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The Establishment Provisions of the Europe Agreements:

Implementation and Mobilisation in Germany and the Netherlands

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Foreword

Each time the European Union has enlarged, the existing Member States have worried about the expected labour migration from the acceding countries and its potential to disturb the Member States' labour markets. The upcoming enlargement to Central and Eastern Europe is no exception. One of the most difficult themes in the negotiations on accession is the free movement of workers. Particularly in Germany and Austria, pleas have been made for transitional periods of up to fifteen years for the extension of the free movement to the candidate countries.

Between 1991 and 1996, Association Agreements were settled between the European Union and each of the candidates. These so-called Europe Agreements have not given any right of access to employed work in the European Union to nationals of the candidate countries. However, all the Agreements do include provisions on the establishment of candidate country companies, branches and agencies. This includes small service companies, even sole proprietorships, and it also includes the establishment of self-employed persons. The Agreements stipulate that each Member State shall grant a treatment no less favourable than that accorded to its own companies and nationals to candidate country companies and nationals.

These establishment provisions are a particularity of the Europe Agreements. Similar provisions are not found in earlier Association Agreements. This paper examines how and to what extent these provisions on establishment have been incorporated into the national immigration law and practice of two existing Member States: What has been the reaction at the national level to the creation of what looks like a right in EC Law, in a highly sensitive field? In addition, the paper examines how and to what extent the right of establishment has been invoked by nationals of the candidate countries.

The research on which this paper is based covers four Member States (France, Germany, the Netherlands and the United Kingdom), and is carried out at the Centre for Migration Law, University of Nijmegen. This paper presents the results for Germany and the Netherlands.

I would take this opportunity to thank a number of persons and institutions. First, the Centre of European Law and Politics (ZERP) has made available crucial resources for the project. Most of the data for Germany were collected during my stay as a visiting scientist at the ZERP in May 2001. Special thanks are due to Professor Klaus Sieveking for his helpful comments and the interest he showed in the project. Thanks are also due to Antje Pissors for the layout of this paper. Last but not least, I want to express my gratitude to the key informants in the two countries, who shared their knowledge and views with me.

Nijmegen, April 2002 Anita Böcker

Introduction

In 1998, the EU formally launched the process that should lead to its enlargement to Central and Eastern Europe. The process embraces ten Central and Eastern European countries (CEECs). Accession negotiations were opened with five of these countries (the Czech Republic, Estonia, Hungary, Poland and Slovenia[1]) on 31 March 1998, and with five other countries (Romania, the Slovak Republic, Latvia, Lithuania and Bulgaria[2]) on 15 February 2000.

One of the most difficult themes in the negotiations is the question of the free movement of workers. In previous enlargements it was the same. Particularly at the accessions of Greece in 1981 and of Portugal and Spain in 1986, existing Member States feared a large influx of workers that would seriously disturb their labour markets. The upcoming enlargement to Central and Eastern Europe raises even more fears, since it is without precedent in terms of scope and diversity: the number of candidate countries, their area and population, and the income gap with the existing Member States. In the case of the southward enlargements, it was agreed to apply transitional arrangements to the extension of the free movement of workers to the new Member States. The transition period was seven years, but was eventually reduced to six years as the fears of a massive migration wave proved to be without foundation. Particularly in Germany and Austria, pleas have been made for transitional periods of up to fifteen years for the extension of the free movement of workers to the candidate CEECs. In April 2001, the European Commission decided to propose flexible transitional arrangements. The Commission proposal envisages a general transition period of five years with a possible extension by individual Member States for a further two years.

A fact that has gone almost unnoticed in the debate about the free movement of workers is that there is a category of CEEC nationals for whom a right to take up economic activities in the EU Member States already exists. Between 1991 and 1996, the EC and its Member States concluded Association Agreements with all ten candidate CEECs. All these Agreements have granted the right of establishment to CEEC companies, branches and agencies, including smallservice companies, even sole proprietorships, and in nearly all cases also the establishment of self-employed persons. For companies, the right may be exercised by key personnel, as defined in the Agreements whom the enterprise is entitled to send to the Member State to effect the establishment right.

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1 This so-called Luxembourg group also includes Cyprus.

2 This so-called Helsinki group also includes Malta.

Little is known about the experiences with this right of establishment. There has been some discussion among lawyers about the question of direct effect.[3] The question of direct effect was also a central issue in four cases referred to the European Court of Justice by the High Court in London and a Dutch court.[4] This paper seeks to examine something quite different: how and to what extent the establishment provisions of the Association Agreements have been incorporated into the national law and practice of Germany and the Netherlands, and how and to what extent the right of establishment has been invoked by CEEC nationals in these two Member States.

The research on which this paper is based covers four EU Member States (France, Germany, the Netherlands and the UK), but the paper is limited to Germany and the Netherlands.[5] Various methods were used to collect data: literature study, analysis of available statistics, analysis of case law and interviews with key informants. In both countries, interviews were held with immigration lawyers and officials, representatives of Polish consulates and staff persons of Chambers of Commerce. In Germany, I also interviewed representatives of organisations of Polish immigrants and entrepreneurs, and staff persons of a *Handwerkskammer* (Crafts Chamber) and a *Gewerbeamt* (Trades Office).

In the next chapter, the Europe Agreements and their provisions will be examined in more detail. Existing research and knowledge led to a number of expectations regarding the implementation and mobilisation of the right of establishment in Germany and the Netherlands; these expectations are set out in Chapter 2. Chapter 3 discusses the research findings: how has the right of establishment been incorporated into the national law and practice of the two Member States, and how and to what extent has it been mobilised by CEEC nationals? Chapter 4 summarises the research findings, highlighting differences and similarities between Germany and the Netherlands.

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3 For an overview, see Guild 2001, pp. 195 ff.

4 We will discuss these cases, and the judgments of the Court of Justice, in Chapter 2.

5 The research is carried out by Elspeth Guild and myself. Elspeth Guild collected the data for the UK and France, I for Germany and the Netherlands. The data for Germany were collected during my stay as a visiting researcher at the Centre for European Law and Politics at the University of Bremen. The research results for the four countries will be published later this year in: A. Böcker & E. Guild, *Implementation of the Europe Agreements in France, Germany, the Netherlands and the UK: Movement of persons* (London: Platinium, 2002).

I. The Right of Establishment in the Europe Agreements

Between 1991 and 1996 the EU concluded Association Agreements with ten countries in Central and Eastern Europe: Poland, Hungary, the Czech Republic, Slovakia, Bulgaria, Romania, the Baltic states (Estonia, Latvia, Lithuania), and Slovenia.

Table 1 : The Europe Agreements

Country	Date of signature	Entry into force	Official application for EU membership
Hungary[6]	December 1991	February 1994*	March 1994
Poland[7]	December 1991	February 1994	April 1994
Romania[8]	February 1993	February 1995	June 1995
Bulgaria[9]	March 1993	February 1995	December 1995
Slovakia[10]	October 1993	February 1995	June 1995
Czech Republic[11]	October 1993	February 1995	January 1996
Latvia[12]	June 1995	February 1998*	October 1995
Estonia[13]	June 1995	February 1998*	November 1995
Lithuania[14]	June 1995	February 1998*	December 1995
Slovenia[15]	June 1996	February 1999*	June 1996

* In the Agreements with Hungary, the Baltic states and Slovenia, the right of establishment for self-employed persons is delayed until the end of the first transitional period. For Hungarians, the right was delayed until February 1999, for Latvians, Estonians and Lithuanians it was delayed until January 2000, and for Slovenians it is delayed until February 2003.

6 OJ 1993 L 347.
7 OJ 1993 L 348.
8 OJ 1994 L 357.
9 OJ 1994 L 358.
10 OJ 1994 L 359.
11 OJ 1994 L 360.
12 OJ 1998 L 26.
13 OJ 1998 L 68.
14 OJ 1998 L 51.
15 OJ 1999 L 5I/I.

1. Provisions on Movement of Persons

There is no standard format for Association Agreements in general. However, the Agreements settled with the CEECs, the so-called Europe Agreements, are all very similar.[16] They normally have nine titles.[17] Title IV of each Agreement is entitled 'Movement of workers, establishment, supply of services'. It consists of three chapters.

a) Movement of Workers

The first chapter is entitled 'Movement of workers'. The term 'movement' is somewhat misleading as the provisions on workers' rights in this chapter extend only to a right of non-discrimination in working conditions, remuneration and dismissal for workers already legally employed.[18] The Agreements also provide that the legally resident spouse and children of a legally employed worker may work in the host country during the period of the worker's authorised stay. An exception is made, however, for seasonal workers and workers under the provisions of bilateral agreements.[19] Apart from this, the Agreements only contain provisions with programmatic effect. They provide, for example, that the existing facilities for access to employment under bilateral agreements 'ought to be preserved and if possible improved' and that Member States which have not concluded such agreements 'shall consider favourably' the possibility of doing so.[20] They also provide that the Member States will examine the possibility of granting work permits to CEEC nationals already having residence permits with the exception of those who have been admitted as tourists or visitors.[21] The Association Council is given competence to con-

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16 The Poland Agreement served as the prototype and thus will be the point of reference in this paper as well.

17 Title I: Political dialogue; Title II: Agriculture; Title III: Free movement of goods; Title IV: Movement of workers, establishment, supply of services; Title V: Payments, capital, competition and other economic provisions, approximation of laws; Title VI: Economic co-operation; Title VII: Cultural co-operation; Title VIII: Financial co-operation; Title IX: Institutional, general and final provisions.

18 Art. 37(1) Poland Agreement. The non-discrimination provision in the Europe Agreements does not apply to social security. This is probably a consequence of the *Kziber* judgment, in which the Court of Justice held the prohibition on discrimination in social security in the Morocco Agreement to have direct effect. Cf. Guild 2001, p. 186.

19 Art. 37(1) Poland Agreement.

20 Art. 41(1) Poland Agreement.

21 Art. 41(3) Poland Agreement.

sider other improvements, including facilities of access for professional training.[22]

So far, two cases have been referred to the European Court of Justice regarding the right of non-discrimination in working conditions, both by German courts. The first case concerned a Polish national who had been given a fixed-term contract as a language assistant at the University of Bielefeld, but claimed that she was entitled to a contract of indefinite duration on the grounds that under national law only such indefinite contracts may be offered to German nationals. The Court handed down its judgment in January 2001. It found that its long-standing jurisprudence on the illegality of short-term contracts for nationals of other Member States where such contracts cannot be offered to nationals of the Member State also applies to CEEC nationals on the basis of their right to non-discrimination in working conditions in the Europe Agreements, which is worded in the same way as that of the EC Treaty. The Court specified, however, that the right to equal treatment in working conditions only applies to CEEC nationals who have been authorised to reside on the territory and to work there.[23] The second case, which is still pending, concerns the application, by the German Handball Association to a Slovak professional handball player, of a rule under which clubs may only use a limited number of players from non-EU countries in championship and cup matches. The Court was asked whether the application of this rule is contrary to the non-discrimination provision of the Slovakia Agreement.[24]

b) Supply of Services

The third chapter of Title IV of the Agreements covers the supply of services between the Community and the CEECs. This may also involve the temporary movement of natural persons, where a service can only be provided if the persons providing the service are in the territory of the recipient. However, the Agreements only foresee 'to take the necessary steps to allow the supply of services […] taking into account the development of the services sector in the Parties'.[25]

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22 Artt. 41(2), 42 Poland Agreement.

23 C-162/00 *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer,* judgment 29 January 2002.

24 C-438/00 *Deutscher Handballbund eV v Kolpak.*

25 Art. 55(1) Poland Agreement.

c) Establishment

The second chapter of Title IV deals with establishment. Again the provisions in the Agreements are very similar. They state that the treatment granted to the companies and nationals of the other party shall not be less favourable than that accorded to one's own nationals and companies.[26] In the four most recently concluded Agreements with the Baltic states and Slovenia the right to equal treatment is extended to the treatment granted to own companies or nationals or any third country companies or nationals, whichever is the better. The right of establishment extends to a right for companies to employ key personnel like managers, directors or persons possessing highly uncommon technical knowledge. These employees should be nationals of the same country as the company and they must have been employed by the company for one year before the deployment.[27]

The definition of 'establishment' in all ten Agreements is very similar to that used in the EC Treaty – '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 …'.[28] The right of establishment of the EC Treaty as interpreted in Community law includes a right of access to the territory in order to carry out the economic activity in addition to a right to remain on the territory for that purpose. However, the right of establishment in the Europe Agreements is subject to provisos which raise questions both about its direct effect and the applicability of the interpretation of the right of establishment of the EC Treaty. In particular, the Agreements all contain a provision which states that 'nothing in the Agreement prevents the parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits'.[29] A Joint Declaration attached to the Agreements states that a visa requirement for natural persons *per se* does not have the consequence of nullifying or impairing the right of establishment. In addition, the Agreements include a provision stating that the Agreements 'shall not prejudice the application by each Party of any measures necessary to prevent the circumvention of its measures concerning third country access to its markets'.[30]

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26 Art. 44 Poland Agreement.
27 Art. 52 Poland Agreement.
28 Art. 44(4) Poland Agreement.
29 Art. 58(1) Poland Agreement.
30 'The Contracting Parties agree to be guided by Articles 52 to 56 […] and Article 58 […] of the Treaty establishing the Community for the purpose of abolishing progres-

2. *The Member States' Commitment to Strict Immigration Control*

The establishment provisions are a particularity of the Europe Agreements. Similar provisions are not found in earlier Association Agreements. The EEC-Turkey Association Agreement (1963) only contains a provision with programmatic effect;[31] the Additional Protocol to this Agreement (1970) contains a standstill provision prohibiting the introduction of new national restrictions on the freedom of establishment and the freedom to provide services.[32] At previous accessions, there were no transitional periods for the extension of the freedom of establishment to the new Member States, but nationals of these countries were not granted a right to establishment in advance either.

The Europe Agreements were concluded at a time when Germany and other EU Member States were still receiving high numbers of asylum applications from CEEC nationals, particularly Romanians. In 1992, the year preceding the signature of the Agreements with Romania and Bulgaria, Germany received 104,000 applications from Romanians and 32,000 from Bulgarians. In addition, the unemployment rates in most Member States were moving upwards. In Germany the rate went up from 5.6% in 1991 to 8.4% in 1994; the rate for the EU went up from 8.2% to 11.2%.[33] Moreover, the Court of Justice had already handed down judgment in cases on the Turkey Agreement (*Sevince*[35]) and the Maghreb Agreements (*Kziber*[36]). The Member States were quite shocked by these judgments. They therefore were well aware of the potential impact of the Europe Agreements on domestic immigration law and policy.

The concern of (some of) the Member States to restrict the influx of CEEC migrants and to protect their labour markets resulted in the exclusion of the possibility of employment. It was left to the Member States individually to determine whether they wished to make facilities available and under what conditions. It seems plausible that the provisions about establishment were included not just because of the political will to include the CEECs in Western

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sively the obstacles to the freedom of establishment between themselves' (Article 13 EEC-Turkey Agreement).

31 Art. 13 EEC-Turkey Agreement.

32 Art. 41(1) of the Additional Protocol. In 2000, the Court of Justice handed down a judgment in which it held this provision to have direct effect, but to be not in itself capable of conferring upon a Turkish national a right of residence in the Member State in whose territory he has remained in breach of the domestic immigration law (C-37/98 *Savas* [2000] All ER (EC) 627).

33 *Eurostatistics: Data for Short-Term Economic Analysis*, 1996/1, Luxembourg 1996.

35 C-192/89 [1990] ECR I-3461.

36 C-18/90 [1991] ECR I-199.

Europe, but in recognition of the desire of businesses from the Member States to gain access to the markets of the CEECs and their need for a framework to do so. The principle of reciprocity meant that the same rights of access to economic activity were guaranteed to nationals of the CEECs in the Member States as were granted to nationals of the Member States in the CEECs.[37] The Member States' concern to protect their labour markets then resulted in several provisos permitting Member States to continue to apply their restrictive national immigration laws. After the judgments of the Court of Justice in Sevince and Kziber, the Member States wanted to avoid creating rights with direct effect for individuals.

3. Judgments of the European Court of Justice

The right of establishment in the Europe Agreements has so far been the subject of four judgments of the Court of Justice. In September 2001 the Court delivered three judgments in cases referred by the High Court in London. These were followed in November 2001 by a fourth judgment in a case referred by a Dutch court. The first case (*Gloszczuk*) concerned two Polish nationals whose applications to remain in the UK as self-employed workers were rejected on the grounds that they had stayed irregularly in the UK after their applications for extensions of their visas were refused.[38] The second case (*Kondova*) concerned a Bulgarian national who arrived in the UK with a short stay visa and applied for asylum shortly after arrival. Her asylum application was rejected. She appealed and commenced activities as a self-employed cleaner.[39] The third case (*Barkoci and Malik*) concerned two Czech nationals who applied to remain in the UK as self-employed workers after their asylum applications had been refused. They were also in receipt of public benefits.[40] The last case (*Jany*) concerned a number of Czech and a Polish nationals who applied to remain in the Netherlands as self-employed prostitutes.[41]

In all four cases the Court insisted that the right of establishment has direct effect and can be relied upon directly by individuals, and that, moreover, it presupposes a right to enter and remain in the host Member State. (Here the Court did not follow the opinions of its Advocates-General, who held the right to have direct effect, but did not consider that it confers rights of entry and

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37 Cf. Guild 2001, p. 170.
38 C-63/99 *Gloszczuk*, judgment 27 September 2001.
39 C-235/99 *Kondova*, judgment 27 September 2001.
40 C-259/99 *Barkoci and Malik*, judgment 27 September 2001.
41 C-268/99 *Jany*, judgment 20 November 2001.

residence on CEEC nationals.) The Court also pointed out, however, that the rights of entry and residence conferred on CEEC nationals as corollaries of the right of establishment are not absolute privileges. Their exercise can be limited by national rules regarding entry, stay and establishment. In *Barkoci and Malik* the Court went on to specify that the Agreements do not preclude a system of prior control (i.e., a visa requirement) to check the exact nature of the activity envisaged by the applicant. However, where a CEEC national submits an application for leave to enter for purposes of establishment at the point of entry into the Member State, the competent authorities of the Member State should exercise their discretion in such a way that leave to enter can be granted to a CEEC national lacking entry clearance on a basis other than that of the national immigration legislation. They should do so if the application 'clearly and manifestly satisfies the same substantive requirements as those which would have been applied had he sought entry clearance in the [CEEC]'.[42] In *Jany* the Court held that the 'activities as self-employed persons' referred to in the Europe Agreements have the same meaning and scope as 'the activities as self-employed persons' referred to in Article 52 of the EC Treaty. The activity of prostitution in a self-employed capacity can be regarded as a service provided for remuneration and is therefore covered by both these expressions. The Court went on to specify that prostitution is an economic activity pursued by a self-employed person where it is carried out by the person providing the service: 'outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration; under that person's own responsibility; and in return for remuneration paid to that person directly and in full.'[43]

It is important to note that the data for this paper were collected before the Court of Justice handed down its decisions on the interpretation of the provisions on establishment in the Agreements. Thus the Member States were not yet aware of the meaning which the Court would give to the right of establishment. The Member States implemented the provisions of the Agreements with the idea in mind that there was a wide margin of appreciation for them.

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42 C-259/99 *Barkoci and Malik*, para. 74.

43 For more details, see Guild's discussion of the judgments in Böcker & Guild 2002.

II. Background

1. The Distinction Between Employment and Self-employment

The Europe Agreements offer openings for the movement of self-employed persons but not for workers. Therefore the distinction between workers and self-employed persons under the Agreements is much more important than the distinction within the framework of the EC Treaty.

On the one hand, it can be argued that the establishment provisions of the Agreements are unlikely to be invoked by large numbers of CEEC nationals. The requirements for setting up in business (start capital, qualifications, knowledge of markets, overcoming legal and administrative barriers) make it not very likely that large numbers of self-employed persons will move. The 'normal' route to self-employment, both for non-migrants and for migrants, is first to work in employment for some time and then to set up in business. In many EU Member States, the numbers of migrant businesses have gone up in recent years. However, the majority of these businesses are set up by migrants who gained admission to the country for other purposes and decided to set up in business only after a more or less prolonged stay.

On the other hand, the borders between wage and salary employment and self-employment are rather fluid. Self-employment has grown in many countries over the past decades.[44] Germany and the Netherlands are among the countries with the fastest growth. The growth is concentrated particularly among self-employed without employees. Some of the growth results from changes in industrial organisation, such as the increase in subcontracting and outsourcing; some is a response to new opportunities offered by the fast growth of the services sector in many countries; and some may represent a transfer of work from wage and salary employment to self-employment in order to reduce tax liabilities.[45] Though many countries have adopted policies to encourage self-employment, there have also been concerns about the possible increase of 'false' self-employment. For example, Germany laid down more stringent conditions for a person to be classed as self-employed for social security purposes in 1998.[46]

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44 OECD 1992, 2000.

45 OECD 2000.

46 Gesetz zu Korrekturen in der Sozialversicherung und zur Sicherung der Arbeitnehmerrechte vom 19.12.1998 (BGBl I, p. 3843). One year later, however, it was decided to use a somewhat more liberal definition of self-employment again (Gesetz zur Förderung der Selbständigkeit vom 20.12.1999, BGBl 2000 I, p. 2).

If self-employed persons can move whereas workers cannot, this may also influence the choices of (potential) migrants. Migrant workers and/or their employers may try to circumvent the limited scope of the movement of workers and invoke the right of establishment. In fact, already before the entry into force of the Europe Agreements there were attempts in Germany and the Netherlands to circumvent the work permit system by presenting Polish workers in the construction industry and – in the Netherlands – in the market gardening sector as self-employed persons.[47] Likewise, in the 1990s many British nationals went to Germany to work in the construction industry. Many of them were hired out by Dutch contractors (*koppelbazen*) and submitted so-called E 101 certificates from the British Department of Social Security to prove that they were self-employed. In this way their employers were able to save taxes and social insurance contributions.[48]

It is clearly for this reason (to prevent that dependent employment is presented as self-employment) that the Europe Agreements explicitly stress that the rights granted to nationals only apply to persons exclusively self-employed and that they cannot be interpreted as giving access to the Parties' labour markets. As both Member States had experienced attempts to circumvent their national work permit systems, we expected that the German as well as the Dutch authorities would be rather suspicious about applications of CEEC nationals seeking to come to the country for purposes of establishment. We expected the distinction between employment and self-employment to be a point of dispute between applicants from CEECs and both Member States.

2. Existing Migration Networks

Migration research reveals that family or ethnic networks are an important factor in international labour migration. Existing immigrants tend to attract more immigrants from the same origin. On the other hand, they may signal labour market saturation or negative social experiences, deterring further immigration.

When the first Agreements entered into force, concentrations of CEEC nationals in EU Member States that could lead to significant network effects existed particularly in Germany (see Table 2).

47 See, e.g., De Bakker 2001.

48 See, e.g., Bundesregierung 1996, p. 67; Bundesregierung 2000, p. 37.

Table 2 : Residents from CEECs (by citizenship) in the EU-15, Germany and the Netherlands, 1 January 1990 and 1 January 1994 (thousands)

	Current EU-15		Germany		Netherlands	
	1990[1]	1994[2]	1990	1994	1990	1994
Bulgaria	12	72	6	57	--	1
ex Czechoslovakia	41	91	32	63	--	1
Hungary	47	89	32	62	1	1
Poland	355	410	220	261	3	6
Romania	38	216	21	163	1	2
Total CEEC-6	493	878	311	606	5	11
CEEC residents in % of total foreign population	2.1%	5.2%	6.4%	8.9%	0.8%	1.4%

1) Excluding Austria, Ireland, Portugal. The number of CEEC residents in Austria in 1991 amounted to 62,000.[49]
2) Partly based on EUROSTAT estimates.
-- Figure not available.

Source: EUROSTAT.

At the beginning of the 1990s, the numbers of residents from CEECs in most EU Member States were small. CEEC immigrants made up only 2% of the total foreign population in the European Union. By the time the first six Agreements entered into force (1994-1995), the numbers had gone up but were still small in view of the large gap in per capita incomes and the short geographical distances. CEEC immigrants made up only 5% of the total foreign population in the European Union. Poland was the most important country of origin. However, Germany and Austria were home to over 70% of the total number of residents from the CEECs in the European Union. CEEC nationals made up nearly 9% of the total foreign population in Germany. Moreover, the figures in Table 2 do not include undocumented CEEC migrants and workers. It is widely assumed that their numbers have multiplied during the 1990s. A recent study estimated the number of 'working tourists' (engaged in short-term work abroad, travelling back and forth every two or three months) at 600,000 to 700,000, or more than twice the number of documented CEEC workers.[50] The

49 Salt 2000.
50 Morawska 2000, p. 7; see also European Commission 2001, p. 30.

number of 'trading tourists' (engaged in cross-border trading) is probably larger still. Particularly Poles have been found to engage in such undocumented work and unreported trading activities. On the basis of these figures, we expected that network effects would occur particularly among Poles in Germany.

Relations with potential employers are also important. There is empirical evidence that most highly skilled labour migrants are contracted migrants, who have been offered a new job prior to moving. Such migrants are mostly moved either within multinational companies, by companies with international contracts or between companies by international recruitment agencies. Organisations are able to overcome barriers (e. g. non-recognition of professional qualifications) more easily than individuals.[51] For unskilled and irregular migrants relations with employers are important, too. A study about the recruitment of migrant workers in various economic sectors in the Netherlands revealed that there often existed long-standing personal relationships between Polish seasonal workers and their Dutch employers. A large group of Polish workers arrived 'spontaneously' each year. However, they always came from the same regions in Poland and workers originating from a particular region also shared a particular destination in the Netherlands.[52]

In short, international labour migration does not take place in a social vacuum and prospective migrants often need the assistance of employers or other interested parties in the destination country to overcome legal and other barriers. We therefore expected that attempts to circumvent the restrictions on the movement of workers by way of the right of establishment occur especially where there are existing migration ties between employers or recruitment agencies in a Member State on the one hand, and workers in a candidate CEEC on the other hand.

3. Implementation and Street-level Application of the Establishment Provisions

With regard to the implementation and street-level application of the Europe Agreements, we did not expect that all individual Member States have been quick to transpose the provisions offering openings for movement of persons into their national law. Moreover, we did not expect that the Member States have implemented the provisions in a uniform way. As noted above, the Member States' concern to protect their labour markets resulted in the insertion of

51 Davis & Saunders 1997.
52 Odé 1996.

several provisos in the Agreements. The Agreements therefore do not clearly define the scope for national appreciation. Only in September and November 2001, the ECJ handed down a series of judgments clarifying the scope. The available literature on the implementation of Community law shows that even in the case of directives and regulations, the implementation by individual Member States often is not uniform and effective. Research on the implementation of the Diplomas Directive, meant to ease the free movement of professionals between EU Member States, reveals that most Member States were slow to implement it, and what's more, in some cases adaptation requirements were tightened instead of being eased.[53]

Case studies on environmental directives suggest that the larger the adaptations required from a Member State by Community legislation (the larger the degree of institutional incompatibility between national laws and practices and EU requirements), the smaller the probability of an effective implementation of Community legislation.[54] Other factors in these studies are government willingness to implement, domestic pressure in favour of EU requirements (emanating from political parties, environmental organisations or business and industry groups), and the opportunity structure for domestic groups.[55]

With regard to the street-level application (or non-application) of the provisions of the Agreements, we expect existing traditions and routines to be an important factor. A study on the remaining obstacles for the free movement of persons within the EU revealed that thirty years after the introduction of the free movement of workers, Dutch immigration officers still tended to treat nationals of EU Member States as if they were third country nationals. For example, they often assumed that EU citizens are allowed to work in the Netherlands only after having been granted a residence document. Self-employed EU citizens were often asked to produce financial accounts showing the success of their business even though this requirement is excluded by the Directive 73/148. The officers turned out to have only limited knowledge of European migration law.[56] We expected the Europe Agreements and the openings they offer for movements of persons to be much less known.

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53 Davis & Saunders 1997; see also Peixoto 2001.

54 E.g., Knill 1998; Knill & Lenschow 1998. These researchers focussed particularly on the impact of national administrations and their traditions.

55 E.g., Börzel 2000; Haverland 2000.

56 Badoux 1999; Siegel 1999.

4. Differences Between Germany and the Netherlands

This paper focuses on the implementation and mobilisation of the right of establishment in Germany and the Netherlands. The two Member States differ with regard to the (economic, cultural, historical) ties they maintain with CEECs; the numbers of immigrants from CEECs also differ strongly. Within the European Union, Germany is by far the most important destination for CEEC migrants. This explains why the extension of the free movement of workers to the candidate CEECs has aroused more debate and concern in Germany (and the second most important destination Austria) than in other Member States.

Paradoxically, Germany has also adopted a more liberal attitude towards (temporary) labour migration from Central and Eastern Europe than other Member States. Within the European Union, Germany has concluded the vast majority of bilateral labour migration agreements with CEECs.[57] Seasonal worker agreements enable workers from CEECs to work in Germany for up to three months in any one year in economic sectors with seasonal manpower requirements. Agreements on project-tied workers (*Werkvertragsarbeitnehmerverträge*) enable German firms to subcontract part of a project to a CEEC firm, which then posts its workers in Germany to carry out the work.[58] Guest-worker agreements (*Gastarbeitnehmerverträge*) are intended to offer CEEC workers an opportunity to improve their vocational and language skills in companies in Germany. In addition, the Recruitment Freeze Exemption Ordinance (*Anwerbestoppausnahmeverordnung*) contains exceptions for various other forms of temporary employment and for border commuting of Poles and Czechs.[59] The partial lifting of the ban on recruitment of 1973 was aimed primarily at channelling immigration from Central and Eastern Europe into temporary forms of migration and employment.

The Netherlands, on the other hand, have not concluded bilateral agreements on labour migration with any of the candidate CEECs. Neither does the national immigration legislation provide for preferential treatment for labour immigration from the CEECs. In the 1980s it was tolerated that Polish nationals who entered the country as asylum seekers or tourists carried out seasonal work, particularly in the flower bulb industry. Towards the end of the 1980s,

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57 For an overview, see Werner 1996.

58 These agreements have aroused quite some controversy. The quotas for posted workers have been reduced from a total of nearly 100,000 workers in 1992 to around 30-40,000 in later years. See Faist et al. 1999 for a detailed analysis of the legal and political aspects.

59 For an overview, see Cyrus 1997.

this policy was discontinued. Employers had to apply for work permits. As from 1990, the policy with regard to issuing work permits for Polish seasonal workers was tightened up. In response to this restrictive policy, some employers attempted to circumvent the work permit system by entering into contracts with Polish firms that brought in their own workers.[60]

The next chapters will pay special attention to these and other differences between the two Member States and how they affect the implementation of the right of establishment on the one hand, and its mobilisation by CEEC nationals on the other hand.

III. Implementation and Mobilisation of the Right in Germany and the Netherlands

1. Political Debate About the Right of Establishment

In the Netherlands, the Europe Agreements were ratified without further ado. In Germany, the ratification of the first Agreements was delayed by concerns about the possible effects of the Agreements for the medical professions. There were fears that many doctors from the CEECs might want to come to Germany and open a medical practice. This would thwart the policy to restrict the admission of so-called *Vertragsärzte* (panel doctors). Pleas were made for excluding the medical professions from the provisions of the Agreements. As it was not feasible to reopen negotiations at the EU level, another solution had to be found. By means of amending laws, an article to the effect that CEEC doctors would only be admitted in areas where there is a shortage of doctors was inserted into the acts on the ratification of the Agreements with Poland and Hungary. The federal government assured parliament that this solution did not contravene German or European law.[61]

2. Transposition of the Right of Establishment Into National Law

The first Europe Agreements, with Poland and Hungary, entered into force on 1 February 1994. For Polish nationals, the right of establishment was applicable from that date. The EC-Hungary Agreement contained a transitional period

60 Groenendijk & Hampsink 1994; Odé 1996; De Bakker 2001.

61 BR Drucksache 759/92, 760/92; BT Drucksache 12/4650, 12/5155; BGBl. 1993 II, pp. 1316, 1472; see also Haage 1997.

of five years for nationals establishing themselves as self-employed persons.

The Netherlands were quick to implement the EC-Poland Agreement. Shortly after the entry into force of the Agreement, a few new paragraphs were inserted into the Aliens Circular (*Vreemdelingencirculaire*), a set of instructions to the authorities responsible for the application and enforcement of the Aliens Act. The subsequent extension of the implementing rules to nationals of other CEECs, as other Europe Agreements entered into force, was less quick. Nationals of Romania, Bulgaria, Slovakia and the Czech Republic were covered only in 1996, over a year after the entry into force of the agreements with these countries. The implementing rules have not yet been extended to nationals of the Baltic states, although the transitional period for these three countries expired on 31 December 1999. Our respondents from the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*) attributed this delay to the large workload of the officials concerned: on 1 April 2001, a new Aliens Act entered into force.

In Germany, on the other hand, there was a long period of uncertainty about the effects and application of the right of establishment. Only in 1996, two years after the entry into force of the Poland Agreement, some *Länder* issued circulars with ministerial instructions about the application of the provisions with regard to movement of natural persons in the Agreements. Most of these circulars were based on the views expounded by the representative of the federal Interior Ministry at a conference of the *Ausländerreferenten* (civil servants with responsibility for foreigners' affairs) of the federal government and the *Länder* governments in June 1996.[63] The interpretation of the federal Interior Minister was that the right of establishment does not imply the right of entry and residence, but reduces the discretion of national authorities in granting or refusing admission.[65] In the general instructions on the application of the Aliens Act of 1990, the following, rather vague, paragraph was inserted: 'Aliens who according to one of the Europe Agreements with Central and Eastern European countries have been granted certain establishment rights, and who are entitled to national treatment, are subject only to trade and profession law restrictions.'[66] These instructions were issued only in 2000.

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63 Lange 1997, p. 409.

65 Lange 1997; see also Lange 1996.

66 'Ausländern, denen nach einem der Europa-Abkommen mit mittel- und osteuropäischen Staaten Niederlassungsrechte in bestimmten Umfang gewährt werden, unterliegen im Falle der Inländergleichbehandlung nur noch berufs- und gewerberechtlichen Beschränkungen' (Allgemeine Verwaltungsvorschrift zum Ausländergesetz, 10.3.3.3).

In both countries, Hungarian individuals were explicitly excluded during the transitional period before the right of establishment for individuals came into force.

a) The German Implementing Rules

Interestingly, not all the German *Länder* issued circulars. And those which did, did not always follow the federal government's interpretation. For example, Lower Saxony took the position that only persons who are already lawfully residing in the country can invoke the right of establishment. According to a circular issued by the Lower Saxon Interior Ministry in April 1996,[70] the term establishment as defined in Article 44 of the Poland Agreement does not imply a right of entry and residence, and, what's more, does not reduce the national discretion. The Lower Saxon interpretation of the right of establishment of the Poland Agreement was that Polish nationals are granted a right to national treatment only after they have been granted a residence permit. The circular of the Lower Saxon Interior Minister was issued before the above mentioned conference but was not withdrawn afterward. Lower Saxony took this position because the aliens authorities in Lower Saxony had experienced problems with undocumented Polish workers: when these workers – who were employed in the building and building cleaning industry – were expelled, they attempted to return to Germany as self-employed persons.

Most *Länder*, however, did accept the interpretation of the federal Interior Ministry. For example, a circular issued by the North-Rhine Westphalian Interior Ministry at the end of 1996 stated that though the Europe Agreements do not grant CEEC nationals a right with direct effect, the discretion in granting or refusing residence permits to nationals of these countries who fulfil the conditions for establishment of the Agreements 'is reduced to zero'.[71] National legal and administrative rules are nevertheless applicable, and restrictions which are justified on the grounds of public order, security or health are permissible. The North-Rhine Westphalian circular further states that the provisions of the Europe Agreements do not apply if the self-employed activities are supplemented by employment, and that it may and must be prevented that self-

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70 Niedersächsisches Innenministerium, Erlass vom 3. April 1996, 45-21-12233/1-26.

71 Runderlass des Innenministeriums des Landes NRW vom 21. November 1996 – 1 B/43.156. This circular was published in Informationsbrief Ausländerrecht, Vol. 19, No. 4, 1997, pp. 151-152.

employed activities are taken up without the necessary financial means, or that these activities are used as a disguise for employment in the labour market. Where a CEEC national who is not yet lawfully resident in Germany wants to set up in business in Germany, he or she is not exempted from the obligation to obtain a visa abroad, before coming to Germany. The *Ausländerbehörden* (aliens authorities) are instructed to examine the following aspects:

– they should consult the competent authorities (e. g., *Gewerbeamt, Handwerkskammer*) to ensure that the relevant national regulations on access to trades and professions are observed;

– a public interest test is no longer allowed, i. e., the *Ausländerbehörden* should not take into consideration competitive, economic, labour market and employment policy aspects;

– the intended activities should be of long duration – the circular explains that the Europe Agreements are not applicable to the supply of services – and should be carried out exclusively in self-employment;

– the applicant should have sufficient command of the language for the activities he or she intends to take up;

– the applicant should prove that he or she has sufficient capital to set up in business and to meet his or her costs of living during the start-up period. After a normal start-up period, the economic activities should provide the applicant with sufficient means of subsistence.

The circulars issued by other *Länder* mention more or less the same aspects. A few circulars explicitly point out that students are not to be allowed to take up part-time economic activities as self-employed persons (*Teilzeitselbständigkeiten*).[72]

Generally, non-EU nationals seeking to come to Germany to set up in business are subject not only to restrictions posed by regulations on access to trades and professions, but also to the restriction that their economic activities serve a substantial economic interest or a special local need. The *Ausländerbehörde* submits the application to the local Trades Office (*Gewerbeamt*) and the Chamber of Commerce (*Industrie- und Handelskammer*), or – depending on the trade or profession involved – another chamber, e.g. the Crafts Chamber (*Handwerkskammer*), for consideration and advice. In the case of CEEC na-

72 E.g., Ministerium des Innern des Landes Sachsen-Anhalt, Runderlass vom 18. November 1996, 42.21-12231-31.

tionals, the Trades Office and relevant chamber are not asked to subject the application to a public interest test; they should only check if the applicant meets the relevant requirements for establishment for the trade or profession in which he or she intends to establish him- or herself – that is, according to the above-cited paragraph from the general instructions on the applications of the Aliens Act and the circulars issued in most of the *Länder*. Particularly in *Länder* where no circulars have been issued, the aliens authorities will not always be aware of the provisions on establishment of the Europe Agreements. We actually found this to be the case in one of our interviews with aliens officers.

b) The Dutch Implementing Rules

In the Netherlands, the right of establishment has been implemented in basically the same manner. Non-EU nationals seeking to come to the Netherlands to engage in self-employed activities, have to prove that these activities serve a substantial Dutch interest. CEEC nationals are exempted from this requirement.

The provisions on movement of persons under the Europe Agreements have been implemented by inserting a new section into the chapter on international treaties of the Aliens Circular.[73] It says that nationals of the associated CEECs who want to establish themselves economically in the Netherlands, are entitled to a treatment no less favourable than that accorded to Dutch nationals, if they want to take up and pursue economic activities as self-employed persons and if they want to set up and/or manage undertakings, in particular companies. They are not allowed to take up employment. The Circular points out that the provisions of the Europe Agreements do not apply if the self-employed activities are supplemented by employment.[74] Nationals of the associated CEECs who seek to come to the Netherlands to set up in business have to satisfy the following general admission requirements for self-employed individuals:

– they have to satisfy the requirements for practising their profession or running their business;

– they have to prove that their economic activities (will) yield sufficient means of subsistence. Their application must be accompanied by satisfactory documentation, for example a balance sheet and a profit-and loss-

73 Vreemdelingencirculaire 2000 B11/6.
74 Vreemdelingencirculaire 2000 B11/6.3.

account. Where a first application for a residence permit or an application for a visa is concerned, the applicant can be asked to submit a business plan, which should include personal data, information about the business, legal aspects, a commercial plan, management plan and financial plan;

– an application can be rejected on grounds of public peace or order or national security.

As stated above, CEEC nationals cannot be rejected on the grounds that their activities do not serve a substantial Dutch interest. Their applications therefore do not have to be submitted to the Ministry of Economic Affairs for consideration and advice. CEEC nationals are also exempted from the following requirements:

– they cannot be rejected on the grounds that the business is not a new business;

– they cannot be rejected on the grounds of their age (for other non-EU nationals the age limit is 60 years).

c) Exemption from the Public Interest Requirement

In both countries, CEEC nationals have been exempted from the public interest test which most other non-EU nationals have to undergo. In Germany, the public interest requirement applies not only to individuals seeking to gain admission to the country to set up in business, but also to individuals who have been admitted to Germany for other purposes and subsequently wish to engage in self-employed activities. Temporary residence permits are as a rule issued with the restriction that self-employment is not allowed.[75] The holder of such a permit thus has to apply for a new permit in order to get access to self-employed activities. Only holders of a permanent resident permit (*unbefristete Aufenthaltserlaubnis* or *Aufenthaltsberechtigung*) are free to take up a self-employed activity, provided they fulfil the requirements for establishment for the trade or profession involved.

The exemption from the public interest test is an important exemption, because in both countries it is hard to pass this test. In Germany, only applicants with high or uncommon qualifications (who would also meet the requirements for a work permit) are likely to pass the test.[76] In the Netherlands, applicants

75 Allgemeine Verwaltungsvorschrift zum Ausländergesetz, 14.2.4, 10.0.3.
76 See, e.g., Marx 2000, p. 171.

have to show that their economic activities have innovative value; their activities should 'add something positive' to the Dutch economy.[77]

d) Non-exemption from the Visa Requirement

Both in Germany and the Netherlands, nationals of Poland, Hungary, the Czech Republic, Slovakia, the Baltic countries, Bulgaria (as from 10 April 2001), and Romania (as from 1 January 2002) do not need a visa for a stay of up to three months as a visitor. Both Germany and the Netherlands have transposed the Community Regulation on Visas under which there is only a mandatory white and a black list, and these countries are on the white list. [78]

Nationals of the associated CEECs do require a visa, however, for stays of more than three months and/or leading to the holder taking up activities as a self-employed person. They have to obtain this visa abroad before arriving in the country. Exceptions to this rule apply where the individual is already legally resident in the country. In Germany a so-called *Duldung* (tolerance) is not considered a residence title; a CEEC national with a *Duldung* will therefore have to apply for a visa abroad. In both countries, the visa application must be approved by the aliens authority in the place where the applicant intends to take up residence. In Germany, the approval procedure for visas for stays of more than three months normally takes up to three months. The time needed for processing an application for a visa to come to Germany for the purpose of self-employment varies a lot. Applicants can sometimes speed up the procedure by consulting the relevant authorities during a visit to Germany prior to filing their application at the German embassy or consulate in their country of origin. In the Netherlands, it generally takes three to six months for a so-called *machtiging tot voorlopig verblijf* to be issued.

Where a CEEC national makes an application to remain in the country as a self-employed person, the application will be refused on the grounds of the individual's failure to obtain a visa. In Germany, this provision was introduced with the present Aliens Act in 1991.[79] In the Netherlands, the obligation to obtain a visa in advance in the country of origin was introduced only in 1998.[80] The immigration laws of both countries provide for more favourable treatment for nationals of certain non-EU/EEA countries. Nationals of Australia, Canada, Israel, Japan, New Zealand, the USA and Switzerland can travel to Germany

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77 Badoux 1993; Spijkerboer 2001, pp. 541 ff.; Koopman 2002, pp. 215 ff.
78 Regulation 539-2001.
79 § 3.3 Ausländergesetz.
80 Art. 16(1) sub a Vreemdelingenwet 2000; Art. 3.71 Vreemdelingenbesluit 2000.

and switch their status from tourist to, e. g., self-employed while in the country.[81] In the Netherlands the same applies to nationals of Australia, Canada, Japan, Monaco, New-Zealand, the USA and Switzerland.[82] CEEC nationals are excluded from this more favourable treatment.

3. The Distinction Between Self-employment and Employment

The Dutch aliens officers have been expressly instructed to be on the alert for 'bogus constructions' (*schijnconstructies*), i. e., arrangements aimed at circumventing the requirement of a work permit by presenting actual employment in the labour market as participation in a company. Applicants have to make a reasonable case for the self-employed nature of their activities. If there are doubts about the genuineness of the venture, the application must be submitted to the Ministry of Economic Affairs for consideration and advice.[83]

The concept of 'bogus constructions' was developed already before the entry into force of the Poland Agreement. It was especially aimed at Polish seasonal workers. In the early 1990s, various constructions were invented by Polish workers (or their Dutch employers) to circumvent the work permit system. For example, Dutch asparagus growers sold their harvest to Polish companies under the express condition that the buyer would take care of the harvesting work. In response to these constructions, an administrative order was issued in 1992 to the effect that contracts in which natural persons undertake to perform certain services or carry out a certain work, and which involve work that is usually carried out in an employed capacity, are equated with employment contracts.[84] In the Aliens Employment Act (*Wet Arbeid Vreemdelingen*) of 1995, the definition of employer was expanded to include all persons who in the course of official, professional or commercial activities have another individual carry out work for them, as well as natural persons who have another individual perform domestic services or provide personal care. Whether there is an employment contract or a relationship of subordination is irrelevant. During the parliamentary discussion of the bill, the Minister of Social Affairs and Employment stated that a 'bogus construction' can (also) be inferred if the applicant stays in the Netherlands only for a short period of time and does not take on or hardly takes on entrepreneurial risks or if he or she mainly contributes his/her own labour and contributes little or no risk capital to the business.

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81 § 9 Verordnung zur Durchführung des Ausländergesetzes.
82 Art. 2.2 Voorschrift Vreemdelingen 2000.
83 Vreemdelingencirculaire 2000 B11/6.3.1.
84 Gelijkstellings-Amvb, KB 27 August 1992, *Staatsblad* 478.

Employment without the required work permit is treated as a criminal offence of the employer. The employer is also liable for the income tax and contributions for the workers.

In Germany, the *Länder* have also instructed their aliens officers to watch out for bogus constructions (*Scheinselbständigkeiten*). However, the German *Ausländerbehörden* appear to meet with little difficulties in distinguishing between 'genuine' and 'bogus' self-employed persons. From the interviews with aliens officers and practising lawyers, we got the impression that the German *Ausländerbehörden* rely on a routine which they apply to other self-employed applicants as well: the applicant is required to produce evidence of capital, not only to start up the business, but also to pay the costs of living during the first year, in case the business does not take off successfully at once. An applicant as a rule needs at least € 25,000 to pass this means test.

In the Netherlands, no such routine exists. Applicants are required to produce a business plan with a projected balance sheet. As paper does not blush, the expected income shown on this projected balance sheet will always be sufficient. Therefore the Dutch authorities need other criteria to distinguish 'bogus' applications from genuine ones.

In Germany we found hardly any case law about the right of establishment of the Europe Agreements, whereas in the Netherlands there is quite a lot of jurisprudence. Most of the legal issues arising in the Netherlands relate to the criteria for distinguishing between employment and self-employment. There have been a series of cases of (particularly Polish) nationals of CEECs who claimed the right of establishment as self-employed partners in firms carrying out agricultural work, in which a central question was whether (all) the partners could be considered self-employed persons.[85] Whether the individuals concerned could be considered self-employed persons was also a central question in a series of cases of prostitutes.[86] The main criteria used by the Dutch authorities, that the activity the applicant intends to take up is usually exercised in an employed capacity, has not always been accepted by the Dutch courts.[87]

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85 E.g., President Rechtbank 's-Gravenhage zp Haarlem 21 November 1997 AWB 96/5007; *Rechtspraak Vreemdelingenrecht* 1997, 95; President Rechtbank 's-Gravenhage zp Haarlem 3 April 1998 AWB 98/1313; *Jurisprudentie Vreemdelingenrecht* 1998, 83; Rechtbank 's-Gravenhage zp Haarlem 6 February 1998 AWB 97/5467; *Jurisprudentie Vreemdelingenrecht* 1998, 51.

86 E.g., Rechtbank 's-Gravenhage zp Amsterdam 30 October 2000 AWB 99/10875; *Jurisprudentie Vreemdelingenrecht* 2001, 40.

87 The Dutch case law will be considered in depth in Böcker & Guild 2002. In *Jany*, the Court of Justice also held that the difficulties the Dutch authorities may encounter when carrying out checks on CEEC nationals wishing to become established in the

4. Regulated Professions and Businesses

Particularly in Germany, applications for visas or residence permits for the purpose of self-employment are submitted to the Chamber of Commerce or other authorities to ensure that the applicants satisfy the requirements for exercising their business or profession. Both countries have a tradition of tight regulation of economic life. However, the Netherlands has started a process of deregulation. As of 1 January 2001, there are over 50 trades for which there are not any licensing requirements. The government aims at withdrawing the Establishment of Businesses Act (*Vestigingswet Bedrijven*) completely in 2006. Where necessary, safety, health and environmental requirements will have to be laid down in other legislation by then. From the interviews with key informants in the Netherlands, we got the impression that trade law restrictions do not constitute an important obstacle for most applicants.

In Germany, a master craftsman's certificate is a prerequisite to managing an enterprise for 94 crafts occupations listed in Appendix A of the Crafts Code (*Handwerksordnung*). The list includes traditional occupations like painter, bookbinder or baker, but also occupations like building cleaner and office electronics information technology specialist. Only persons who have taken a master's examination and who have been registered on the Roll of Craftsmen of the regional Crafts Chamber are allowed to set up in business. Persons who do not have a master's certificate can apply for an exceptional authorisation (*Ausnahmebewilligung*). Non-EU foreign nationals who can prove that they have acquired the required knowledge and skills are generally not required to take the German master's examination, particularly if they already worked as a self-employed person in their country of origin.[88] However, as only few countries require an examination comparable to the German master's examination as a requisite for exercising a handicraft[89], many applicants will find it difficult to establish the equivalence of their knowledge and skills. In the interviews with associations of Polish entrepreneurs in Germany we were told that the master's certificate requirement is an obstacle particularly in the 'new' *Länder*. CEEC nationals who cannot obtain an *Ausnahmebewilligung* will have to hire a mas-

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Netherlands for the purpose of engaging in the activity of prostitution 'cannot permit those authorities to assume that all activity of that kind implies that the person concerned is in a disguised employment relationship and consequently to reject an application for establishment solely on the grounds that the planned activity is generally exercised in an employed capacity' (C-268/99 *Jany*, para. 67).

88 Heck 1995, p. 226.

89 In the European Union, for example, only Luxembourg has comparable mandatory master's certificate requirements. See Schwappach & Schmitz 1996, p. 6; Leisner 1998, p. 445.

ter.

Both countries have many regulated professions, including the traditional professions (e. g., physician, lawyer, notary, accountant) as well as some newer professions (e. g., adviser on working conditions, garden designer and landscape architect).[90] To exercise these professions, a specific national diploma is required. Qualifications from abroad may not be recognised, requiring applicants to re-qualify. There is as yet no special regime for CEEC nationals.

In Germany, there has been some discussion on the question whether the right to national treatment implies that CEEC physicians and dentists are entitled to a temporary authorisation to practise their profession (*vorübergehende Berufserlaubnis*) during an adaptation year. The federal government and most *Länder* hold that CEEC nationals whose qualifications equal to those of physicians or dentists who have completed their studies in Germany have a right to such a temporary authorisation, in order to enable them to prepare the conditions for obtaining the *Approbation*. The right to the *Approbation* would otherwise be nullified.[91]

5. *Key Personnel*

In the Netherlands, the provisions in the Agreements permitting companies to send their key personnel to the Member States have been incorporated in the Aliens Circular.[92] The employer must obtain work permits for the employees. The authority responsible for issuing work permits, the Employment Service (*Centrale organisatie werk en inkomen*) checks whether the employees do indeed belong to the organisation's key personnel. Until recently, the instructions issued to this authority on the application of the Aliens Employment Act did not make mention of the provisions in the Europe Agreements. The Minister of Social Affairs probably did not consider it necessary to make any specific arrangements as the instructions on the application of the Aliens Employment Act already stated that for key personnel of international companies, work permits can be issued irrespective of the labour market situation.[93] The definition of an international company in the instructions on the application of the Aliens Employment Act, however, is more restricted than the definition of a

90 For the complete list of regulated professions in the Netherlands, see http://europa.eu.int/comm/education/socrates/naric/coun/ne/

91 Haage 1997, pp. 168-169; see also *Informationsbrief Ausländerrecht,* Vol. 18, No. 9, 1996, p. 294; Weiss 1998a, p. 41, n. 136.

92 Vreemdelingencirculaire 2000 B11/6.2.

93 Uitvoeringsregels Wet Arbeid Vreemdelingen, sub 21.

company in the Agreements.[94] In August 2001, when the concept of key personnel in the instructions was also narrowed down (to personnel with a salary above € 50,000), a sentence was added, stating that for key personnel as mentioned in the Europe Agreements, the provisions of these Agreements apply.[95]

In Germany, the Ordinance on Residence Permits for Gainful Employment (*Arbeitsaufenthalteverordnung*) and the Recruitment Freeze Exemption Ordinance (*Anwerbestoppausnahmeverordnung*) already contained an exception for key personnel of companies with subsidiaries in Germany (they should have the nationality of the country in which the company has its headquarters). Interestingly, in 1998 a distinction was introduced in the Recruitment Freeze Exemption Ordinance between companies carrying out *Werkverträge* and other companies. Key personnel of companies carrying out *Werkverträge* can obtain work permits for up to four years only; for the key personnel of other companies, no such limitation exists.

In the interviews with associations of Polish entrepreneurs in Germany we were told that the street-level application and enforcement of the rules greatly differ from one *Land* to another.

6. Mobilisation of the Right of Establishment by CEEC Nationals

The exact numbers of CEEC nationals given permits to stay in Germany and the Netherlands as self-employed persons are unknown. However, it is clear that the right of establishment has not been invoked by large numbers of CEEC nationals. According to the information we received from officials in both countries, both the numbers of permits granted and the numbers of applications have been small.

A study on Polish migrants in Berlin found that both in 1993 and 1994 about 180 Poles established themselves as self-employed persons in this city. However, less than one in ten starting entrepreneurs also applied for a residence permit for the purpose of self-employment. The study suggested that most Polish entrepreneurs in Berlin prefer to keep their permanent home in Poland rather than take up residence in Germany.[96]

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94 According to the Uitvoeringsregels Wet Arbeid Vreemdelingen, sub 21, the employer has to be 'a large independent (…) company (…) with subsidiaries in a number of countries.'

95 Wijziging Uitvoeringsregels Wet Arbeid Vreemdelingen, Staatscourant 20 August 2001, No. 159, p. 9.

96 Miera 1996, pp. 28-29.

For the Netherlands, we do have the numbers of residents from CEECs with a permit to stay in the Netherlands as self-employed persons on 1 January 1999 (see Table 3). Although the figures in this table do not include persons who left the country before January 1999, it is clear that the numbers of CEEC nationals admitted for pursuing self-employed activities are low. However, the numbers of nationals of other countries admitted for this purpose are also low. CEEC nationals make up about 12 percent of all holders of a permit to stay as self-employed. This is much higher than their percentage of the total foreign population of the Netherlands.

Table 3 : Non-Dutch residents with a permit to stay in the Netherlands as self-employed persons, 1 January 1999

Poland	118
ex Czechoslovakia	54
Hungary	16
Rumania	13
Bulgaria	10
total CEEC-6	211
USA	178
UK	146
Germany	140
ex USSR	98
Total all nationalities	1697

Source: Centraal Register Vreemdelingen (Central Register of non-Dutch nationals), compilation by CBS (Statistics Netherlands).

Despite the small numbers, it is interesting to examine who has used – or attempted to use – the right of establishment of the Europe Agreements.

a) Mobilisation in the Netherlands

From the interviews with practising lawyers in the Netherlands, we got the impression that the provisions of the Europe Agreements have been invoked mainly by persons who were already in the country. Many of them may not have come to the Netherlands for the express purpose of setting up in business. Three categories can be distinguished.

First, there is a rather heterogeneous category of individuals for whom the right of establishment meant a sort of last resort. They established themselves

in various industries, in particular service industries requiring low levels of capital investments and without licensing requirements. Their applications were often successful; perhaps the authorities in some cases were also happy to be able to close the file. Most of these applications were filed before the introduction, in 1998, of the obligation to obtain a visa abroad before coming to the Netherlands.

In particular Polish nationals have founded partnership firms (*vennootschappen onder firma*), sometimes consisting of 40 to 50 or even more partners, to take up activities in the construction industry and the market gardening industry. As far as we have been able to establish, all these applications were rejected. However, a few cases are still pending and may end positively for the applicants because the State Secretary of Justice (as defendant) so far has not been able to convince the court that they are not self-employed. There was a short wave of such applications around the time of the entry into force of the Poland Agreement. Since then there have been only few new applications. According to the information provided to us by Chambers of Commerce, the number of new establishments of Polish partnership firms has also declined. Besides, the partners in recent established firms probably prefer to start working without applying for residence permits first. In some cases, most or all of the partners are replaced by new ones after three or six months.

More recently, several hundred prostitutes applied for a permit to stay in the Netherlands as self-employed sex workers. Many of them had been (unlawfully) resident and working in the Netherlands for years. A few cities tolerated that nationals of countries for which there are no visa requirements for a stay of up to three months as a visitor engaged in prostitution during this visa-free period. Establishing themselves as self-employed sex workers became an option for these and other prostitutes from CEECs when the ban on brothels was lifted in the Netherlands. The bill in question was introduced in parliament in 1997 and was passed in November 1999. Its entry into force, in October 2000, necessitated an amendment to the Aliens Circular. It was decided not to lift the ban on granting work permits to prostitutes from countries outside the European Union for at least two years. Applications of non-EU nationals seeking to establish themselves as self-employed prostitutes should also be rejected, on the grounds that their activities do not serve a substantial Dutch interest. However, the circular contained an opening for CEEC nationals. It stated that they may establish themselves as self-employed prostitutes, provided that they satisfy the general admission requirements for self-employed individuals and do not work for an employer.[97] In practice, all applications so far have been re-

97 Tussentijds Bericht Vreemdelingencirculaire 2000/19.

jected on the grounds that these requirements were not met. Quite a number of prostitutes have taken their case to court. In 1999, the district court of The Hague referred one of these cases (involving a Polish and a Czech prostitute) to the European Court of Justice, asking for clarification of the relevance of the Europe Agreements for the legal status of individuals in general and of prostitutes in particular.[98]

In the Netherlands, the number of work permits issued for key personnel of CEEC companies has remained extremely low. In the period 1997-2000, the Employment Service issued only two work permits for key personnel under the Europe Agreements.[99]

b) Mobilisation in Germany

From the interviews in Germany, we got the impression that the establishment provisions of the Europe Agreements have been of benefit particularly to persons who were already staying in the country, and moreover, already had a residence permit, but one which did not allow them to engage in self-employment.

Like in the Netherlands, there have been attempts by Polish partnership firms to obtain residence permits for the partners. However, they did not invoke the right of establishment of the Europe Agreements[100], but a national provision to the effect that partners in a partnership firm who are authorised to represent or direct the firm do not need a work permit.[101] According to a government report issued in 1996, this arrangement was developed by Dutch labour brokers in co-operation with German lawyers. The Polish partners did not apply for residence permits. In case of controls they referred to the above provision, producing a partnership agreement and trades register notification.[102] Four years later it was reported that the number of attempts to circumvent the work permit legislation by presenting Polish workers as partners had decreased as a result of a 'consistent prosecution policy'.[103]

The fears that large numbers of CEEC physicians would open a medical

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98 C-268/99 *Jany*, judgment 20 November 2001.
99 Arbeidsvoorziening 2001, p. 53.
100 See the commentaries in *Informationsbrief Ausländerrecht* Vol. 19, Nr. 2, 1997, pp. 69-72 and Vol. 19 Nr. 6, 1997, pp. 251-253 on a court decision concerning a Polish partnership firm (Oberverwaltungsgericht Bautzen 3. Senat, 2.6.1995).
101 § 9.1 Arbeitsgenehmigungsverordnung (until 1998: Arbeitserlaubnisverordnung).
102 Bundesregierung 1996, pp. 50-51.
103 Bundesregierung 2000, p. 37.

practice in Germany have not materialised. Between 1994 and 2000, the number of Polish doctors with a practice in Germany (*niedergelassene Ärzte*) increased from 91 to 148, and the number of Romanian doctors from 93 to 133. The increase in the number of Russian doctors was of the same order of magnitude: from 46 in 1994 to 77 in 2000. The numbers of Czech and Slovakian doctors went up much less, and the number of Hungarian doctors showed no increase at all.[104]

In Germany the establishment provisions of the Europe Agreements appear to have been used more by CEEC companies and less by individuals than in the Netherlands. Many CEEC companies with subsidiaries in Germany have brought their key personnel to Germany. A large subcategory are companies which carry out *Werkverträge* in Germany. Quite a number (at least 100) of these companies have set up subsidiaries in Germany. At the entry into force of the Europe Agreements, the German Ordinance Defining Exceptions from the Recruitment Stop already contained an exception for key personnel of companies with subsidiaries in Germany. Interestingly, in 1998 a distinction was introduced in this ordinance between companies carrying out *Werkverträge* and other companies. Key personnel of companies carrying out *Werkverträge* are allowed to stay for maximum four years; for the key personnel of other companies, no such limitation exists.

c) Mobilisation by CEEC Nationals Already Present in the Country

In Germany, the establishment provisions of the Europe Agreements seem to have been used less than in the Netherlands by CEEC nationals who were unlawfully resident in the country. This may be explained by a difference between the Dutch and German aliens legislation. In the Netherlands until quite recently, the authorities did not refuse an application solely on the grounds of the applicant's failure to obtain a visa abroad before coming to the Netherlands. In Germany, on the other hand, it is a long-standing rule that such applications are refused.

In Germany, however, the provisions of the Europe Agreements have been of benefit to persons who already had a residence permit, but one which did not allow them to engage in self-employment. This has to do with another difference between the German and Dutch aliens legislation: the German law is more restrictive with regard to access to self-employed activities. As noted above, a temporary residence permit as a rule does not allow engaging in self-

104 Figures obtained from the Ärztekammer Bremen. The numbers are for the whole of Germany.

employment. In the Netherlands this is different: those who have free access to the labour market, also have free access – as far as the aliens legislation is concerned – to self-employment. This means that the largest categories of newcomers, those who are admitted for family reunion or asylum, can engage in self-employment without needing an extra permit.

The above differences may also explain another difference between Germany and the Netherlands. As noted above, in the Netherlands the establishment provisions of the Europe Agreements have resulted in quite some case law. In Germany, on the other hand, we found only two cases in which explicit reference was made to the right of establishment in the Europe Agreements, one concerning a Polish national whose application for registration as a dentist (*Approbation*) had been refused[105], and one concerning a Polish national who had been granted permission to remain in Germany (in the form of an *Aufenthaltsbewilligung*) to study chemistry at the Technical University of Berlin, and who subsequently sought to take up part-time economic activities as a self-employed person.[106] According to practising lawyers in Germany, their clients from Central and Eastern Europe mostly refuse to go to court if their application for a residence permit is rejected. The difference may be that in the Netherlands those CEEC nationals who went to court did not have much to loose. Most court cases concerned CEEC nationals who had been present in the country for years, but did not have a residence permit.

IV. Conclusions

In both Member States the right of establishment has been invoked rather seldom. This may have to do with a more general characteristic of the migration from Central and Eastern Europe to the European Union in the past ten years: it has very much become a pendular migration. Many CEEC migrants appear not to be interested in permanent settlement, but keep on moving between their country of origin and one or more Western European countries. The income earned abroad enables these short-term migrants to stay at home. Their residence status is often unclear; the borders between lawful and irregular residence appear to be rather fluid. This new pattern of migration has been documented especially for Polish migrants in Germany.[107] Various factors have played a role in its development: the relatively short geographical distance, the high purchasing power

105 Verwaltungsgericht des Saarlandes 22 July 1994 – 1 F 39/94.
106 Oberverwaltungsgericht Berlin 3 June 1997 – 8 B14.97.
107 See, for example, Frejka et al. 1998; Irek 1998; Morokvasiç 1994; Wallace et al. 1996.

in Poland of the income earned abroad, the relatively high level of education of the migrants and the relatively favourable social and economic prospects in Poland. The immigration policies of the EU Member States have probably also played a role. On the one hand, permanent settlement is discouraged. On the other hand, the abolition of visa requirements for nationals of most CEECs does enable migrants from these countries to return home for any period and then move again.

A second, related explanation for the rather limited use of the establishment provisions in Germany may be the relative abundance of alternatives. As noted above, Germany has concluded more bilateral labour migration agreements with CEECs than any other EU Member State. In 1998, over 200,000 seasonal workers, mostly from Poland, were employed in Germany. In the same year, on average 33,000 project workers were working in Germany. Half of them were Poles, two third were working in the construction industry.[108] In addition, the Ordinance Defining Exceptions to the Recruitment Stop contains exceptions for various other forms of temporary employment and for border commuting of Poles and Czechs. Finally, large numbers of Polish nationals with German 'roots' (*Deutschstämmige*) living in Poland have acquired German passports while retaining their Polish nationality. The German authorities silently agreed to this practice – even though the German nationality legislation was strongly opposed to multiple nationality – hoping that it might help to reduce the numbers of *Deutschstämmige* settling permanently in Germany. Estimates of the number of dual nationals living in Poland range from 100,000 to 300-700,000.[109] German employers have developed recruitment activities specifically directed at these dual nationals, who have free access to the labour markets of the EU. This last alternative has been discovered by Dutch employers, too. A number of temporary employment agencies in the Netherlands specialise in recruiting workers with dual citizenship from the Polish region Silesia. Unlike in Germany, there are few other legal openings for the employment of CEEC nationals in the Netherlands.

A third explanation may be the rather restrictive way in which both countries have implemented the establishment provisions. Both countries have shown a strong commitment to remaining in control of the movement of persons from CEECs. The discussion about excluding the medical professions in Germany, the exclusion of Hungarian nationals during the first stage of the

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108 Ausländerbeauftragte 2000, pp. 152-153.

109 Groenendijk 1997, p. 470. Until 1990 the (West) German government actively promoted the migration of ethnic Germans to Germany. As of 1990 it adopted a policy of controlling and seeking to reduce the immigration of *Aussiedler*.

Hungary Agreement in both countries, the development of a long list of criteria for distinguishing between 'genuine' and 'bogus' self-employment in the Netherlands, and the introduction of a distinction between companies carrying out *Werkverträge* and other CEEC companies in Germany were all dictated by fears that the establishment provisions might be used to thwart existing national policies. In both countries the national legislation provides for favourable treatment of nationals of certain countries outside the European Union seeking entry for economic activities. Nationals of Australia, Canada, Japan, the United States and a number of other countries can travel to Germany or the Netherlands and file an application to remain in the country as a self-employed person. CEEC nationals are excluded from this more favourable treatment. The fact that the CEECs are about to join the European Union and that CEEC nationals will sooner or later have full free movement rights has not had much impact on the manner in which the immigration authorities in both countries view CEEC nationals. Germany did sign many bilateral labour migration agreements with CEECs, but was careful to prevent permanent settlement.

Although both countries implemented the establishment provisions in basically the same manner – by exempting CEEC nationals from the requirement that their economic activity serves a substantial national interest – there are differences both in the use of the right of establishment by CEEC nationals and in the way their applications for residence permits are dealt with. In Germany the establishment provisions appear to have been used more by CEEC companies (to employ their key personnel) and less by individuals than in the Netherlands. Moreover, in Germany the right of establishment appears to have been used less than in the Netherlands by CEEC nationals who were unlawfully resident in the country. The Dutch courts received quite a lot of appeals against refusals of applications by CEEC nationals to remain, whereas in Germany we found references to only two court decisions. Most of the legal issues arising in the Netherlands relate to the distinction between self-employment and employment. In Germany this distinction has also been a point of dispute, but the applicants invoked the national immigration legislation rather than the Europe Agreements. These differences can be traced back to:

– differences in the existing national immigration legislation: the failure to obtain a visa abroad being a ground for refusal of the application in Germany, but not – until recently – in the Netherlands; the more limited access to self-employment for legally resident aliens in Germany;

– differences in the existing national requirements for exercising certain businesses and professions: the list of regulated economic activities in Germany being longer than in the Netherlands;

– existing routines in the street-level application of rules on the admission

of self-employed non-EU nationals: means tests playing a more decisive role in Germany than in the Netherlands;

– and probably also to differences in existing migration patterns: particularly in Germany self-employed Poles may prefer to keep their permanent home in Poland rather than taking up residence in Germany.

The data for this paper were collected before the European Court of Justice handed down its judgments in four cases regarding the right of establishment in the Europe Agreements. In both countries changes to national legislation may be required as a result of the Court's interpretation of the right. In particular, the Court's judgment in *Barkoci and Malik* can be interpreted as requiring the Member States to permit an application to be submitted at the border.[110] The immigration authorities in both countries now refuse to consider applications of CEEC nationals who have not obtained a visa abroad. However, both governments are not very likely to amend their national legislation on this point without further dispute: the mandatory visa requirement is perceived by the authorities as an important tool to control immigration. The Dutch government, in its initial consideration of the judgments, took the position that its legislation does not require amendment as a result.[111] It will probably require further judgments to clarify the scope of the right, but given the time needed for a reference to result in a judgment, the CEECs may have become Member States before that.

110 See, e.g., *Jurisprudentie Vreemdelingenrecht* 2001, Nr. 304; see also Guild's discussion of the judgments in Böcker & Guild 2002.

111 It did so in a letter to the parliamentary committee of Justice in December 2001 (NDS 5922, just001105, 12 December 2001). In November 2001, a Dutch court considered that the Dutch immigration rules – unlike the British rules – do not provide for discretion in case the substantive requirements for admission are satisfied. For that reason the Court of Justice's judgment in *Barkoci and Malik* would not require the Dutch authorities to permit CEEC nationals who entered the country without a visa but whose application satisfies the substantive requirements to apply for a residence permit in the country.

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