentary committee. All these agreements include a social component, with varying degrees of intensity.

A. *Categories of External Agreements*

The association phenomenon can take an extremely wide range of forms. We may distinguish two categories of agree-

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20. See EC Treaty, *supra* note 1, art. 238, [1992] 1 C.M.L.R. at 717 (stating "[t]he Community may conclude with one or more States or international organizations agreements establishing an association including reciprocal rights and obligations, common action and special procedures.").

21. *Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, [1987] E.C.R. 3719, 3751, ¶9, [1989] 1 C.M.L.R. 421, 437.

ments: agreements with potential acceding Member States and agreements concluded with other states, intended to contribute to their development. The agreements concluded with European countries that are potential acceding Member States can further be broken down into "first-generation" and "second-generation," or European, agreements.<sup>22</sup> The first-generation agreements encompass those concluded with Turkey in 1963, Malta in 1970, and Cyprus in 1972, the objective being to prepare these states for their prospective accession. There are three sets of European agreements: the 1993 Visegrad agreements, concluded with Poland, the Czech Republic, Slovakia, and Hungary; the 1994 agreements, with Romania and Bulgaria; and finally, the Agreement on the European Economic Area ("EEA"), which entered into force on January 1, 1994 and which is likewise based on Article 238 of the EC Treaty.<sup>23</sup>

The Ankara Agreement of September 12, 1963<sup>24</sup> includes a distinct reference to the EC system for freedom of movement for workers which is to be gradually transposed to relations between the European Community and Turkey through a decision of the EEC-Turkey Association Council ("Association Council").<sup>25</sup> The European Agreements all contain a provision concerning labor, considerably toned down compared with the provisions of the Ankara Agreement. There are good reasons to assume that the Member States intended to avert consequences arising from the case law such as those that have determined the interpretation of the provisions of previous agreements, in particular those concluded with the Maghreb countries. It should be noted that, since the enlargement of the European Union on January 1,

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22. These agreements are designed to establish, between the contracting parties, at an "asymmetrical" dismantling rate, a free trade area for industrial products while at the same time improving agricultural trade; to achieve a certain liberalization of the movement of services, capital and persons (establishment and, to a lesser extent, employed persons); to strengthen cooperation, encompassing technical, scientific, cultural, environmental, trade, and financial areas. In particular, these agreements set up a classic institutional structure (association council, association committee, parliamentary committee) and a valid framework for political dialogue and consultation.

23. Agreement on the European Economic Area, O.J. L 1/1 (1994).

24. The Ankara Agreement of September 12, 1963, T.C. Resmi Gazete [Turkish Republic Official Gazette] No. 11858 (1964), 3 I.L.M. 65 (1963).

25. See Additional And Supplementary Protocols of November 23, 1970, T.C. Resmi Gazete [Turkish Republic Official Gazette] No. 14406 (1972), 3 I.L.M. 65. This does not apply to the association agreements with Malta and Cyprus which only apply to trade. This explains at the same time why these agreements are not mixed.

1995, the EEA has been in effect with only three non-member countries, Norway, Iceland, and Liechtenstein. With regard to the freedom of movement for persons, the EEA transposes all Community law to relations between the EC and the non-member countries concerned.

Agreements concluded with other states, intended to contribute to their development, include the Lomé I to IV Conventions<sup>26</sup> concluded with the ACP countries and the cooperation agreements concluded in 1976 with the Maghreb countries of Algeria, Morocco, and Tunisia.<sup>27</sup> The African, Caribbean, and Pacific States ("ACP") agreements, although they include social measures, are not designed to treat, even progressively, the nationals of the third countries concerned on a par with EC nationals. In fact, in contrast with the agreements with the Maghreb countries which include measures in the field of cooperation in labor matters, the rights of ACP nationals in the European Community are not referred to in the corpus of the Lomé IV Convention but in an annexed declaration relating to the workers of one of the contracting parties legally residing in the territory of a Member State or an ACP state.<sup>28</sup>

The conclusion of these different external agreements, even taking account of a certain standardization of the clauses relating to labor in each group of agreements, has led to differences in the status of foreigners on EC territory according to whether

26. See EEC-ACP, 14 I.L.M. 595 (1975); EEC-ACP, 19 I.L.M. 327 (1979); EEC-ACP, 24 I.L.M. 571 (1984); ACP-EEC, 29 I.L.M. 783 (1990) ("Lomé IV").

27. EEC-Algeria, O.J. L 263/1 (1978); EEC-Morocco, O.J. L 264/1 (1978); EEC-Tunisia, O.J. L 265/1 (1978). See Nadifi, *Le statut juridique des travailleurs maghrébins résidant dans la CEE*, REVUE DU MARCHÉ COMMUN 289 (1989) (discussing status of Maghreb workers in European Community). It is interesting to note that the agreements with Morocco and Tunisia are due to be replaced shortly by the Euro-Maghreb association agreements signed in May and September 1995 with Tunisia and Morocco, respectively. These agreements, in the process of being ratified, essentially take over the current provisions relating to labor, in particular Articles 64 and 65 of each agreement, apart from a number of new provisions concerning the dialogue between management and labor intended to improve the freedom of movement for workers, equality of treatment, and social integration in the territory of the host countries, found in articles 69 and 70.

28. Annex VI to the Lomé IV Convention, 29 I.L.M. at 792 (1990); see *id.*, Annex V, at 792 (containing joint declaration on ACP migrant workers and ACP students in European Community); *id.* at ¶1 (containing grant of fundamental freedoms as they derive from general principles of international law), *id.* at ¶4 (discussing adoption by ACP States of necessary measures to discourage irregular immigration of their nationals into European Community and technical assistance by latter).

an agreement has or has not been concluded with the state of which the foreign worker is a national and according to the nature of the relations established under the agreement between the European Community and that state, and according to the nature of the objectives pursued. It is not the intention of this Essay to embark upon an exhaustive analysis of the social rights which these agreements grant, in varying degrees, to nationals of non-member countries. Instead, this Essay highlights the contribution ECJ case law has made to the scope of these rights.

B. *ECJ Case Law on the Social Rights of Nationals of Non-Member Countries*

1. Freedom of Movement for Workers

The right of workers to free movement is recognized to the largest extent by the EEA, as this agreement takes over in its entirety EC law on the freedom of movement for persons. In other words, the freedom of movement as guaranteed by the EC Treaty is now extended to the territories of the European Free Trade Association ("EFTA") states and their nationals. The Ankara Agreement also includes a strong reference to the EC system, although less so than the EEA. Under the terms of Article 12 of the Ankara Agreement, the contracting parties agree to be guided by Articles 48, 49, and 50 of the EC Treaty for the purpose of progressively securing freedom of movement for workers between them.<sup>29</sup> The Agreement was supplemented by an Additional Protocol, signed in Brussels in 1970, Article 36 of which provides that freedom of movement for workers between Member States of the European Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement, by December 1, 1986, and that the Association Council shall decide on the rules necessary to that end.<sup>30</sup> The negotiations on implementing the first stage of freedom of movement for workers led to Decision 2/76 of the Association Council of December 20, 1976 ("Decision 2/76"). A subsequent stage was attained by Decision 1/80 of the Association Council of 19 September 1980 ("Decision 1/80").

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29. EC Treaty, *supra* note 1, arts. 48-50, [1992] 1 C.M.L.R. at 612-14.

30. Agreement establishing an Association between the European Economic Community and Turkey, J.O. L 293/4 (1964), O.J. L Eng. Spec. Ed., art. 12, 113/1, at 5 (1973).

In its *Demirel* Judgment, the ECJ declared that examination of Article 12 of the Ankara Agreement and Article 36 of the Protocol "reveals that they essentially serve to set out a *programme* and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers."<sup>31</sup> Decisions 2/76 and 1/80 do not contain further provisions likely to confer directly a right of free movement. The social provisions of Decision 1/80, replacing the corresponding provisions laid down in Decision 2/76, are confined to Article 6(1), conferring on a Turkish worker who already forms part of the regular employment market the right to continue to pursue his employment with the same employer after one year of employment or in the same occupation with an employer of his choice after three years of employment in that field, or to take up freely in the territory of the same Member State any employment of his choice, after four years of employment. They are also confined to Article 7, conferring on the members of this Turkish worker's family who have already been authorized to join him the right to accept, under certain conditions, any offer of employment in the same Member State. It appears, therefore, that each Member State retains control of its migratory flows as the Turkish national is allowed, only in accordance with national legislation, to enter and pursue a first employment in the Member State concerned. There are no further rights to family reunification that could be based on the provisions of the Ankara Agreement, Decision 1/80, or the Additional Protocol, even after December 1, 1986.<sup>32</sup>

Be that as it may, within the limits of this competence of each Member State to regulate both the entry into its territory of Turkish nationals and the conditions of their first employment, several ECJ judgments have specified the scope of Articles 6(1) and 7 of Decision 1/80, making provision for the position of Turkish workers already lawfully integrated in the labor market of the Member States and their children who have been authorized to join them. The ECJ ruled in *Sevince* that Article 6(1) of

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31. *Demirel*, [1987] E.C.R. at 3753, ¶23, [1989] 1 C.M.L.R. at 439 (emphasis added).

32. *See id.* at 3753, ¶22, [1989] 1 C.M.L.R. at 439 (concerning case of wife of Turkish worker in Germany who applied for residence permit, which she was refused with deportation order). As noted above, the ECJ found that neither Article 12 of the Agreement nor Article 36 of the Protocol constitute rules of EC law which are directly applicable in the internal legal order of the Member States. *Id.* at ¶23.

Decision 1/80 has direct effect in the Member States. This means that Turkish nationals who satisfy the requisite conditions may directly exercise the rights which this provision confers upon them. Later, in the *Bozkurt* case,<sup>33</sup> the ECJ argued that in order to determine whether a Turkish worker is to be regarded as belonging to the labor force of a Member State within the meaning of Article 6(1) of Decision 1/80, it should be ascertained "whether the legal relationship of employment can be located within the territory of a Member State or retains a sufficiently close link with that territory."<sup>34</sup> This particular case involved an international truck-driver working for a Dutch employer on journeys to the Middle East. His employment contract had been concluded in accordance with Dutch law and in between trips he resided in the Netherlands. According to the evaluation criteria which the ECJ established in this judgment, including the place where the worker was hired, the territory on which the paid employment is based, and the social legislation applicable, the link with Netherlands territory was not in doubt.<sup>35</sup>

It should be emphasized that the right to a renewal of the work permit with the same employer, in accordance with the conditions laid down in Article 6(1) of Decision 1/80<sup>36</sup> or the right to accept any offer of employment which Article 7 of Decision 1/80 confers on children of Turkish workers,<sup>37</sup> are in no way dependent on the reasons for which the right of entry and residence in the Member State concerned was obtained. Moreover, the pursuit by a Turkish worker of lawful employment in a Member State and his right subsequently to take up any employ-

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33. *Bozkurt v. Staatssecretaris Van Justitie*, Case C-434/93, [1995] E.C.R. I-1475, I-1492.

34. *Id.* at I-1492, ¶ 22.

35. *Id.* It is interesting to note that in this case the ECJ referred to its case law on the freedom of movement for workers under Regulation 1612/68 in accordance with the principle laid down in Article 12 of the Ankara Agreement. *Id.* See *Lopes de Veiga v. Staatssecretaris Van Justitie*, Case 9/88, [1989] E.C.R. at 2989, 3009-3010, ¶15, [1991] 1 C.M.L.R. 217, 231 (referring to Regulation 1612/68).

36. *Eroglu v. Land Baden-Württemberg*, Case C-355/93, [1994] E.C.R. I-5113, I-5141, ¶22 (concerning child of Turkish worker who had initially been admitted to territory of host country not to reunite family, but for purposes of study).

37. See *Kus v. Landeshauptstadt Wiesbaden*, Case C-237/91, [1992] E.C.R. I-6781, I-6814, ¶21, [1993] 2 C.M.L.R. 887, 907 (concerning Turkish worker who had been permitted to enter territory of Federal Republic of Germany to marry German woman, i.e. for purposes other than pursuit of employment).

ment, in accordance with the conditions of Decision 1/80, necessarily imply, according to the ECJ, the existence, at least at present, of a right of residence for the person concerned.<sup>38</sup> The same applies to the child of a Turkish worker who, after having completed vocational training in the host country, accepts a job offer in accordance with Article 7 of Decision 1/80.<sup>39</sup>

Recognition of the right of residence is not even subject to the condition that the legality of the employment must be established by ascertaining that the Turkish worker is in possession of any specific administrative document, such as a work permit or residence permit, issued by the authorities of the host country.<sup>40</sup> Recognition of the right of residence, however, could not follow solely from the fact that the person concerned pursues, on a provisional basis because of the suspensory effect deriving from his appeal concerning the extension of his residence permit, the employment which he has legally been able to continue to pursue until the national court takes a final decision on his appeal provided, obviously, that the ECJ rejects the appeal.<sup>41</sup>

In the *Bozkurt* case, the ECJ refused to recognize the existence of a right of stay in a Member State, in light of the current state of the provisions adopted by the Association Council, for a Turkish worker with permanent incapacity for work following an accident at work. According to the ECJ, "Article 6 of Decision No 1/80 covers the situation of Turkish workers who are working or are temporarily incapacitated for work. It does not, on the other hand, cover the situation of a Turkish worker who has definitively ceased to belong to the labour force of a Member State" because, for instance, he has reached retirement age or become totally and permanently incapacitated for work.<sup>42</sup>

Rather surprisingly, the European agreements, although intended to pave the way for prospective accession, include no provision comparable to Article 12 of the Ankara Agreement or Article 36 of the Additional Protocol of 1970, allowing for the

38. See *SZ Sevince v. Staatssecretaris Van Justitie*, Case C-192/89, [1990] E.C.R. I-3461, I-3505, ¶29, [1992] 2 C.M.L.R. 57, 94; *Kus*, [1992] E.C.R. at I-6816, ¶¶29, 30, [1992] 2 C.M.L.R. at 908; *Bozkurt*, [1995] E.C.R. at I-1492, ¶28.

39. *Eroglu*, [1994] E.C.R. at I-5140-141, ¶¶18-20.

40. *Bozkurt*, [1995] E.C.R. at I-1492, ¶29.

41. See *Sevince*, [1990] E.C.R. at I-3505-506, ¶¶31-32, [1992] 2 C.M.L.R. at 94; see also *Kus*, [1992] E.C.R. at I-6812-813, ¶¶13-18, [1993] 2 C.M.L.R. at 905-06.

42. *Bozkurt*, [1995] E.C.R. at I-1506, ¶29.



progressive attainment of the freedom of movement for nationals of the countries of central and eastern Europe. Certainly, the heading of Title IV of each of the agreements refers to the movement of workers and the right of establishment and services, but no mention is made of any "freedom" in a common area. At the most, provision is made for firms benefiting from the right of establishment to have the right in the territory of a Member State to employ, directly or through one of their branches, nationals of their country of origin, provided that they already form part of their key personnel. What this means is that a Hungarian or Polish worker who is a senior manager or an official with special responsibilities has the right to work, and, therefore, to reside, in any Member State if the firm employing him is established there. The right of residence is limited, however, to the period of employment.

## 2. Equality of Treatment with Regard to Working Conditions, Remuneration, and Social Security

The EEA integrates EC law on this subject by referring to Article 48(2) of the EC Treaty, Article 7(2) of Regulation 1612/68, and Article 3 of Regulation 1408/71. Moreover, Article 37 of the 1970 Additional Protocol to the EEC/Turkey Agreement provides, "as regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the EC shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community."<sup>43</sup> The Maghreb Agreements contain a provision that is couched in virtually identical terms. In the field of social security, we also find in the Maghreb Agreements a rule establishing equality of treatment between Maghreb workers and members of their families on the one hand and EC nationals on the other.<sup>44</sup> This equality

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43. Additional Protocol, art. 37, O.J. L 113/17, at 26 (1973).

44. See, e.g., EEC/Morocco Agreement, art. 41(1), O.J. L 264/20; Office national de l'emploi (Onem) v. Kziber, Case C-18/90, [1991] E.C.R. I-199, I-214-215, ¶11 (interpreting Article 41(1) of EEC/Morocco Agreement); Yousfi v. Belgium, Case C-58/93, [1994] E.C.R. I-1353, I-1368-1369, ¶16 (holding no discrimination allowed). Several judgments specify the scope of the principle of non-discrimination enshrined in Article 39(1) of the EEC/Algeria Agreement, O.J. L 263/21, worded identically with Article 41(1) of the EEC/Morocco Agreement, and in particular its scope in relation to persons and matters covered. Cf. Krid v. CNAVTS, Case C-103/94, [1995] E.C.R. I-719, I-736, ¶23 (noting similarity of wording of agreements). Article 39(1) and Article 41(1)

of treatment is also enshrined in Article 3 of Decision 3/80 of the EEC/Turkey Association Council of September 19, 1980.

In *Kziber*,<sup>45</sup> the ECJ recognized that Articles 40 and 41(1) of the EEC/Morocco Agreement have direct effect. Accordingly, the same should apply to the corresponding articles of the other Maghreb Agreements, the Additional Protocol of 1970, and Decision 3/80 of the EEC/Turkey Association Council. It is true that the question of the direct effect of a provision laid down in an agreement must be evaluated in the framework of the agreement of which it forms part. That it is couched in terms identical or virtually identical to those of an article of the EC Treaty whose direct effect is recognized: the reference should be to the agreement as a whole, which must be such as to produce direct effects.<sup>46</sup>

The direct effect of Article 41(1) of the EEC/Morocco Agreement has been recognized in respect to the grant of a Belgian *allocation d'attente* for the child of a Moroccan national who had retired in Belgium after having been employed there, notwithstanding the absence of provisions adopted by the Cooperation Council under which the principles enshrined in this Article could have been applied, as provided for in Article 42(1) of the said Agreement.<sup>47</sup> According to the ECJ:

[T]he fact that Article 42(1) provides for the implementation of the principles set out in Article 41 by the Cooperation Council may not be construed as calling in question the direct applicability of a provision which is not subject, in its im-

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are applicable to economically active persons and those who have left the labor market on reaching pensionable age or after one of the risks or contingencies for which social security benefits become due has materialized. See *Kziber*, [1991] E.C.R. at I-227, ¶26 (finding Article 39(1) encompasses both active and retired workers); *Yousfi*, [1994] E.C.R. at I-1370, ¶21 (holding Article 41(1) encompasses both active and retired workers and members of family of these workers residing with them in the Member State where they work, even after worker's death); *Krid*, [1995] E.C.R. at I-738, ¶30 (including family members under Article 39(1)). As for the concept of social security, this must be construed in the same way as the identical concept laid down in Regulation 1408/71. See *Kziber*, [1991] E.C.R. at I-227, ¶25 (extending benefits to unemployment benefits and other forms of social security); *Krid*, [1995] E.C.R. at I-738, ¶¶32-33 (analogizing social security to other permitted benefits).

45. *Kziber*, [1991] E.C.R. at I-226, ¶22.

46. *Kupferberg v. Hauptzollamt Mainz*, Case 253/83, [1985] E.C.R. 157, 186, ¶21 (discussing EEC/Spain Agreement); *Demirel*, [1987] E.C.R. at 3723, ¶14, [1989] 1 C.M.L.R. at 438 (concerning Article 12 of Ankara Agreement and Article 36 of Additional Protocol of 1970).

47. *Kziber*, [1991] E.C.R. at 227-28, ¶¶ 24-29.

plementation or effects, to the adoption of any subsequent measure. The role assigned to the Cooperation Council by Article 42(1) consists . . . in facilitating compliance with the prohibition of discrimination . . . but it may not be regarded as rendering conditional the immediate application of the principle of non-discrimination.<sup>48</sup>

The ECJ drew the same conclusion with respect to Article 40 of the Agreement.<sup>49</sup>

This recognition of direct effect of Article 41(1) of the EEC/Morocco Agreement has probably had a pernicious effect on the negotiations of European agreements with the countries of Central and Eastern Europe in that the Member States have tried to prevent the corresponding provisions of these agreements from producing a direct effect. Thus, Article 37 of the European Agreement concluded with Hungary, which makes provision for equality of treatment as regards working conditions, remuneration, and dismissal in terms similar to Article 40 of the EEC/Morocco Agreement starts, “[s]ubject to the conditions and modalities applicable in each Member State . . . .”<sup>50</sup> Moreover, the European agreements do not include a provision similar to Article 41(1) of the EEC/Morocco Agreement, guaranteeing equality of treatment in the social security sphere. Instead, there is a reference to the provisions to be adopted by the Association Council responsible for ensuring coordination of the social security schemes of the contracting parties.

The result is that the status of Article 37 of the European Agreement with Hungary is questionable, and doubts exist as to whether it is, thereby, deprived of any direct effect. It may be considered that equality of treatment is essentially unconditional and that equality cannot be granted and at the same time be subjected to a condition, all within the same provision. If any meaning is to be assigned to the rule of equality of treatment,

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48. *Kziber*, [1991] E.C.R. at I-226, ¶ 19 (holding not conditional)

49. *Id.* [1991] E.C.R. at I-226 ¶22 (finding Articles 40 and 41 of EEC/Morocco Agreement directly applicable); see also, *Yousfi*, [1994] E.C.R. at I-1368-69, ¶16 (concerning refusal to grant allowance for handicapped to son of Moroccan national employed in Belgium); *Krid*, [1995] E.C.R. at I-740, ¶39 (concerning refusal to grant supplementary allowance of National Solidarity Fund to widow of Algerian national who had spent his entire working life in France).

50. European Agreement Establishing an Association between the European Communities and their Member States and the Republic of Hungary, O.J. L 347/2, art. 40, at 10 (1993).

however, the reference in Article 37 to "conditions and modalities applicable in each Member State" may in fact be superfluous. These are all questions that the ECJ might some day be invited to rule on.

It will be noted, finally, that Paragraph 1 of the "Joint declaration on workers who are nationals of one of the Contracting Parties and are legally resident in a territory of a Member State or an ACP State," appearing in Annex VI to the Fourth Lomé Convention, is worded in terms similar to those of Article 40 of the EEC/Morocco Agreement, for which the ECJ has recognized a direct effect.<sup>51</sup> It is possible, then, that the same scope may be assigned to it, but to date the ECJ has not yet had an opportunity to rule on this question. As this Essay has already pointed out, this provision does not appear in the Lomé Convention itself but in a "joint declaration" annexed to it. The law of treaties recognizes a binding value for such acts only if they form an integral part of the agreement to which they are annexed. The declaration in Annex VI does not seem to meet this requirement. On the one hand, Article 368 of the Lomé Convention refers only to the Protocols, stipulating that the Protocols form an integral part of the Convention. On the other hand, in contrast with certain declarations formally attached to an article of the Convention, the declaration in question contains no reference of this kind.

### 3. Coordination of Social Security Schemes

Decision 3/80 of the EEC/Turkey Association Council,<sup>52</sup> adopted pursuant to Article 39 of the Additional Protocol, essentially comprises social security coordination rules under which certain provisions of Regulation 1408/71<sup>53</sup> and Regulation 574/72<sup>54</sup> are by analogy made applicable in relations between the contracting parties. Article 32 of Decision 3/80 provides that Turkey and the European Community shall, each for itself, take the measures necessary to implement the provisions of the Decision. In 1983, the Association Commission transmitted to the Council a proposal for a regulation under which Decision 3/80

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51. Lomé IV, annex VI, 29 I.L.M. at 792.

52. See *Taflan-Met v. Bestuur van de Nieuwe Algemene Bedrijfsvereniging*, Case C-277/94, [1996] E.C.R. I-4085 (discussing Decision 3/80).

53. Commission Regulation No. 1408/71, O.J. L 149/2 (1971).

54. Commission Regulation No. 574/72, O.J. L 74/1 (1972).

was made applicable within the European Community and which set forth the additional procedures for implementing the Decision. The Council has not adopted this provision to date. A reference for a preliminary ruling is currently pending before the ECJ, emanating from the Arrondissementsrechtbank of Amsterdam,<sup>55</sup> asking whether Decision 3/80 is applicable in the European Community in the absence of implementing measures adopted by the Council and whether Articles 12 and 13 of the Decision, concerning the grant of invalidity, old age, and survivor's benefits, have direct effect.

In his opinion delivered on March 26, 1996, Advocate General La Pergola came to the conclusion that Decision 3/80 has not actually come into force.<sup>56</sup> He essentially pointed out that, contrary to Decisions 2/76 or 1/80, this instrument contains no provision establishing the date from which the Decision has taken effect. Advocate General La Pergola considered, therefore, that the EEC/Turkey Association Council did not agree to make Decision 3/80 applicable before the implementing measures have been adopted by the Contracting Parties. Consequently Articles 12 and 13 of Decision 3/80 could not be applied nor could they grant any rights to individuals even supposing that they are sufficient and clear enough to do so.<sup>57</sup> The other agreements discussed also instruct their association or coopera-

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55. The ECJ decided this case subsequent to the completion of this Essay. *Taflan-Met*, [1996] E.C.R. at I-4085.

56. Opinion of Advocate General La Pergola, *Taflan-Met* Case C-277/94 (not yet reported).

57. After this Essay was completed, the ECJ rendered, on September 10, 1996, its judgment in the *Taflan-Met* Case. The ECJ considered that although Decision No. 3/80 contains no provision for its entry into force, it did enter into force on the date on which it was adopted, that is to say, September 19, 1980, and consequently the contracting parties have been bound by that decision since then. The ECJ inferred such effect from the agreement on which Decision No. 3/80 is based, in particular from the power to make decisions conferred by Article 22 of the Agreement on the Council of Association. *Taflan-Met*, [1996] E.C.R. at I-4085.

It follows from the *Taflan-Met* Judgment that since September 19, 1980, the European Community has to adopt implementing measures in the field of social security according to Article 32 of Decision No. 3/80. The Council, however, has made no decision since the submission by the Commission of the proposal for a regulation in 1983. This is all the more important to ascertain as the ECJ, in the *Taflan-Met* Case, has also ruled that as long as supplementary measures, essential for implementing Decision No. 3/80, have not been adopted by the Council, the provisions of that Decision, in these circumstances, Articles 12 and 13, "do not have direct effect in the territory of the Member States and are therefore not such as to entitle individuals to rely on them before the national courts." *Taflan-Met*, [1996] E.C.R. at I-4113.

tion council to take social security coordination measures,<sup>58</sup> but so far no decision of the type adopted by the EEC/Turkey Association Council has yet been adopted.

### CONCLUSION

It is clear that the case law of the ECJ on the social provisions laid down in association or cooperation agreements illustrates, on specific points, the will of the ECJ to interpret EC law in accordance with "the idea of social justice and the demands of European integration at the level of the people, viewed in the light of the general objectives of the treaties," as emphasized by Judge A. Touffait. The chief impetus of this case law has undoubtedly been the principle of equality of treatment enshrined in these agreements, which indeed constitutes one of the cornerstones of the EC legal system.

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58. *See, e.g.*, EEC/Morocco Agreement, art. 41, O.J. L 264/10 (1978) (containing agreement to coordinate social security); EC-Hungary Europe Agreement, Council Decision No. 89/593, arts. 38-39, O.J. L 327/9 (1988) (expressing intention to coordinate social programs).