OPINION OF ADVOCATE GENERAL LÉGER

delivered on 8 May 2001 [1]

1. By reason of the intermediate position that they occupy within Community law, [2] association agreements lend themselves to comparisons with the principles issuing from the Treaty.

2. Whether they fall within the category of agreements concluded with a view to development cooperation or within that of so-called 'pre-accession' agreements, [3] their interpretation frequently involves close examination of those elements which distinguish them from the traditional principles of Community law. This is *a fortiori* the case in view of the fact that some of those principles, adapted to take account of the specific objectives of the agreements, none the less occupy a significant position within them.

3. Among those principles, the free movement of persons is one of those which has most frequently been examined in the Court's case-law. The free movement of workers, in particular, has generated a multitude of judgments delivered in connection with the agreement establishing an association between the European Economic Community and Turkey. [4]

4. The present case follows on from those preceding cases by virtue of its subject-matter, namely the free movement of persons and the associated rights of entry and residence. However, it is distinguishable in other respects.

5. The provisions of the Europe agreements which are in issue concern, not the free movement of workers, but rather freedom of establishment. The nationals of the non-member countries who invoke that freedom are seeking to establish themselves within the territory of a Member State in order there to pursue a professional activity as self-employed persons. Notwithstanding identical terminology, the legal arrangements governing the freedom of establishment at issue in the main proceedings are not, strictly speaking, those which the Treaty establishes for Community nationals.

1 — Original language: French.

2 — An association agreement must 'cover the entire space between a commercial agreement and an accession agreement' (W. Hallstein, cited by C. Blumann, in the general conclusion to the colloquium 'Le concept d'association dans les accords passés par la Communauté: essai de clarification', *Actes du colloque*, Bruylant, 1999, p. 319). C. Blumann adds that, as originally conceived, association agreements were to cover 'everything which went beyond a commercial agreement but remained short of enlargement' (*ibidem*).

3 — B. Flamand-Lévy, 'Essai de typologie des accords externes', *Actes du colloque*, cited above, p. 66.

4 — OJ 1964 217, p. 3687, hereinafter 'the EEC-Turkey Agreement'.

6. Another particular feature of the dispute in the main proceedings is the fact that the activity in issue is prostitution. Having regard to the imprecision surrounding the manner of its exercise, the disquiet which it arouses with regard to respect for the dignity of the human person and its implications in regard to public policy, prostitution appears in many respects as an activity which it is difficult at the outset to assign to any particular legal scheme.

I — Facts and main proceedings

7. The dispute in the main proceedings is between, on the one hand, Ms Jany and Ms Szepietowska, who are Polish nationals, and four Czech nationals, Ms Padevetova, Ms Zacalova, Ms Hrubcinova and Ms Überlackerova, [5] and, on the other, the Staatssecretaris van Justitie. [6] These nationals of non-member countries established their residence in the Netherlands at various dates between May 1993 and October 1996 pursuant to the Netherlands Law on Aliens, and all of them work as prostitutes in Amsterdam.

8. They applied to the commissioner of the Amsterdam-Amstelland regional police for the issue of residence permits to enable them to work as self-employed prostitutes. Those applications were rejected by the Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service) of the Ministry of Justice. [7] The applicants in the main proceedings thereupon lodged objections against those decisions before the same authority. By decisions of 6 February 1997, those objections were also declared unfounded, on the ground that prostitution is an unlawful activity or is at least not a socially acceptable form of work and cannot be treated as being either regular work or a liberal profession.

9. By decisions of 1 July 1997, the Arrondissementsrechtbank te 's-Gravenhage (District Court, The Hague), the Netherlands, ruled that the objections lodged against the decisions taken by the Netherlands authorities on 6 February 1997 rejecting the applications were well founded and set those decisions aside on the ground that they were not properly reasoned.

10. By decisions of 12 and 23 June 1998 and of 3 and 9 July 1998, the IND, ruling again on the objections of the applicants in the main proceedings, declared all of them to be unfounded.

11. The actions brought by the applicants in the main proceedings before the referring court seek the annulment of those new decisions by the Netherlands authorities.

5 — Otherwise referred to as 'the applicants in the main proceedings'.

6 — Hereinafter 'the Secretary of State for Justice'.

7 — Hereinafter 'the IND'.

12. The applicants in the main proceedings take the view that Article 44 of the Europe Agreement of 16 December 1991 establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part,[8] and Article 45 of the Europe Agreement of 4 October 1993 establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part,[9] directly confer on them a right to enter the Netherlands as self-employed prostitutes, and in particular a right to treatment which is no less favourable than that which the Kingdom of the Netherlands reserves for its own nationals.

13. In their view, the concept of 'economic activities [pursued] as self-employed persons' featuring in the association agreements has the same meaning as 'activities as self-employed persons' for the purposes of Article 52, second paragraph, of the EC Treaty (now, after amendment, Article 43, second paragraph, EC), which defines the scope of the freedom of establishment.

14. Further, the applicants in the main proceedings consider that they have demonstrated that they are genuinely working in a self-employed capacity and that they satisfy all of the corresponding legal obligations. They submit that their status as self-employed workers cannot be placed in doubt on the ground that their activity requires little in the way of investment, since the work factor is predominant. The Secretary of State for Justice was, in their view, wrong to stress the requirement that an undertaking be set up and managed.

15. Before the referring court, the Secretary of State for Justice argued that prostitution is not an economic activity falling within the scope of the association agreements. The absence of any express exclusion of prostitution from those agreements is attributable to the fact that it is already prohibited by law within the territory of most contracting parties.

16. According to the Secretary of State for Justice, for the Netherlands to admit prostitutes from associate countries for purposes of establishment would involve risks of fraud, as the existence of an independent undertaking or participation in a company could be simulated solely for the purpose of obtaining a right of residence under the association agreement. In particular, there is no way to be satisfied that the applicants in the main proceedings are genuinely working in a self-employed capacity and that they came entirely of their own free will to the Netherlands. Nor is it possible to ascertain whether they are able freely to dispose of their income or whether they have been recruited by a controller to whom they must pay over part of that income.

17. The Secretary of State for Justice takes the view that, even if it were accepted that prostitution is an economic activity for the

8 — OJ 1993 L 348, p. 2, hereinafter 'the EC-Poland Agreement'.

9 — OJ 1994 L 360, p. 2, hereinafter 'the EC-Czech Republic Agreement'.

purposes of the association agreements, the fact remains that, in this case, rights based on the association agreements are being invoked by the applicants in the main proceedings without any intention on their part to set up and manage their own undertakings. In this regard, he submits that those applicants reside in the Netherlands only for a short period of the year and 'provide principally their own work and no risk capital'.

II — Legal framework

A — *The Community legislation*

The EC-Poland Agreement

18. Pursuant to Article 121 thereof, the EC-Poland Agreement entered into force on 1 February 1994.

19. According to the preamble to that agreement, [10] the contracting parties:

'RECOGNI[SE] that the Community and Poland wish to strengthen [their traditional] links and to establish close and lasting relations, based on reciprocity, which would allow Poland to take part in the process of European integration, thus strengthening and widening the relations established in the past...;

...

[BEAR] IN MIND the economic and social disparities between the Community and Poland and thus [recognise] that the objectives of this association should be reached through appropriate provisions of this Agreement;

...

RECOGNI[SE] the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective'.

20. Article 1(2) of the Association Agreement provides that its aims include promo-

10 — Second, 12th and 15th recitals.

tion of the expansion of trade and harmonious economic relations between the parties so as to foster dynamic economic development and prosperity in Poland, and provision of an appropriate framework for Poland's gradual integration into the Community.

21. The relevant provisions of the EC-Poland Agreement are contained in Title IV, which is entitled 'Movement of workers, establishment, supply of services'.

22. Article 44(3) and (4) of the EC-Poland Agreement, which forms part of Chapter II, entitled 'Establishment', provides:

'3. 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 Polish companies and nationals as defined in Article 48 and shall grant for the operation of Polish companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and nationals.

4. For the purposes of this Agreement:

(a) "*establishment*" shall mean

(i) as regards nationals, the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, which they effectively control. Self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market or confer a right of access to the labour market of another Party. The provisions of this chapter do not apply to those who are not exclusively self-employed;

...

(c) "*economic activities*" shall in particular include activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions.'

23. Article 53(1) of the EC-Poland Agreement provides that '[the] provisions of this

chapter shall be applied subject to limitations justified on grounds of public policy, public security or public health'.

24. Article 58(1) of the EC-Poland Agreement, which features in Chapter IV, entitled 'General provisions', provides:

'For the purpose of Title IV of this Agreement, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons, and supply of services, provided that, in so doing, they do not apply them in a manner [such] as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement. This provision does not prejudice the application of Article 53.'

The EC-Czech Republic Agreement

25. Pursuant to Article 123 thereof, the EC-Czech Republic Agreement entered into force on 1 February 1995.

26. Apart from some editing details, the following provisions of the EC-Czech Republic Agreement reproduce the text of the corresponding provisions of the EC-Poland Agreement, with only the sequence of the recitals in the preamble (the second being an exception) and the numbering of the articles being altered.

27. According to the preamble to that agreement, [11] the contracting parties:

'RECOGNI[SE] that the Community and the Czech Republic wish to strengthen [their traditional] links and to establish close and lasting relations, based on reciprocity, which would allow the Czech Republic to take part in the process of European integration, thus strengthening and widening the relations established in the past...;

...

[BEAR] IN MIND the economic and social disparities between the Community and the Czech Republic and thus [recognise] that the objectives of this association should be reached through appropriate provisions of this Agreement;

...

11 — Second, 15th and 18th recitals.

RECOGNI[SE] the fact that the Czech Republic's ultimate objective is to accede to the Community and that this association, in the view of the Parties, will help the Czech Republic to achieve this objective'.

28. Article 1(2) of the Association Agreement provides that its aims include promotion of the expansion of trade and harmonious economic relations between the parties so as to foster dynamic economic development and prosperity in the Czech Republic, and provision of an appropriate framework for the Czech Republic's gradual integration into the Community.

29. The relevant provisions of the EC-Czech Republic Agreement are contained in Title IV, which is entitled 'Movement of workers, establishment, supply of services'.

30. Article 45 of the EC-Czech Republic Agreement, which forms part of Chapter II, entitled 'Establishment', provides:

'3. 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 Czech Republic companies and nationals and shall grant in the operation of Czech Republic companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and nationals.

4. For the purposes of this Agreement:

(a) *establishment* shall mean

(i) as regards nationals, the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, in particular companies, which they effectively control. Self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market of another Party.

The provisions of this chapter do not apply to those who are not exclusively self-employed;

...

(c) *economic activities* shall in particular include activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions.'

31. Article 54(1) of the EC-Czech Republic Agreement provides that '[the] provisions of this Chapter shall be applied subject to limitations justified on grounds of public policy, public security or public health'.

32. Article 59(1) of the EC-Czech Republic Agreement, which features in Chapter IV, entitled 'General provisions', provides:

'For the purpose of Title IV of this Agreement, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons, and supply of services, provided that, in so doing, they do not apply them in a manner [such] as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement. This provision does not prejudice the application of Article 54.'

B — *The Netherlands legislation*

33. Article 11(5) of the Vreemdelingenwet [12] provides that a residence permit for the Netherlands may be refused to a foreigner on grounds of public interest.

34. According to the order for reference, the interpretation of that provision by the Secretary of State for Justice features in Chapter B 12 of the 1994 Vreemdelingencirculaire. [13] In his view, foreigners can have no entitlement to a residence permit unless their presence within the national territory can serve an essential national economic interest or unless overriding humanitarian reasons or obligations arising under international agreements require that such a permit be issued. [14]

35. Pursuant to the Ministerial Circular on Aliens, [15] nationals of one of the non-member countries with which the European

12 — Hereinafter 'the Law on Aliens'.

13 — Hereinafter 'the Ministerial Circular on Aliens'.

14 — It should, however, be noted that, according to the Netherlands Government, the condition that an application for a residence permit should represent an 'essential economic interest for the Netherlands... does not apply in regard to nationals of the contracting parties who are engaged in economic activities [in a self-employed capacity]' (paragraph 28 of its written observations).

15 — Chapter B 12, Article 4.2.3.

Communities and their Member States have concluded an association agreement, such as the Republic of Poland or the Czech Republic, who wish to establish themselves in the Netherlands under those agreements, must:

(a) satisfy the conditions generally applicable to entry in a self-employed capacity, as well as the special conditions applicable to the exercise of the activity in question;

(b) have adequate financial resources; and

(c) not constitute a danger to public order, national security or public health.

36. The Ministerial Circular on Aliens provides that an application for establishment must be rejected if the activity contemplated by the applicant is generally exercised in an employed capacity. The person concerned may submit documents originating, so far as possible, from independent persons or authorities and describing the function which that person intends to carry out, such as registration in the register of the chamber of commerce or enrolment with a professional body, a certificate from the tax authorities stating that he is liable to VAT, a copy of the purchase or hire contract for premises used for the purposes of his trade or profession, or financial accounts prepared by an accountant or management firm. If there is suspicion of a 'fictitious arrangement', an application for leave to enter as a self-employed person must also be submitted to the Ministry of Economic Affairs, which will check whether the applicant genuinely intends to pursue an activity in such a capacity.

III — The questions submitted for preliminary ruling

37. Taking the view that the dispute in the main proceedings called for an interpretation of Community law, the Arrondissementsrechtbank te 's-Gravenhage decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Can Polish and Czech nationals rely directly on the Agreements in the sense that they are entitled, *vis-à-vis* a Member State, to claim that they derive a right of entry and residence from the right laid down in Article 44 of the Agreement with Poland and Article 45 of the Agreement with the Czech Republic in order to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, irrespective of the policy which the Member State in question pursues in this regard?

2. If the answer to that question is in the affirmative: is a Member State free

under Article 58 of the Agreement with Poland and Article 59 of the Agreement with the Czech Republic to make the right of entry and residence subject to specific conditions, such as those contained in the policy followed by the Netherlands, which include the condition that the alien must, in carrying on his business, have adequate means of support (in accordance with Chapter A 4/4.2.1. of the 1994 Vreemdelingencirculaire, this means a net income which is at least equal to the subsistence level within the meaning of the Algemene Bijstandswet (General Law on Welfare))?

3. Do Article 44 of the Agreement with Poland and Article 45 of the Agreement with the Czech Republic allow prostitution to be excluded from the notion of "economic activities as self-employed persons" on the ground that prostitution does not come within the description in Article 44(4), opening words and (c), of the Agreement with Poland and Article 45(4), opening words and (c), of the Agreement with the Czech Republic, for reasons of a moral nature, on the ground that prostitution is prohibited in (a majority of) the associate countries, and on the ground that it gives rise to problems concerning the freedom of action of prostitutes and their independence which are difficult to monitor?

4. Do Article 43 EC (formerly Article 52 of the EC Treaty) and Article 44 of the Agreement with Poland and Article 45 of the Agreement with the Czech Republic permit a distinction to be drawn between the notions of "activities as self-employed persons" and "economic activities as self-employed persons" contained in those respective provisions so that the activities carried out by a prostitute in a self-employed capacity come within the term used in Article 43 EC (formerly Article 52 of the EC Treaty) but not within that used in those articles of the Agreements?

5. If the answer to the previous question is that the distinction therein referred to is permissible:

(a) Is it compatible with Article 44 of the Agreement with Poland and Article 45 of the Agreement with the Czech Republic and the freedom of establishment which those provisions are intended to realise to impose minimum conditions on the self-employed persons referred to in paragraph (3) of those articles in regard to the range of their activities and also to impose restrictions such as that:

— the operator must perform skilled work;

— a business plan must exist;

— the business operator must (also) attend to the manage-

ment of the business and not (exclusively) to executive (production) activities;

— the business operator must strive to ensure continuity of the undertaking, which means *inter alia* that he must have his principal place of residence in the Netherlands;

— there must be investment, and long-term commitments must be entered into?

(b) Do Article 44 of the Agreement with Poland and Article 45 of the Agreement with the Czech Republic provide justification for not regarding as self-employed any person who is dependent on and indebted to the person who recruited her and/or placed her in work, even though it is established that, as between the person concerned and that third party, there is no question of an employment relationship, against which the term "self-employed" in paragraph 4 of Articles 44 and 45 of the Agreements seeks to establish a barrier?'

38. In reading those questions, two aspects may be distinguished.

39. The first relates to the right of nationals of non-member countries to enter and reside in the territory of a Member State which may follow from the freedom of establishment provided for by the association agreements between those States.

40. The second relates to the question of whether an 'economic activity pursued in a self-employed capacity' is a description which can be attributed to the activity of a prostitute, thereby justifying application of the provisions of the association agreements on the right of establishment. If Article 44 of the EC-Poland Agreement and Article 45 of the EC-Czech Republic Agreement were to be construed as meaning that prostitution is an 'economic activity pursued in a self-employed capacity', the principle of national treatment prescribed by those provisions might thereby become applicable in the present case.

41. After examining the question of the right of entry and residence, I shall seek to ascertain the scope of an 'economic activity pursued in a self-employed capacity' before determining whether this can apply to prostitution.

IV — The existence of a right of entry and residence deriving from the freedom of establishment (first and second questions)

42. It appears from the first two questions that the referring court is seeking clarifica-

tion of the content of Articles 44 and 58 of the EC-Poland Agreement and on the direct effect of Article 44(3) of that agreement. [16] It is for that reason necessary to consider whether this latter provision can give rise directly to rights which an individual may invoke before a court in a Member State. If that is the case, it will be necessary to determine whether the right of establishment granted to Polish nationals includes a right of entry and residence.

A — *The direct effect of Article 44(3) of the Association Agreement*

43. As Advocates General Mischo and Alber have recently pointed out, the answer to the question regarding the direct effect of association agreements may easily be formulated in the light of the Court's settled case-law. [17]

44. A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. [18]

45. Article 44(3) of the Association Agreement imposes on each Member State an obligation described in unambiguous terms and the parameters of which are perfectly delimited. It is clear that Member States are required to grant Polish companies and nationals a freedom of establishment and a freedom to exercise their activities which are equal to those enjoyed by their own nationals.

46. The principle of non-discrimination, as here worded in Article 44(3), has long been recognised as having direct effect in other provisions relating to the free movement of persons, whether in the Treaty or in association agreements. [19] The wording of that article is equally explicit with regard to

16 — In view of the similarity between the two association agreements, the reasoning applied in the present Opinion to the EC-Poland Agreement (hereinafter 'the Association Agreement') ought, for purely practical reasons, to be regarded as transposable in all respects to the corresponding provisions of the EC-Czech Republic Agreement.

17 — See the Opinions of Advocate General Alber in Case C-63/99 *Gloszczuk*, at present pending before the Court, concerning the EC-Poland Association Agreement, and Case C-235/99 *Kondova*, also pending before the Court, concerning the EC-Bulgaria Association Agreement, and the Opinion of Advocate General Mischo in Case C-257/99 *Barkoci and Malik*, pending before the Court, concerning the Association Agreement between the EC and the Czech Republic.

18 — See, for example, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 14; Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 15; Case C-432/92 *Anastasiou and Others* [1994] ECR I-3087, paragraph 23; Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 31; Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 60; and Case C-37/98 *Savas* [2000] ECR I-2927, paragraph 39.

19 — See, *inter alia*, Case 167/73 *Commission* v *France* [1974] ECR 359, concerning Article 48 of the EC Treaty (now, after amendment, Article 39 EC); Case 2/74 *Reyners* [1974] ECR 631, concerning Article 52 of the EC Treaty, and Case C-18/90 *Kziber* [1991] ECR I-199, concerning the principle of non-discrimination as featuring in an association agreement.

the content of the rule set out. Moreover, there is no condition which would restrict its implementation.

47. In the present case, as the Court has already stated with regard to other association agreements, the rule of equal treatment lays down a precise obligation as to results and, by its nature, can be relied on by an individual before a national court as a basis for requesting it to disapply the discriminatory provisions of the legislation of a Member State under which the establishment of a Polish national is made subject to a condition which is not imposed on nationals, without any further implementing measures being required for that purpose. [20]

48. Examination of the purpose and nature of the Association Agreement confirms this analysis. According to the second and 15th recitals in the preamble and under Article 1(2) of the Agreement, its aim is to establish an association to promote the expansion of trade and harmonious economic relations between the contracting parties and so to foster dynamic economic development and prosperity in the Republic of Poland with a view to facilitating its accession to the Community.

49. Such a purpose conferred on the Agreement could not be fully realised if those involved in economic activities were not themselves placed in a position to ensure that the principles thus outlined are complied with.

50. It should be added that, in accordance with the Court's settled case-law, the fact that the Association Agreement seeks essentially to promote the economic development of Poland and thus involves an imbalance in the obligations assumed by the Community towards the non-member country concerned is not such as to prevent the Community from recognising some of its provisions as having direct effect. [21]

51. Article 44(3) of the Association Agreement must therefore be regarded as having direct effect, with the result that it may be relied on by individuals before national courts.

52. The fact that this provision may be relied on does not, of course, prejudge the interpretation of its content. Consequently, it is necessary to determine the effects which may flow, with regard to rights of entry and residence, from the freedom of establishment, as that follows from Article 44(3) of the Association Agreement.

20 — See *Sürül*, cited above, paragraph 63.

21 — See, as an example of recent case-law, *Savas*, cited above, paragraph 53.

B — *The existence of an unconditional right of entry and residence*

53. The national court is unsure whether the scheme of establishment provided for under the Association Agreement includes an obligation on the host Member State to grant, under all circumstances, a right of entry and residence in favour of Polish nationals.

54. It is, in my opinion, necessary to dispel the idea that the right to the same treatment as nationals in regard to establishment includes, within the area covered by the Association Agreement, an untrammelled right of entry and residence.

55. Admittedly, no freedom of establishment is possible if the statutory provisions established by the host State present nationals of non-member countries with an insurmountable barrier to entry and residence within its territory.

56. This is the direction taken by the case-law developed in the interpretation of the Treaty or other association agreements. The right to be treated in the same way as nationals in the matter of establishment presupposes that a right to enter and reside within the territory of the host State will be granted to those nationals of non-member countries who wish to take up and pursue, in a self-employed capacity, activities of an industrial or commercial nature, activities of craftsmen and activities of the professions. [22]

57. It is, however, necessary to specify the reasons why certain limits may be placed on that right. In this regard, a distinction has to be drawn between the legal arrangements governing the freedom of establishment introduced by the Association Agreement and those provided for under the Treaty.

58. The points of similarity between Article 52 of the Treaty and Article 44(3) of the Association Agreement might suggest a transposition to the latter of the case-law developed in regard to Article 52 of the Treaty.

59. Extension of the interpretation of a Treaty provision to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country depends, *inter alia*, on the aim pursued by each provision within its particular context. A comparison between the objectives and context of the

22 — See Case 48/75 *Royer* [1976] ECR 497, paragraphs 31 and 32, according to which the right of nationals of Member States to enter the territory of another Member State and reside there for the purposes intended by the Treaty, in particular to look for or pursue an occupation or activity as a self-employed person, is a right conferred directly by the Treaty. See also Case C-363/89 *Roux* [1991] ECR I-273, paragraph 9, and *Savas*, paragraph 60, concerning the freedom of movement of workers as established by the EEC-Turkey Agreement.

agreement and those of the Treaty is of considerable importance in that regard. [23]

60. The Treaty seeks to establish an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital. [24] The Association Agreement, for its part, is designed to provide an appropriate framework for Poland's gradual integration into the Community. [25]

61. Consequently, while the prospect of Poland's accession to the European Union points to its unconditional submission, over time, to all of the Community's rules, in particular those relating to the freedom of establishment, the necessarily gradual pace imposed on the accession process confers on the establishment arrangements set out in the Association Agreement a less radical content than that which is possible for the corresponding Community arrangements.

62. Other association agreements designed with a view to the accession of non-member countries to the Community, such as the EEC-Turkey Agreement, do not feature any arrangements conferring on nationals of the non-member country concerned a right of residence within the territory of the Member States. In contrast to the EEC-Turkey Agreement, the Association Agreement does not authorise the free movement of workers.

63. These differences of content linked to comparable end objectives reinforce the idea of arrangements governing free movement which have not thus far been finalised.

64. The main ground for not reasoning by way of analogy, however, is provided by the actual wording of the Association Agreement.

65. In specifying that no provision of Title IV of the Agreement, of which Article 44 forms part, may prevent the parties from applying their laws and regulations regarding entry, stay and establishment of natural persons, Article 58(1) of the Association Agreement makes the arrangements governing the right of establishment more restrictive as regards their organisation.

66. Whereas every citizen of the Union derives directly from the Treaty the right to move and reside freely within the territory of the Member States and may, by virtue of

23 — See, as a recent example of the established case-law, Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraph 11, and, as an example of a comparison between two association agreements, Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 61.

24 — Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC).

25 — Article 1(2) of the Association Agreement.

that fact, freely establish himself or herself there,[26] for a Polish national that freedom will be restricted by the national legislation of the Member States governing the entry and residence of aliens. The right of entry and residence conferred on Polish nationals is thus by no means an absolute privilege.

67. That right may be limited by the host Member State, provided that, in accordance with the wording of Article 58(1) of the Association Agreement, the benefits accruing to any Party under the terms of a specific provision of the Association Agreement are not thereby nullified or impaired.

68. Read in the light of Article 58(1) of the Association Agreement, Article 44(3) thereof must therefore be construed as meaning that the arrangements governing establishment which it introduces do not include an obligation on the host Member State to grant a right of entry to its territory and a right to reside within that territory to Polish nationals, as the exercise of those rights is subject to compliance with the limits laid down by the host Member State in regard to the admission, residence and establishment of Polish nationals.

26 — Article 8a(1) of the EC Treaty (now, after amendment, Article 18(1) EC). See Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929.

C — *The condition of adequate resources imposed on the right of entry and residence*

69. The second question submitted for consideration relates to the conditions to which the Kingdom of the Netherlands subjects the entry and residence of foreigners within its territory, which include the requirement that a foreign national must have adequate resources.[27]

70. Among the other conditions relating to entry and residence, the referring court mentions the principle under Netherlands law that a foreigner must not constitute a threat to public order, public safety or public health. The Arrondissementsrechtbank does, however, point out that, in view of Article 58(1) of the Association Agreement, this provision is not included in the question.[28]

71. I shall for that reason confine myself to examining the condition relating to resources. I would point out only that the other questions for preliminary ruling will provide me with an opportunity to address the conditions which national legislation imposes on the actual right of establish-

27 — According to the Netherlands Government, 'the condition requiring resources is a general condition of admission which applies in principle to all foreigners seeking admission for purposes of a normal stay (that is to say, persons who are not asylum-seekers)' (paragraph 27 of its written observations).

28 — Paragraph 4.4 of the order for reference.

ment, rather than on the residence of foreigners.

72. By its second question, the Netherlands court is thus seeking in substance to ascertain whether Articles 44(3) and 58(1) of the Association Agreement preclude national legislation which makes the right of entry and residence of a Polish national wishing to take up and pursue an economic activity as a self-employed person within the territory of the host Member State subject to the condition that the exercise of that activity provides him with adequate means of support. [29]

73. Article 58(1) of the Association Agreement makes an express reservation in regard to the competence of Member States concerning the entry and residence of nationals of each contracting party, with the result that it is clear that national legislation constitutes the norm in this area.

74. However, the competence of Member States in regard to the entry and residence of foreigners cannot be exercised arbitrarily. As already pointed out, Article 58(1) makes the exercise by Member States of the relevant laws and regulations subject to the condition that 'they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement'.

75. It is for that reason necessary to examine whether the condition of adequate resources set out in the national legislation is such as to affect the advantages which the Republic of Poland derives from the provisions of Article 44(3) of the Association Agreement. [30]

76. In order to ensure that this measure does not nullify or impair the advantages which the Republic of Poland derives from the right of establishment, it is necessary to ensure that the measure limiting the right of entry and residence under Article 58(1) of the Association Agreement is not of such a kind as to affect adversely the substance of that right.

77. The condition of adequate resources undoubtedly constitutes a restriction on

29 — Hereinafter referred to as 'the condition of adequate resources' or 'the measure'.

30 — I should point out that, within the area of the free movement of workers as established by the Treaty, the Court's case-law on the question whether a State may require a Community national to have adequate resources has long been settled. A national of a Member State pursuing, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter State, is considered to be the minimum for existence is a 'worker' within the meaning of Article 48 of the Treaty, with the result that he can rely on that provision in order to benefit from free movement within the territory of the Community (Case 53/81 *Levin* [1982] ECR 1035, paragraph 18). See also Case 139/85 *Kempf* [1986] ECR 1741 and Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741. In accordance with the case-law cited above (point 59 of the present Opinion), the extension of the interpretation of a Treaty provision to a similar provision in an agreement which the Community has concluded with a non-member country depends on the purpose served by each respective provision within its specific context. I have already alluded to the differences in objectives distinguishing the Treaty from the Association Agreement, which preclude a simple transposition of the Treaty interpretation to that Agreement, and to the actual wording of Article 58(1) of the Association Agreement, from which it follows that Member States may, under certain conditions, maintain their national legislation on entry and residence.

both residence and establishment in so far as non-compliance with that condition will disentitle a Polish national from entering the territory of the Member State for the purpose of there exercising any activity whatever, in particular an activity as a self-employed person.

78. Thus, in order to be permissible, that measure must pursue a lawful objective. It must also be appropriate for guaranteeing achievement of that objective without going beyond what is necessary to that end.

79. In this regard, the fact that the host State ensures that a national of a non-member country intending to establish himself within its territory has a minimum level of resources does not strike me as liable to affect the right of establishment in any unlawful way inasmuch as that measure is designed to ensure that the Polish national does intend to become established without seeking to work in an employed capacity within the host Member State. It is common knowledge that under Article 44(4)(a)(i) of the Association Agreement capacity as a self-employed person does not confer the right to take up employment in the labour market of the host State.

80. The requirement of adequate resources is thus a means by which to verify that the Polish national is sincere in his stated intention to actually pursue an activity in a self-employed capacity and to determine, once that person has settled in the Netherlands, that that activity is genuine.

If the person concerned does not have adequate resources when entering the territory of the host Member State, there is a risk that he will seek to supplement his income by recourse to paid employment or public funds. This risk still continues, and indeed is even increased, if the absence of the essential minimum required by national legislation is confirmed after the person concerned has entered national territory, a fact which would provide evidence that his undertaking has been unsuccessful and would point to the likelihood of a search for alternative resources. [31]

81. I should add that the provision in question can only with difficulty be regarded as being excessive in relation to the objective pursued, in so far as it consists of a simple objective finding, the making of which can provide reliable indications as to the true nature of the activity undertaken.

82. Accordingly, I take the view that Articles 44(3) and 58(1) of the Association Agreement do not stand in the way of national legislation which makes the right of entry and residence of a Polish national seeking to take up and pursue an economic activity as a self-employed person within

31 — My view on this point concurs with that expressed by Advocate General Alber in his Opinion in *Kondova*, cited above, (point 105), and by Advocate General Mischo in his Opinion in *Barkoci and Malik*, cited above, (point 84).

the territory of the host Member State subject to the condition that such person has adequate resources.

83. The referring court goes on to ask what constitutes 'economic activities [pursued] as self-employed persons' featuring in Article 44(4)(a)(i) of the Association Agreement.

V — The scope of the notion of 'economic activity pursued in a self-employed capacity' (Questions 4 and 5(a))

84. The aforementioned questions arise from the Netherlands Government's argument that the notion of 'economic activity pursued in a self-employed capacity' used in the Association Agreement requires to be distinguished from the concept of 'activities as self-employed persons' in Article 52, second paragraph, of the Treaty.

85. The Netherlands Government argues essentially that the freedom of establishment introduced by the Association Agreement is reserved for 'genuinely self-employed persons', an expression which refers to nationals holding a professional qualification who intend to set up an undertaking in the host Member State. The Association Agreement does not, it claims, concern those who seek to carry out unqualified work, who have not drawn up any business strategy or made any investment whatever. [32]

86. The Association Agreement, so it argues, is a first step towards integration of the associate countries within the Community. The interpretation proposed by the Netherlands Government takes into account the difficulties linked to the socio-economic disparities between the Community and those countries.

87. Consequently, by its fourth question, the national court is asking whether it is necessary to distinguish between 'economic activities as self-employed persons' and 'activities pursued in a self-employed capacity'. According to the line of reasoning followed by the Netherlands Government, certain unskilled activities, including prostitution, come within the scope of Article 52, second paragraph, of the Treaty, but not necessarily within that of Article 44(4)(a)(i) of the Association Agreement. This is the meaning to be attributed to Question 5(a), which concerns the minimum conditions imposed under national law, described as restrictive by the Netherlands court. [33] The scope of Article 44(4)(a)(i) of the Association Agreement is, in essence, narrower than that of Article 52, second paragraph, of the Treaty.

32 — Paragraphs 32 and 33 of its written observations.

33 — The Netherlands legislation requires of a foreign national that he carries out skilled work, has drawn up a business strategy, assumes both managerial and executive tasks, is resident in the Netherlands, in order to guarantee the continuity of the undertaking, carries out investments and assumes long-term commitments.

88. By those questions, the national court is asking whether the notion of 'economic activities [performed] as self-employed persons', within the meaning of Article 44(4)(a)(i) of the Association Agreement, falls to be construed as referring only to activities in a self-employed capacity requiring a professional qualification and carried out by a trader residing in the host Member State, in accordance with certain specific requirements, such as the preparation of a business strategy, the making of investments and the assumption of long-term commitments, with the person in question devoting his attention to both management and the production of goods or services.

89. That provision must be interpreted on the basis of its wording and of the purpose which it serves in the measure containing it. [34]

90. Article 44(4)(a)(i) of the Association Agreement refers to the 'right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings'. In so doing, it does not draw any distinction which would give credence to the idea that freedom of establishment is limited to a specific category of economic activities pursued in a self-employed capacity. [35]

91. Regard being had to the wording of that provision, any activity will come within the scope of the freedom of establishment if it is economic in character and is performed in a self-employed capacity. [36] Even if it diverges from Article 52 of the Treaty in the manner in which it describes the activities covered by the freedom of establishment, the wording of Article 44(4)(a)(i) of the Association Agreement does not lend itself to a restrictive reading of the scope of that provision with regard to the nature of those activities. As is the case with the term 'economic activities as self-employed persons', the notion of 'activities as self-employed persons' does not make the activity in question subject to any whatsoever of the conditions set out above. The benefit of this freedom thus does not appear to be linked to compliance with any condition regarding qualifications, residence or the manner in which the profession is exercised.

92. Furthermore, as I have pointed out on several occasions, identity, or indeed a similarity or closeness, of the terms used will not guarantee identical legal treatment if the objectives of the legal measures in

34 — As a recent example of the established case-law on the method of interpretation, see Case C-208/98 *Berliner Kindl Brauerei* [2000] ECR I-1741, paragraph 18.

35 — Not all of the language versions of this text use, as do the French, German, Danish, English, Italian and Finnish versions, the notion of 'economic activities [pursued] as self-employed persons'. In the other versions, however, the same idea follows from the significantly approximate notions of 'economic activities other than in employment' (Greek, Dutch and Portuguese versions), 'independent economic activities' (Spanish version), or 'economic activities in the person's own undertaking' (Swedish version).

36 — I shall return to the notion of an 'economic activity' and to that of an 'activity pursued in a self-employed capacity' in the arguments which follow, which will focus on what constitutes the activity of prostitution.

question do not correspond.[37] Thus, assuming that the same expressions were used in the Treaty and in the Association Agreement, we would still not be entitled to draw precise consequences as regards the legal treatment applicable.[38]

93. Consequently, in accordance with this latter case-law, and with that which states that, where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part,[39] it is necessary to examine these latter aspects of the provision in question.

94. It is true that one may reason, on the basis of the Association Agreement's objective of creating the conditions for the future accession of a non-member country to the Community, that the system of establishment which it introduces is less developed than that in the Treaty.

95. The position of the non-member country would be no different to that of the Member States of the Community if the Community principles were applicable to it in all respects.

96. It cannot therefore be discounted in principle that the situation of that non-member country may be subject to different rules, even though those rules address the same principle of freedom of establishment. To this must be added the existence of economic and social disparities between the Community and the non-member country which the Association Agreement seeks to reduce through 'appropriate provisions'.[40]

97. Regard being had to these objectives, the hypothesis of a difference between the Treaty and the Association Agreement affecting the legal conditions governing freedom of establishment is not *per se* improbable.

98. In the absence, however, of any indication resulting from the actual wording of the Association Agreement, this can be the position only if it was indeed the contracting parties' intention to introduce an intermediate right of establishment, a hypothesis which has in no way been established.

99. No more than the provisions of the Association Agreement relating to the right of establishment, its preamble does not

37 — Point 59 and footnote 30 of the present Opinion.

38 — In this regard, a comparison of the language versions of Article 52, second paragraph, of the Treaty and of Article 44(4)(a)(i) of the Association Agreement does not reveal any particular tendency with regard to identity of or differences in the expressions used in the Treaty and the Association Agreement. The terms employed are sometimes rigorously identical (the German and Danish versions, which use the notion of 'independent economic activity') or very close (the English, Dutch, Greek, Portuguese, Finnish and Swedish versions). The expressions diverge in French, as we have seen, but also in Italian and Spanish. It should be pointed out that, under Article 120 of the Association Agreement, the language versions of the Agreement are all equally authentic (Article 122 of the EC-Czech Republic Agreement).

39 — See, as a recent example of settled case-law, Case C-482/98 *Italy* v *Commission* [2000] ECR I-10861, paragraphs 46 to 49.

40 — 12th recital in the preamble.

reveal any intention on the part of the parties to define restrictively the scope of that right.

100. The objectives pursued by the signatory States are described in general terms and do not contain any precise reference to a right of establishment having a limited scope. From the mere fact that the Association Agreement seeks to reduce the disparities and to strengthen the links between the contracting States with a view to the integration of one of them within the Community, it strikes me, at the very least, as arbitrary to infer that one of the rights set out in that agreement, among others, [41] ought to be narrowly construed. *A fortiori*, there would be no justification for stating, in the absence of any serious indication derived from the Association Agreement, that the restrictive construction to be placed on the principle in question concerns specifically the nature of the activity and the means by which it is carried out or the condition of residence of the person carrying out that activity.

101. The position taken by the Netherlands Government thus has no basis in the Association Agreement.

102. The argument that it is for the Member States to provide themselves with the means for preventing nationals of the non-member countries from invoking the right of establishment for the purpose of seeking paid employment, contrary to Article 44(4)(a)(i) of the Association Agreement, within Community territory is not devoid of cogency. The importance attached by the authorities in the Netherlands to detecting 'fictitious arrangements' by specifically analysing the actual relations between traders, and by not confining themselves to the legal description attributed to those relations by the persons involved undoubtedly meets the requirements of a faithful application of the Association Agreement. [42]

103. This step, however, must be taken in compliance with that text, which, while it prohibits the use of self-employed status for

41 — The Association Agreement also deals with the movement of workers and supplies of services. It is significant that the manner in which these principles are described does not, this time, leave any room for reasonable doubt that their definition is deliberately restrictive. The provisions dealing with the supply of services, for example, do not introduce a system for the free supply of services equivalent to that of the Treaty: whereas Article 44(3) provides that '[e]ach Member State shall grant, from entry into force of this Agreement, a treatment no less favourable...', Article 55(1) states that '[t]he Parties undertake... to take the necessary steps to allow progressively the supply of services...'. In one case, the Association Agreement introduces an obligation as to the result, while in the other the rule resembles more an obligation imposed on the contracting parties to provide the means, so much so that one writer has found it possible to state that 'Central and Eastern European countries' nationals are entitled to a real right of establishment and none of them benefit from the right to supply services in the Community' (D. Martin, 'Association Agreements with Mediterranean and with Eastern Countries: Similarities and Differences', *Assoziierungsabkommen der EU mit Drittstaaten*, Manz Verlag, Vienna, 1998, p. 39). Nothing in the preamble to the Association Agreement announces this difference, with the result that, rather paradoxically, the provisions relating to establishment and those dealing with the supply of services may, all together, be regarded as the transposition in the law of the signatory States of the same objectives of approximation, reduction of disparities in development, and of future accession.

42 — Paragraphs 37 to 39 of its written observations.

purposes of paid employment, does not authorise the signatory States to safeguard that prohibition at the cost of limiting the freedom of establishment itself.

104. In other words, the host State is entitled to check that actual professional relations do correspond to the declared legal relations in order to apply to them the appropriate legal arrangements. It cannot in any way impose a restriction whereby self-employed traders not holding a minimum professional qualification or not satisfying other conditions governing their performance of an economic activity in a self-employed capacity would thereby be treated in the same way as employed persons.

105. There is even less justification for inferring automatically from the fact that a foreign national does not hold a professional qualification, does not have a business strategy or has not carried out any investment that he is abusing the establishment procedure for the real purpose of taking up employment on the labour market of the host State.

106. While those criteria may be used as pointers to the true intentions of the person concerned, they can purposefully be construed only after they have been considered against the nature of the activity which that person declares he wishes to pursue in a self-employed capacity. One cannot impose the same requirements in regard to a plan to set up a company to be engaged in activities requiring extensive investment or high skill levels as in regard to an activity the exercise of which will, in view of its characteristics, not be dependent on any of those prior conditions.

107. The discussion on this issue appears to me to be influenced by the activity in issue in the main proceedings, with the result that the manner in which it is understood is affected by considerations relating to public policy or public morality.

108. While this approach may guide the action of Member States in determining their own policy in the matter, as Article 53(1) of the Association Agreement allows them to do, my view is that this may not, in the absence of precise reasons, constitute a pretext for a restrictive reading of the right established by that Agreement.

109. It cannot be entirely ruled out that the exercise of professional activities other than prostitution could be adversely affected by

the interpretation proposed by the Netherlands Government. [43]

110. It is hazardous to assume *a priori* that all economic activities carried out in a self-employed capacity require, for example, a qualification or investments.

111. I am not entirely sure whether these conditions laid down by national legislation are cumulative or alternative. Whatever construction one may place on them, the conditions which that legislation lays down do none the less appear to be clearly restrictive.

112. If those conditions fall to be read as being cumulative in their application, certain activities requiring extensive qualifications but without necessarily demanding any particular investment might, without reason, be prohibited.

113. On another hypothesis, the possibility cannot be entirely ruled out that, although low in number, perfectly lawful activities may be prohibited without any legitimate reason.

114. The condition relating to the level of resources, on which the right of entry and residence may lawfully be made to depend, is in itself of such a kind as to inform the competent authorities regarding the intention of the nationals of the non-member countries not to seek paid employment.

115. I should add that legal certainty within an area as sensitive as that of the movement of persons does not sit very satisfactorily with a demarcation line as imprecise as that intended to distinguish activities that require qualifications from other activities. In the absence of any objective criterion making it possible to distinguish qualified persons from other persons or activities requiring qualifications from others that do not, it seems to me desirable not to draw any distinction of this kind.

116. As regards the obligation to have one's principal residence in the Netherlands, which, according to the referring court, is justified by the need to ensure continuity of the undertaking, this ground, invoked by the Netherlands Government, does not appear convincing.

This measure constitutes a restriction on the freedom of establishment inasmuch as it prevents a trader established in Poland

43 — Many other professional activities may undoubtedly be considered not to require any particular qualification and as thus failing to satisfy the condition of 'work pursuant to qualifications' provided for under national legislation (door-to-door salesmen are one example). This may also be the case with regard to activities the exercise of which, having regard to their nature, cannot always be made subject to a control of the level of qualifications, such as is the case with certain artistic activities (see the example of a painter in Case 197/84 *Steinhauser* [1985] ECR 1819). These activities also do not call for a business strategy or specific investments.

from carrying out an economic activity, in a stable and continuous manner, within the territory of the host Member State, without terminating the economic activity carried out on Polish territory. The continuity of an activity is not placed in question simply by the fact that the trader has increased the number of his centres of activity. Continuity depends on the capacity of that trader to organise his activities, and such a capacity should not be underestimated. The Court's case-law on this matter, in application of the Treaty rules, is settled and must be transposed unless grounds to the contrary can be inferred from the Association Agreement. [44]

117. It follows that the notion of 'economic activities [performed] as self-employed persons', within the meaning of Article 44(4)(a)(i) of the Association Agreement, must be construed as not being reserved solely to economic activities performed in a self-employed capacity, requiring a professional qualification and carried out, by a trader residing within the territory of the host Member State, pursuant to certain precise detailed arrangements, such as the need to draw up a business strategy, carry out investments and assume long-term commitments, with the trader having to be involved in both management and the production of goods or services.

44 — See, *inter alia*, Case 107/83 *Klopp* [1984] ECR 2971, Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, and Case C-162/99 *Commission* v *Italy* [2001] ECR I-541. With specific regard to prostitution, however, the question of multiple residences seems to me to be of secondary importance. Given its nature, it is clear that this activity does not lend itself to installation in more than one place. The hypothesis that a prostitute does not establish her main residence within the territory of the host State but will travel there on a regular basis derives rather from the logic of the free provision of services, within the meaning of the Treaty, which will then justify a question being asked as to the corresponding legal arrangements provided for by the Association Agreement, which we know imposes less rigorous obligations on the contracting parties (see footnote 41).

VI — Classification of prostitution as an 'economic activity pursued in a self-employed capacity' (Questions 3 and 5(b))

118. By these questions, the referring court is asking whether the notion of 'economic activities [performed] as self-employed persons', within the meaning of Article 44(4)(a)(i) of the Association Agreement, applies to prostitution.

119. It is appropriate at the outset to recall the particular nature of the activity in question. The antiquity of the practice of prostitution and the tolerance demonstrated towards it in most Western European States have not sufficed to remove it from the group of activities censured by public moral standards and monitored by those responsible for enforcing public policy. The image of the human person which this practice tends to incorporate and the connections which its practice favours with a certain form of delinquency [45] have elicited reactions on the part of societies which have, however, rarely taken the form of a definitive ban.

45 — It goes without saying that the dividing line between prostitution and human trafficking is not always easy to identify in view of the difficulty in establishing that those engaged in prostitution are acting voluntarily. Procuring, moreover, is, in the same way as the sexual exploitation of children, more often a cause for concern on the part of the authorities responsible in each Member State for implementing public policy. Finally, the prostitution scene is frequently linked to that of drugs.

Thus, still today, many States tolerate, recognise, indeed even regulate this activity. [46] It is common ground that this area of competence is not one available to the Community. According to settled case-law, it is not for the Court to substitute its assessment for that of the legislatures of the Member States in which that activity is practised legally. [47]

120. However, once a Member State forms the view that a professional activity may lawfully be carried out within its territory, it is legitimate, should a dispute arise involving the exercise of free movement by persons engaged in that activity, to seek the legal classification which may be conferred on that activity. No argument can therefore be derived from moral considerations in determining the legal classification to be applied to the activity in question in the light of the relevant provisions of Community law.

46 — Contrary to what the referring court has indicated, prostitution is not banned in the majority of the 'association countries'. According to the information available to me, in ten Community Member States at least, the exercise of prostitution by an individual does not amount to an offence (Kingdom of Belgium, Kingdom of Denmark, Federal Republic of Germany, Kingdom of Spain, French Republic, Italian Republic, Grand-Duchy of Luxembourg, Kingdom of the Netherlands, Kingdom of Sweden, United Kingdom of Great Britain and Northern Ireland). A special situation obtains in Sweden, where it is the clients of prostitutes, but not the prostitutes themselves, who face prosecution (*Le régime juridique de la prostitution féminine*, Les documents de travail du Sénat, Series: Législation comparée, No LC 79, 11 October 2000, Paris).

47 — Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 32. On 24 February 1997 the Council of the European Union adopted a joint action on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children (OJ 1997 L 63, p. 2).

121. In order to determine whether the legal arrangements governing freedom of establishment, as provided for by the Association Agreement, apply to the activity of a prostitute, it is necessary to consider whether prostitution is an economic activity within the meaning of Article 44(4)(a)(i) of that Agreement before examining whether it can be treated as an activity pursued in a self-employed capacity for the purposes of that provision.

A — *The economic character of the activity of prostitution*

122. Article 44(4)(c) of the Association Agreement defines economic activities as being activities 'of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions'.

123. Like the United Kingdom Government, I take the view, in replying solely to the requirement of a legal classification, that prostitution is an activity of a commercial character.

124. In its generally accepted meaning, the notion of 'commerce' covers both the

exchange of goods and the supply of services. [48]

125. Several of the Court's judgments dealing with the notion of 'commercial activity', pursuant to various Community principles, provide confirmation that service activities do, as a rule, constitute such an activity. Thus, the service activity consisting in the operation of gaming machines has been defined as being commercial in nature, [49] in the same way as the running of a discotheque. [50]

126. The sexual services provided by prostitutes seem to me clearly to require classification, for legal purposes, as a supply of services.

127. Under the Treaty, an 'economic activity' within the meaning of Article 2 of the EC Treaty (now, after amendment, Article 2 EC) includes supplies of paid employment and those of remunerated services. [51]

128. The same requirement of consideration must be accepted, with regard to the Association Agreement, as an element in the definition of both the notion of 'economic activity' within the meaning of Article 44(4)(c) of the Association Agreement and that of an 'activity of a commercial character', which forms part of it.

129. The differences in objectives liable to distinguish the system of establishment envisaged by the Treaty from that introduced by the Association Agreement do not appear to stand in the way of a transposition of that aspect of the definition.

130. Should the Court be persuaded, however, to rule that prostitution does not have the characteristics of an 'economic activity', on the ground that it is not a 'commercial activity' for the purposes of Article 44(4)(c) of the Association Agreement,

48 — Commerce: 'activity consisting in the purchase, sale, exchange of products, victuals, valuables, and the sale of services: *engage in commerce*' (*Le Petit Larousse Grand Format*, Dictionnaire encyclopédique, éditions Larousse, Paris, 1993); 'transaction, activity of purchase and resale... of a product or item of value; by extension, the provision of certain services' (*Le Petit Robert*, Dictionnaire de la langue française, éditions Dictionnaires Le Robert, Paris, 1999).

49 — Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 19.

50 — Case 196/87 *Steymann* [1988] ECR 6159, paragraphs 3 and 4.

51 — The definition of 'economic activity' within the meaning of Article 2 of the Treaty is general. It is not confined to any one of the freedoms of movement, whether of persons or of services (Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 53). The same reasoning is in particular applicable, pursuant to Article 60, first paragraph, of the EC Treaty (now Article 50, first paragraph, EC), to the definition of 'provision of services' since, according to that provision, services are considered to be services where they are normally provided for remuneration (*Deliège*, cited above, paragraph 55). The same requirement relating to the supply of consideration applies to service activities that are subject to the freedom of establishment (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 20, and *Deliège*, paragraph 55).

the actual wording of that article ought to lead the Court to rule that it does none the less come, for a separate reason, within the scope of that provision.

131. An exhaustive perusal of the language versions of Article 44(4)(c) reveals that, in the majority of them, the list of the activities described as being economic in character is not exhaustive. With the exception of the Spanish and French, all of the versions contain a term such as 'in particular', '*inter alia*' or 'especially', a fact which confirms the contracting parties' unequivocal intention not to limit the legal classification of 'economic activities' solely to the activities there mentioned.

132. It follows from the Court's settled case-law that one version alone cannot take precedence over all other language versions. [52] The same conclusion seems to me unavoidable in the present context, where two language versions are contradicted by all the others. Uniform interpretation of Community rules requires that these isolated versions be read and applied in the light of the versions drawn up in the other Community languages. In the absence of indicia pointing to any intention on the part of the signatory States to limit the scope of the scheme established by the Association Agreement with regard to the right of establishment, it is appropriate to follow the letter of the provision in issue.

52 — See, as a recent example of settled case-law, Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31.

133. Consequently, if prostitution is not a commercial activity within the meaning of the Association Agreement, it none the less falls to be classified as an economic activity by reason of the profit-making objective as evidenced by the search for financial consideration.

B — *Prostitution as an activity pursued in a self-employed capacity*

134. The question as to whether prostitution is engaged in in a self-employed capacity may cause surprise. The criminalisation of procuring by many Member States is evidence of the reality of a *modus operandi* which, for most of the time, restricts prostitutes' freedom. [53]

135. That notwithstanding, one cannot entirely discount the possibility that there are some who engage in this activity without being automatically placed under the strict control of a third party.

136. Admittedly, as the referring court stresses, the conditions in which prostitutes

53 — The abovementioned report compiled by the French Senate mentions six States, of the eight whose legislation was examined, which criminalise all forms of procuring. To these six States must be added the French Republic and the Grand-Duchy of Luxembourg.

ply their trade are difficult to monitor, particularly with regard to confirming the presence of a procurer and assessing how independent the prostitutes are *vis-à-vis* that person. [54]

137. The undeniable difficulty facing any action by the competent authorities does not permit us to offset ignorance of the conditions in which this activity is carried on by making a definitive presumption that all prostitution involves entering into a relationship of dependency *vis-à-vis* a third party.

138. This construction of the Association Agreement would remove an entire economic activity from the scheme covering freedom of establishment, without such a removal being justified by any expression of intention by the parties to the Association Agreement or by the actual wording of the Agreement, even though that activity is freely engaged in by Community nationals within the territory of the host Member State.

139. That being so, it is necessary to set out in more detail the criteria which will enable the referring court to make the legal classification necessary for resolving the dispute in the main proceedings.

140. The condition linked to the exercise of the activity, in a self-employed capacity, is laid down by Article 44(4)(a)(i) of the Association Agreement.

141. We have seen that the forms of wording adopted in the different language versions could be translated not only by the notion of self-employment, but also by that of economic activity which is 'other than in employment', 'independent' or 'in one's own undertaking'. [55]

142. The wide range of these expressions is in large measure encountered again in Article 52, second paragraph, of the Treaty, and for that reason it appears useful to examine the indicia for construing that provision which can be derived from the Court's case-law.

143. The Court has interpreted the notion of an 'activity other than in employment' — or 'activity as a self-employed person' — as presuming the absence of any relationship of subordination between the trader and the person remunerating that trader. Activities carried out on an independent or self-employed basis are thus defined negatively by establishing that

54 — Third question in the order for reference.

55 — See footnote 35.

there is no remunerated relationship for the purposes of Article 48 of the Treaty. [56]

144. Reasoning once again within the context of the Association Agreement, in which neither the purpose nor the wording of the relevant provisions reveals any grounds for giving a different interpretation on this point to the scheme governing freedom of establishment which it introduces as compared with the corresponding scheme under the Treaty, it is appropriate to envisage transposing that definition to Article 44(4)(a)(i) of the Association Agreement.

145. The need to interpret the criterion derived from self-employment in order to demarcate the scope of the rules governing freedom of establishment assumes even greater importance in the present context.

146. Under the rules governing freedom of establishment set out in the Treaty, this criterion allows us to identify those activities which come within the scope of the free movement of workers, which rests, however, on a comparable scheme of non-discrimination. [57]

In contrast, the provisions of the Association Agreement concerning workers are far from enshrining a principle of free movement. We know that Article 44(4)(a)(i) precludes a self-employed trader from invoking that status for the purpose of obtaining paid employment. It must be added that the principle of non-discrimination introduced in Article 37 of the Association Agreement is limited to the conditions covering work, remuneration and dismissal. [58] Further, this right is set out subject to the conditions and modalities applicable in each Member State, which leaves the Member States with a substantial margin of assessment for laying down the criteria governing access to activities in an employed capacity.

147. In other words, the freedom of a national of a non-member country wishing to enter the territory of a Member State is limited by the purpose which national legislation attributes to his planned establishment. Should it prove impossible for him to take up an activity in a self-employed capacity, he may, depending on the provisions of the host Member State, be deprived of the right to switch to an activity as an employed person. One can thus appreciate the interest in defining the parameters of the criterion relating to the self-employed nature of the activity in question.

148. With more specific regard to prostitution, this interest is generated by more serious preoccupations. Lack of independence may be reflected in conditions of constraint and enslavement coming within

56 — See, *inter alia*, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraphs 25 and 26, and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 15.

57 — Article 48 of the Treaty.

58 — The same holds true for Article 38 of the EC-Czech Republic Association Agreement.

the scope of public-policy considerations and the protection of personal dignity and integrity.

149. Bearing in mind the specific interest in identifying the degree of autonomy which the prostitutes enjoy, it is necessary to examine the two criteria applicable, namely the existence of a relationship of subordination and the payment of remuneration.

150. According to the Court's case-law, any person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration is to be treated as being a 'worker' within the meaning of Article 48 of the Treaty. [59]

151. This definition is obviously of interest to us only in so far as it serves to classify, by *a contrario* reasoning, activities pursued in a self-employed capacity. The finding that the activity is not being pursued in a self-employed capacity will not oblige the host Member State to classify as work in an employed capacity that which will, on most occasions, be a relationship of subjection, even of constraint, between a prostitute and a procurer. Once it falls outside the notion of an 'economic activity pursued in a self-employed capacity' and the accompanying scheme of establishment, the question of its legal classification will be a matter for the strict assessment of the Member States in regard to this particular type of relationship, which is as distant as it is possible to be from a normal work relationship.

152. In any event, prostitution may be classified as an economic activity pursued in a self-employed capacity, for the purposes of Article 44(4)(a)(i) of the Association Agreement, once it has been established that the prostitute performs her activity in return for remuneration which is paid to her directly and in full, without any possibility of the choice of this activity and the arrangements for its exercise being dictated by a third person.

153. It is a matter for the national court to determine in each case, in the light of the evidence presented to it, whether those requirements have been satisfied.

154. For the sake of completeness, it is necessary to recall the discretionary scope available to the host Member State in regard to the exercise of an activity liable to impact adversely on public order or nationals of other States engaged in that activity, in accordance with the Court's traditional case-law, pursuant to the Treaty rules, and transposable *in casu* for the reasons outlined above.

155. First, with regard to national measures designed to regulate a particular activity, the arrangements for the exercise of prostitution on a self-employed basis, on

59 — *Asscher*, cited above, paragraph 25.

which depends the recognition of the right of access to that activity within the territory of the host Member State, do not prejudge that State's freedom to adopt a different attitude should it form the view that, for reasons of public policy, the exercise of prostitution ought to be more strictly regulated, if indeed not prohibited.

In the same way as other activities liable to have an adverse effect on public order, it is not possible to disregard the moral, religious or cultural considerations which attach to prostitution. [60] The risks associated with prostitution outlined above [61] justify national authorities having a discretion sufficient to determine the needs involved in protecting the social order, in particular with regard to the details concerning the exercise of that activity. In those circumstances, it is for them to assess whether it is not only necessary to restrict that activity but also to prohibit it, provided that those restrictions are not discriminatory. [62]

156. Second, the public policy proviso contained in Article 53(1) of the Association Agreement allows the contracting parties to impose limits justified on grounds of public policy in regard to nationals of the other parties. In the same way as under the Treaty, it may be accepted that the host Member State is entitled, *vis-à-vis* the non-member State which is a party to the Association Agreement, to take measures which it could not apply to its own nationals, inasmuch as it has no authority to expel the latter from the national territory or to deny them access thereto. [63]

157. In contrast, such a right does exist as against nationals of the non-member country, provided that no arbitrary distinction is applied in the exercise of that right. [64]

158. According to the Court's settled case-law, reliance by a national authority on the concept of public policy presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Although Community law does not impose on the Member States a uniform scale of values as regards the assessment of conduct which may be considered to be contrary to public policy, conduct may not be considered to be of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of a non-member country in the case where the host Member State does not adopt, with respect to the same conduct on the part of its own nationals or nationals of other Member States, repressive measures or other genuine and effective measures intended to combat such conduct. [65]

60 — See *Schindler*, cited above, paragraph 60, and Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 13.

61 — See point 119 of this Opinion and footnote 45.

62 — *Schindler*, paragraph 61, and *Läärä and Others*, cited above, paragraph 14.

63 — Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 7.

64 — Ibid.

65 — Ibid., paragraph 8.

159. The option available to the host Member State to regulate, on public-policy grounds, the activity in question and to limit access to its territory for foreign nationals intending to engage in that activity is thus strictly delimited by the requirements of coherence and non-discrimination laid down in the Court's case-law.

Conclusion

160. In the light of these considerations, I propose that the Court reply as follows to the questions submitted by the Arrondissementsrechtbank te 's-Gravenhage:

(1) Article 44(3) of the Europe Agreement of 16 December 1991 establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, and Article 45(3) of the Europe Agreement of 4 October 1993 establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, have direct effect and may for that reason be relied on by individuals before national courts.

(2) Article 44(3) of the EC-Poland Association Agreement, read in the light of Article 58(1) thereof, and Article 45(3) of the EC-Czech Republic Association Agreement, read in the light of Article 59(1) thereof, must be construed as meaning that the rules on establishment which they introduce do not include an obligation on the host Member State to grant a right of entry to and

residence within its territory to Polish and Czech nationals respectively, as the exercise of that right is subject to compliance with the limits fixed by the host Member State regarding entry, residence and establishment of those nationals.

(3) Articles 44(3) and 58(1) of the EC-Poland Association Agreement and Articles 45(3) and 59(1) of the EC-Czech Republic Association Agreement do not preclude national legislation which makes the right of entry and residence of Polish and Czech nationals wishing to take up an economic activity and to pursue it in a self-employed capacity within the territory of the host Member State subject to the condition that they have adequate resources.

(4) On a proper construction, the notion of 'economic activities [pursued] as self-employed persons' within the meaning of Article 44(4)(a)(i) of the EC-Poland Association Agreement and of Article 45(4)(a)(i) of the EC-Czech Republic Association Agreement is not confined solely to economic activities pursued in a self-employed capacity which require a professional qualification and are performed, by a trader resident within the territory of the host Member State, in accordance with specific conditions, such as the requirements that a business strategy be drawn up, that investments be made and that long-term commitments be assumed, and under which the trader must devote his time to both management and the production of goods or services.

(5) On a proper construction, the notion of 'economic activities [pursued] as self-employed persons' within the meaning of Article 44(4)(a)(i) of the EC-Poland Association Agreement and of Article 45(4)(a)(i) of the EC-Czech Republic Association Agreement does apply to prostitution once it has been established that the prostitute performs her activity in return for remuneration which is paid to her directly and in full, without it being possible for the choice of that activity or the arrangements governing its exercise to be dictated by a third person.