

Rights of Third Country/Newly Independent States' Nationals to Pursue Economic Activity in the EU

ROMAN A. PETROV*

I Introduction

The establishment of European citizenship has confirmed the mobility of the European labour market by stating that, 'Every citizen of the European Union shall have the right to move freely and to reside within the territory of the Member States'.¹

Therefore, the freedom of movement of European citizens and other basic freedoms; freedom of establishment and freedom to supply/receive services are the most important methods to achieve the objective of the internal market. However, these freedoms do not apply solely to the nationals of Member States, and can be enjoyed by third country nationals, including those from the Newly Independent States' (NIS).

The rights of NIS nationals under EU law can vary depending on the place of residence. If a NIS worker is lawfully resident in one of the Member States it is possible for him/her to enjoy limited rights under EU primary and secondary legislation. In other cases, it is possible to apply the provisions of international agreements, for example in the provisions of the partnership and cooperation agreements (PCAs) between the NIS countries and the EU.

It must be noted that the rights of third country nationals' can be interpreted differently according to the nature and objective of an international agreement. The initial objectives of these agreements, from the European Economic Area (EEA) Agreement, which conferred European citizenship to EEA nationals, through the Accession and the Europe Agreements, which are aimed towards 'the process of European integration' to the PCAs.²

* Lecturer in Law at the Economics and Law Faculty, Donetsk State University, Ukraine. The author acknowledges with gratitude the assistance of Mr. Nickolas Hopkins, University of Southampton and Ms. Holly Cullen, University of Durham.

¹ Art. 8(a) EC Treaty.

² Europe agreements have been concluded with Poland, Hungary, Romania, Bulgaria, Slovak and Czech Republics, Slovenia, Estonia, Latvia and Lithuania.

The PCAs were concluded with several former republics of the USSR: Russia, Ukraine, Moldova, Belarus, Kazakhstan, Uzbekistan, Armenia, Azerbaijan, Georgia and the Kyrgyz Republic,³ mainly as 'entry level' agreements intended to transform the former Soviet republics into market economies. Special emphasis has been placed on the acceptance of the World Trade Organization's (WTO) legal framework, *inter alia*, dispute settlement mechanism, the protection of intellectual property similar to 'trade-related aspects of intellectual property' (TRIPs), services obligations similar to the 'general agreement on trade in services' (GATS). This approach was intended to show the priority of adopting market economy standards by the NIS and the transformation of their economies to a competitive market environment in order to proceed with the integration into modern Europe.

Unfortunately, the PCAs grant extremely limited rights to NIS nationals given their initial objective which was intended to achieve, 'a gradual rapprochement and a wider area of cooperation in Europe and its neighbouring regions.'⁴ This allowed for the unequal treatment of NIS nationals compared with that of lawfully resident third country nationals who wanted to enjoy their rights of free movement, establishment, and the freedom to supply services under EU law.

This paper will carefully consider the scope of the basic freedoms which can be enjoyed by NIS natural persons in the EU in order to pursue economic activity. NIS nationals could enjoy the limited scope of the basic Community freedoms, such as freedom of movement, freedom of establishment, and the freedom to supply/receive services, either as third country nationals lawfully resident in one of the Member States, or as NIS nationals who are currently residents in the NIS countries. Consequently, EU legal regulations apply different measures and methods in the treatment of these groups of NIS nationals.

Therefore, it will refer to 'third country nationals' as legally resident non-EU citizens, including lawfully resident NIS nationals, but excluding asylum-seekers, stateless persons, gypsies and illegal immigrant workers. It must be noted however, that lawfully resident NIS nationals enjoy the same rights to move freely in the EU as other non-EU nationals who are lawfully resident in one of the Member States. Correspondingly, the term 'NIS nationals' will refer to citizens of the NIS countries who want to obtain the right of entry and establish them-

³ The Council has opened negotiations with Turkmenistan.

⁴ The violation of the 'essential elements' of the agreement, for example, democracy, market economy and human rights could result in the suspension of the agreement, see declarations attached to each PCA.

selves in the EU, and can only rely on the provisions of the PCAs. Consequently, if the provisions of primary or secondary EU legislation, international agreements, or the case-law of the European Court of Justice (ECJ) confer any rights to NIS nationals legally resident in the EU, as well as to NIS nationals resident in the NIS countries, they will be referred to as 'third country/NIS nationals'.

II The Scope of Third Country/NIS Nationals' Legal Rights under EU Law

Third country/NIS nationals who want to enjoy their basic freedoms in the EU are treated differently than EU nationals. Separate treatment of third country/NIS nationals and EU nationals follows the principle of 'Community priority', which could be illustrated by EU primary and secondary legislation.⁵ Nonetheless, third country/NIS nationals can derive *actual* and *potential* rights from international agreements,⁶ and from rights granted to citizens of the EU. In other words, these rights can flow from the following:

- EU primary and secondary legislation, intergovernmental agreements and Conventions;
- the relationship a third country/NIS national may have with a Union citizen (as a member of family of a migrant worker or employee);
- international agreements between the EC and third countries (such as association agreements and PCAs).⁷

1. The Basic Freedoms of Third Country/NIS Nationals under EU Primary Legislation

Title III of the EC Treaty leaves no room (apart from direct exemptions) for a free interpretation of freedom of movement and establishment, and expressly refer to 'workers' as those who can only be citizens of the EU. Despite the possibility to interpret Articles 48 and 49 of the EC Treaty as a potential measure of the EC competence with regard to third country nationals, the ECJ directly reiterated in its case-law that the rule of non-discrimination laid down in Article 48(2) pro-

⁵ A. Evans, *European Union Law* (Hart Publishing, Oxford, 1998) at 300.

⁶ Steve Peers, 'Towards equality: actual and potential rights of third-country nationals in the European Union', 33 CML Rev. (1996) 7–50 at 7.

⁷ M. Cremona, 'Citizens of third countries: movement and employment of migrant workers within the European Union', LIEI (1996) 87–112 at 88.

hibits any discrimination solely on the grounds of nationality between nationals of the Member States.⁸ Moreover, provisions of the EC Treaty concerning the right of establishment and the provision of services, confer rights exclusively on EU nationals. Article 59(2) offers one potential possibility to extend the freedom to provide services to third country nationals. When it states that

The Council may, acting by a qualified majority on a proposal from the Commission, extended the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

However, this right has never been exercised by the Council. Therefore, the primary provisions of EU law confer directly and exclusively, the rights of free movement and access to employment on nationals of Member States, and leave no opportunity for third country nationals and NIS nationals to exercise these rights.

2. The Basic Freedoms of Third Country/NIS Nationals under EU Secondary Legislation

a) Third country/NIS nationals as family members of a migrant worker. EU secondary legislation reinforced the primary provisions. Article 49 of the EC Treaty provided freedom of movement to workers, and Article 51 provided social security protection specifically to workers who are nationals of the Member States. Furthermore, a spouse or family member of a migrant worker of a third country/NIS national can enjoy significant rights under EU law irrespective of their nationality, as indicated by Council Regulation 1612/68.⁹

Members of a worker's family may be, a 'spouse and those of the children who are under 21 years old or dependent on him',¹⁰ in the ascending or descending line. Third country/NIS nationals who are members of a worker's family may enter any Member State without restrictions to live with the migrant worker.¹¹ There should be no obstacles to the right of mobility of third country/NIS nationals to join a migrant worker's family in the host Member State.¹²

⁸ Case 167/73, *Commission v. France*, [1974] ECR 359 at 44.

⁹ Council Regulation 1612/68, JOL L 257/2 (1968).

¹⁰ Art. 11, Regulation 1612/68.

¹¹ Art. 10(1), Regulation 1612/68.

¹² Preamble Regulation 1612/68. Except the reservation in *Sahota*: if a migrant worker enters the home country solely as a national of this state the rights of the spouse to enter could be governed exclusively by national immigration law, *Sahota v. Secretary of State for the Home Department*, Judgement of 30 April 1997, nyr.

Third country nationals, and NIS nationals respectively, may remain on the territory of the Member State after the separation or the death of the migrant worker, but could be expelled upon divorce.¹³

There is the right exclusively for the spouse and dependent children¹⁴ to install themselves and work (take up activity as employed)¹⁵ in the same Member State as the migrant worker,¹⁶ and supply services on a temporary basis, in another Member State, if they are employed by an EU company.¹⁷ Members of a migrant worker's family have the right to admission, education and social benefits under the same conditions as nationals of the host Member State.¹⁸

3. *The PCAs and the Rights of NIS Nationals under EU Law*

The EU has negotiated and signed a number of international agreements,¹⁹ which grant some rights to third country nationals. It is easy to distinguish several groups according to the purpose and level of the transformation of EC law, *acquis communautaire*, into the legal system of third countries. Consequently, the status of third country nationals and their right of free movement depends upon the type of agreement that regulates their rights. As mentioned earlier, the sole purpose of the PCAs is to achieve a 'wider area of cooperation', by establishing a general framework of liberalized trade between parties, and to provide selected rights of free movement of workers, the provision of services and the right of establishment. As a consequence, NIS nationals can rely on selective provisions of the PCAs in order to enjoy their basic freedoms in the EU. NIS nationals can potentially pursue some of these provisions directly in the national courts of the Member States.

¹³ Case 267/83, *Diatta*, [1985] ECR 567; Case C-370/90, *Surinder Singh*, [1992] ECR I-4266.

¹⁴ Peers argues that a migrant worker may enforce a right to entry for a third country national 'permanent companion', whereby the host Member State grants such rights to its own nationals. See Case 59/85, *Reed*, [1986] ECR 1283.

¹⁵ *Op. cit.*, above note 10.

¹⁶ *Op. cit.*, above note 10; Art. 2(2), Directives 90/364, 90/365, 93/96; see Case 131/85, *Gul*, [1986] ECR 1573, here there is no right to work for any family members of a person exercising the right to remain.

¹⁷ Council Regulation 2317/95 (OJ L234/1, Oct. 1995).

¹⁸ *Op. cit.*, above note 10, and Art. 3, Regulation 1408/71. Art. 7, Regulation 1612/68 provides the possibility of the tax advantages for members of a migrant's worker family.

¹⁹ By 1995, 24 international agreements were signed and implemented.

III Rights of Third Country/NIS Nationals to Enter and Work in the EU

According to Article 8(a) of the EC Treaty, only EU nationals have the right to move freely within the territory of the Member States. However, visa-free circulation is provided for under the Schengen Agreement, and third country/NIS nationals may enjoy their rights to circulate freely for up to three months.²⁰

The PCAs however, do not provide any legal framework for free movement of persons, due to the long-term objective of closer integration, and the potential for establishing a free trade area between the NIS countries and the EU. For example, the EU–Ukraine PCA states

nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services.²¹

Therefore, the legal regulation of the rights of Ukrainian nationals' to enter and work, is held exclusively under the competence of the Member States. This competence is subject to coordination and common action under the Treaty of the European Union,²² excluding the rights of family members of a migrant worker and NIS nationals, who fall under the PCA's 'key personnel' clause.²³

Notwithstanding this, the Resolution on the admission of third country nationals for the purposes of employment and the provision of services does offer the possibility for third country/NIS nationals to enter a Member State, and to be employed by an EU company. However, under the condition that vacancies can not be filled by EU nationals or third country nationals, who are lawfully resident in the EU.

Moreover, third country nationals who are legal residents of a Member State do not have the right to move freely, or to be employed, nor can they obtain the right to continued residence in that Member State, as the ECJ clearly interpreted the provisions within Article 48 of the EC Treaty, to apply solely to EU citizens.²⁴

²⁰ See Art. 19, Schengen Agreement, for rights of third country nationals, who are not lawfully residents in the EU, and Art. 21, Schengen Agreement, for rights of third country nationals who are residence holders (<http://www.ecsanet.org/eudoc.htm>).

²¹ Art. 42, EU–Ukraine PCA.

²² Art. K, TEU includes issues of 'conditions of residence by nationals of third countries, including family reunion and access to employment'.

²³ Art. 35(2)c, EU-Ukrainian PCA. It is identical to other PCAs. For the definition 'key personnel' see below Section IV.1.

²⁴ Case C-355/93, *Eroglu*, [1994] ECR I-5113.

According to the opinion of the Commission, this situation is contrary to the idea of an internal market, and the obligation to remove all internal frontiers in Article 7(a) of the EC Treaty.²⁵ However, this statement is purely symbolic due to the insufficient level of harmonization with external frontiers.

As a consequence, NIS nationals may only enter the EU as a spouse of a migrant worker, as an employee of an EU company, or under the provisions of immigration law in the host Member State.

IV Establishment Rights of Third Country/NIS Nationals

1. As Employees of an EU Company

Third country/NIS nationals can be employed by an EU employer, either as members of a migrant worker's family, or under provisions of national immigration law. The ECJ has stated in its case-law,²⁶ that third country/NIS nationals employed by an EU company have rights under Articles 59 and 60 of the EC Treaty; to move freely in order to provide services, or to be transferred by the company. It therefore follows by analogy,²⁷ that employers have the right to hire third country/NIS nationals who are lawfully resident in the EU, under Articles 48 and 52 of the EC Treaty, or at least transfer those who are already employed. The ECJ went further and stated that the right of establishment and to provide services requires the right of entry and residence.²⁸

Therefore, according to Articles 48, 52, 59 and 60 of the EC Treaty and the ECJ's case-law, third country/NIS nationals who are lawfully resident in the EU may be hired by a European company, and can enjoy rights of free movement, and may provide services, albeit temporarily, for the purpose of employment. However, NIS nationals can, as can NIS nationals who are family members of a migrant worker, exercise their right of establishment under the ECJ's case-law as long as they were employed by an EU company according to the national law of the place of establishment. With the understanding that there were no eligi-

²⁵ Communication of the Commission to the Council and European Parliament on Immigration and Asylum Policies, COM (94) 23.

²⁶ Case C-43/93, *Vander Elst*, [1994] ECR I-3803, here the ECJ stressed that the right to move employees is a part of the right of establishment, and all measures to hinder this right must be considered as non-discriminatory rules hindering companies' freedom of establishment. In addition, the ECJ points out that EU nationals and companies have rights to move in all fields under the EC Treaty; Case C-113/89, *Rush Portuguesa*, [1990] ECR I-1417.

²⁷ *Op. cit.*, above note 6.

²⁸ Jointed Cases C-100/89 and C-101/89, *Kaefel and Procacci*, [1990] ECR I-4547.

ble EU nationals, or third country nationals lawfully residents in the EU, to fill this vacant position.

2. Rights of Establishment under the Provisions of PCAs

Where there may be an absence of rights under the primary or secondary EU legislation, NIS nationals may gain some rights from the international agreements. However, the PCAs (for example the Ukraine–EC PCA) have restricted the rights of Ukrainian citizens, stating that they have no right to the following:

- enter, or stay in the territory of the EU in any capacity and in particular as shareholder or partner in a company or manager, or employed thereof or supplier or recipient of services;
- Community subsidiaries or branches of Ukrainian companies to employ or have employed in the territory of the Community nationals of Ukraine;
- Ukrainian companies or Community subsidiaries or branches of Ukrainian companies to supply Ukrainian persons to act for and under the control of other person by temporary employment contracts.³⁰

Under Article 54(3)(f) of the EC Treaty, the Commission and the Council must effect the progressive abolition of the restrictions on the freedom of establishment and entry of personnel belonging to the main establishment of managerial or supervisory posts in third country agencies, branches or subsidiaries. The PCAs have therefore, provided the right to send key personnel, such as managers or highly specialized experts, to their branches in the EU, upon the condition that they will work exclusively for the company and have been employed by the company for at least one year. Key personnel must correspond to the definition of an ‘intra-corporate transferee’, who is ‘a natural person working within an organization in the territory of a Party, and being temporarily transferred in the context of the pursuit of economic activities in the territory of the other Party (EU)’,³¹ and who ‘possesses uncommon knowledge essential for the activity of the company, works in a senior position receiving general supervision or direction principally from the board of directors.’³²

²⁹ *Vander Elst*, above note 26.

³⁰ Art. 47, EU–Ukraine PCA. Other PCAs have identical provisions which restrict rights of establishment of NIS nationals.

³¹ *Op. cit.*, above note 23.

³² *Ibid.*

As a consequence, the key personnel of a NIS company in the EU can enjoy the same rights and working conditions as local workers, and are and covered by the same rules on working conditions, remuneration and dismissal. The accumulation of pension and social security rights, and the possibility to transfer of these rights to their home country when they return, is the subject of further separate agreements between a NIS country and Member States of the EU.³³

The provisions of the PCAs with regard to rights of key personnel are sufficiently clear and precise as to confer direct effect, and can be enforced by the third country national before national courts. It is therefore possible to conclude that according to the PCAs, NIS nationals have the right of establishment, either as family members of a migrant worker, as employees of an EU company, or as key personnel.

V Rights of Third Country/NIS Nationals to Supply Services Temporarily in the EU

Article 59 of the EC Treaty confers the freedom to supply services exclusively to EU nationals. The Council has never exercised its right to extend this right to third country nationals under Article 59(2) of the EC Treaty.

1. Rights to Supply Services under the PCAs

In addition, the PCAs do not provide or interpret these rights.³⁴ For example, the Russian and Belarus PCAs contain some substantive obligations on trade in services.³⁵ Among the thirty-five types of services, which were granted the most favoured nation (MFN) treatment: advisory and consultancy services, computer related services and value added telecommunication services. Financial and insurance services and transport and tourism have not been included. Providers of the above mentioned MFN services may only enter the EU temporarily, and only then to negotiate and conclude agreements for the provision of services during their visit. Conversely, in the rest of the PCAs the parties 'take the necessary steps to allow progressively the supply of services'.³⁶

³³ *Ibid.*

³⁴ *Op. cit.*, above note 21.

³⁵ Art. 36, Russia PCA, and Art. 28, Belarus PCA.

³⁶ For example, *op. cit.*, Ukrainian PCA.

Moreover, the Ukrainian PCA, like the other PCAs, have established the 'nullification and impairment' clause, which states that each party cannot apply their own laws on entry, residence, work and establishment 'in a manner as to nullify or impair the benefits occurring to any Party under a specific provision'.³⁷ This is obviously intended to exclude any potential direct effect reliance upon this clause by Ukrainian nationals.

2. Rights to Supply Services According to the Case-Law of the ECJ

Third country/NIS nationals may enjoy more extensive rights to provide/supply services in the EU as employees of an EU company, than NIS nationals who rely solely on the provisions in the PCAs. The principle of non-discrimination prohibits any differences in treatment between EU companies and national companies by a Member State. A host Member State cannot therefore treat an EU company differently because of the nationality of that company's personnel.³⁸ Furthermore, the ECJ stated in *Vander Elst*,³⁹ that EU companies may transfer their employees who are third country nationals to provide services temporarily in other Member States, without the necessity to obtain work permits. According to *Rush Portuguesa*,⁴⁰ EU companies do have the right to freely move all their 'habitually' employed staff without any time limit, but the receiving state has the right to apply its own labour laws. However, the ECJ has not specified the duration for the supply of services by transfer employees of EU companies.

Unfortunately, the restrictive wording of the PCAs does not allow NIS nationals to enjoy their freedom to supply/receive services in the EU.

3. Potential Rights of Third Country Nationals to Provide/Supply Services in the EU

Therefore, according to the logic of the *Sager*, and *Schindler* case-law, and the *Cassis* principle of mutual recognition,⁴¹ third country nation-

³⁷ For example, *op. cit.*, above note 21.

³⁸ In case of prohibition of double fiscal contributions see, Jointed Cases 62 and 63/81, *Seco*, [1982] ECR 223.

³⁹ *Op. cit.*, above note 26.

⁴⁰ *Ibid.*

⁴¹ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649. In the *Cassis* judgement, the ECJ made clear that Art. 30, of the EC Treaty can apply to all national

als lawfully established in a Member State and allowed to provide services, might enjoy rights as employed or self-employed service providers, under Article 59 of the EC Treaty, and move freely to any other Member State. According to the *Cassis* principle of mutual recognition, the host Member State would be obliged to avoid the imposition of any non-discriminatory restrictions on technical requirements of those services, or on the professional qualifications of a service provider, unless the restrictions were justified by the 'rule of reason'. The ECJ has stated in *Gebhard*,⁴² that these restrictions must satisfy the following requirements:

- must be non-discriminatory;
- must be justified by imperative requirements in the general interest;
- must be suitable for the attainment of their objective;
- must be necessary in order to attain the objective.

Thus, despite all the recent limitations on free movement of third country nationals, the extension of the *Cassis* doctrine to supply services by third country nationals could significantly enhance the potential rights to move freely in order to provide cross-border services.

VI PCAs and Direct Effect

The ECJ has established that the rules of EU law, resulting from agreements with third countries, can be directly effective, and can confer directly enforced rights to non-EU nationals, if the provisions of the agreement contain an adequate wording and a clear and precise obligation, which is not subject in its implementation or effects, to the adoption of any subsequent measure.⁴³

cont.

measures which do not discriminate against imported products, but may inhibit, *intra*, Community trade in goods, in reason of the difference in trade regulation in the country of origin. The *Cassis* judgement has established two principles. Firstly, the principle of mutual recognition (lawfully marketed products should not be discriminated by Member State's trade regulations), and the rule of 'reason formula', that stated, in the absence of the EC legislation, Member States may provide their own regulation of national trade according to the principle of proportionality, in order to prevent unfair trade practises. Secondly, the ECJ established mandatory requirements and provided additional justification for nationally restrictive measures.

⁴² Case C-55/94, *Gebhard*, [1995] ECR I-1141.

⁴³ Case 12/86, *Demirel*, [1987] ECR 3752, in respect to agreements, and Case C-192/89, *Servince v. Staatsecretaris van Justitie*, [1990] ECR I-3461, in regard to implementing facts. The doctrine of direct effect was developed in Case 26/62, *Van Gend en Loos*, [1963] ECR 1. It was established that provisions of the EC Treaty can be directly enforceable by individuals before national courts if they are: a) clear and unambiguous; b) unconditional; c) its operation must not be dependent on further action being taken by Community or national authorities.

The ECJ has applied these principles in respect of the Association Agreements and its implementation, *inter alia*, in the Lomé Convention and a number of cooperation agreements.

For example, the ECJ ruled that the Cooperation Agreement with Morocco contains directly effective norms, and the nationals of this country may enforce these norms before the court of the Member State.⁴⁴ In *Demirel*,⁴⁵ the ECJ concluded that the provisions of the EC-Turkey Association Agreement 'are not sufficiently precise and conditional to be capable of governing directly the movement of workers [and] impose no more than a general obligation to cooperate'. Therefore, following the rationale of the ECJ case-law, the provisions of the international agreement must fall within the meaning of the identical EU primary or secondary legislation in order to be directly effective.⁴⁶

In contrast to the Europe Agreements, and agreements with Turkey and the Maghreb States, the PCAs are constructed in order to avoid any possible interpretation of direct effect by providing that separate agreements will have to be negotiated later in order to guarantee these rights.⁴⁷ The Parties of the PCAs only 'endeavoured' to provide non-discrimination in working conditions, remuneration and dismissal.⁴⁸ Furthermore, the PCAs do not provide the right for the spouses and children of a NIS national access to the labour market of a Member State during the period of employment of the NIS national, which runs contrary to other cooperation agreements.⁴⁹ In addition, the PCAs do not grant the right to continued residence for family members of a NIS national who is lawfully employed in the EU.⁵⁰

Unfortunately, there are no standstill provisions in the PCAs on the supply of services, and the Parties are free to withdraw from any of these commitments. As a consequence, it could be difficult to predict the direct effect of these provisions, as is the case with the GATT articles, which have not been granted direct effect by the ECJ.

⁴⁴ Case C-18/90, *Kziber*, [1991] ECR I-199; Art. 41(1), of the Cooperation Agreement was identical to Art. 4(1), Regulation 1408/71, and imposed a sufficiently clear, precise and unconditional obligation.

⁴⁵ *Op. cit.*, above note 43.

⁴⁶ In the *Kziber* case (above note 44), Art. 41(1) of the Cooperation Agreement failed in the concept of the 'social security' in Regulation 1408/71, in the *Deak* case (Case 94/84, *Office Nationale de l'Emploi v. Jozsek Deak*, [1985] ECR 1873), respectively with the meaning of Art. 7(2), Regulation 1612/68.

⁴⁷ In the opinion of Peers, the wording clearly precludes from application of case-law on the Maghreb agreements, which found that provisions of the cooperation agreements could be directly effective. See *Kziber*, *op. cit.*, above note 44; and Case C-58/93, *Yousfi*, [1994] ECR I-1353.

⁴⁸ Art. 23, Russian PCA, and Art. 19 of other PCAs.

⁴⁹ European Agreements, Art. 37; EEC-Turkey Decision 1/80, Art. 7.

⁵⁰ Case C-237/91, *Kazim Kus*, [1992] ECR I-6781; Case C-355/93, *Eroglu*, [1994] ECR I-5113.

In spite of the absence of the ECJ's case-law, it is possible for NIS nationals to rely upon the provisions of the PCAs concerning the right to entry of the 'key personnel', and the right to enter in order to sign a contract on provision of services. The respective provisions of the PCAs are relatively precise and unconditional and may confer the direct effect on individuals. However, the rights of a host Member State can be used through the public policy restrictions, as a last chance to impede entry of particular NIS nationals.

VII Potential Rights of Third Country/NIS Nationals in Future Cooperation Agreements

1. Unfair Discrimination of Third Country Nationals

Legal commentators unanimously assert that the EU authorities impose unfair discrimination on the rights of third country nationals' under EU law. Hoogenboom argues that any restrictions on the right of third country nationals of free movement are contrary to the primary objectives of the internal market, and lead to unfair competition and frustrate raising the standard of living in the EU.⁵¹ Moreover, the existence of internal frontiers and border checks contravene the logic of Article 7(a) of the EC Treaty, which states that the internal market is 'an area without internal frontiers'. In Hoogenboom's opinion, the most appropriate solution would be to grant lawfully resident third country nationals the same legal status as that enjoyed by EU citizens under Articles 3(c), 48–66 of the EC Treaty, and secondary EU legislation.

Peers echoes this point,⁵² stating that the EU is pursuing a hypocritical policy by extending the principle of non-discrimination on the grounds of nationality solely to the nationals of Member States. The pressure to change the traditional discriminatory attitude towards third country nationals increased when the Amsterdam Treaty promulgated the European expansion to Eastern Europe, and in the impending creation of free trade areas with the countries of Central and Eastern Europe.

⁵¹ See paper presented by T. Hoogenboom, 'Free movement and integration of non-EC nationals and the logic of the internal market', at the conference on 'Free Movement of Persons in Europe: Legal Problems and Experiences', The Hague, 12 September 1991, T.M.C. Asser Instituut.

⁵² *Op. cit.*, above note 6.

2. Possible Solutions to Extending the Rights of Third Country Nationals

The extension of the potential rights of third country nationals is dependent on whether the ECJ could allow the elimination of discriminatory or non-discriminatory restrictions on free movement, the right of establishment and the freedom of third country nationals to provide services.

On the one hand, it is difficult to predict any substantial diminution of discriminatory restrictions, specifically on the rights of third country/NIS nationals who are not legally resident in the EU. On the other hand, it is important to scrutinize how the recent case-law of the ECJ has the potential to gain additional rights for third country nationals including lawfully resident NIS nationals.

Indeed, the enhanced cooperation of Member States on matters of immigration, and the extension of the ECJ's case-law on the free movement of goods, and persons, and adoption of internationally recognized standards of treatment of third country nationals,⁵³ can encourage optimistic speculation on the issue of extending the scope of the potential rights of third country nationals.

The potential rights of third country nationals could be achieved by the following options:

a) *Extension of the Cassis doctrine.* The ECJ's case-law in *Alpine Investments*,⁵⁴ and *Bosman*,⁵⁵ has developed the 'global approach' to the free movement of persons in EU law. The 'global approach' assumes that:

- non-discriminatory professional rules of Member States may infringe any of Articles 48, 52 or 59 of the EC Treaty;
- the same rule of reason should be applied in order to find out when this is the case.⁵⁷

⁵³ In case of the accession of the EU into the ECHR, third country nationals can extend their potential rights to pursue economic activity. For instance, the ECHR held in the case, *Gaygusuz v. Austria*, (See Case 39/1995/545/631, judgement of the European Court of Human Rights of 16 September 1996) that an emergency assistance allowance was a property right. Consequently, it was contrary to Art. 14, of the ECHR to annul a claim on the ground of nationality.

⁵⁴ Case C-384/93, *Alpine Investments BV v. Minister van Financien*, [1995] ECR I-1141.

⁵⁵ Case C-415/93, *Bosman*, [1995].

⁵⁶ L. Daniele, 'Non-discriminatory restrictions to the free movement of persons', *EL Rev.* (1997) 191-200 at 191.

⁵⁷ *Ibid.*, at 195.

However, the 'global approach' could allow Member States to impose any non-discriminatory measures on the rights of third country nationals to move freely in the EU. Therefore, the application of the *Cassis* principle of 'mutual recognition' would ascertain the rights of third country nationals, and grant additional rights to move freely in the EU for them to provide services, if they were lawfully established in one of the Member States and complied with all professional requirements for those provision of services. Moreover, third country nationals could move freely, not only as employees of EU companies as established by the case-law of the ECJ's referred to earlier, but also as self-employed persons. In addition, it could be argued that the application of the *Cassis* doctrine would allow third country nationals who are cohabitants of migrant workers, to enter and move freely in the EU in order to join a migrant worker. Presumably, third country nationals could obtain the status as a family member of a migrant worker in a Member State where cohabitation is recognized as a lawfully marital relationship. This observation follows from the obligation of the Member States in *Kraus* and *Gebhard*,⁵⁸ to restrict any non-discriminatory national measures, which hinders the free movement of workers and the right of establishment, unless aimed to protect a mandatory requirement, justified in the public interest, which cannot be accomplished by less restrictive measures.

Notwithstanding the contribution of the ECJ in removing obstacles to exercising the rights of establishment and the provision of services by third country nationals, the EC institutions could also reform the present restrictive policy by applying a more liberal approach in regulating the rights of NIS nationals in the second generation of cooperation agreements with the NIS countries, which aimed to establish free trade areas with the EU. The most desirable effect could bring about the application of the following:

b) Anticipation of direct effect of the provisions of future cooperation agreements. The case-law of the ECJ does not clarify whether NIS nationals may directly enforce their rights under the provisions of the PCAs. Theoretically, only those provisions of the PCAs concerning the right of entry of the 'key personnel', and right to enter in order to sign a contract on the provision of services, satisfy all the conditions of direct effect.⁵⁹ It is conceded that it would be difficult to predict how the future provisions of the cooperation agreements could be directly enforceable without any recent rulings of the ECJ. However, the legal

⁵⁸ Case C-19/92, *Kraus*, [1993] ECR I-1663; Case C-55/94, *Gebhard*, [1995] ECR I-1141.

⁵⁹ *Op. cit.*, above note 43.

standing of NIS nationals could be significantly enhanced if selective provisions of future cooperation agreements could be directly enforceable: *inter alia*, rights to move freely in order to provide services and equal social treatment employed third country nationals.

3. The Basis Freedoms of Third Country/NIS Nationals on the Stability of the Integration Process

All the proposed measures to enhance the *potential* economic and social rights of NIS nationals in future cooperation agreements with the NIS countries are aimed at stabilizing the process of European integration, and to avoid any disturbances resulting from existing obstacles for NIS nationals to pursue economic activity in the EU.

Indeed, legal commentators argue that the achievement of the internal market objective has been seriously impeded by the fact that the actual rights of third country/NIS nationals are severely limited, compared to the comprehensive scope of rights enjoyed by EU citizens. It could also be argued that an even more restrictive wording of the PCAs contains a variety of unjustified obstacles for NIS nationals to pursue economic activity in the EU. The possibility to enter the European market varies depending on whether a NIS national is lawfully resident in one of the Member States, a family member of a migrant worker, or they reside in the NIS and wish to exercise his/her rights under the PCAs.

This embarrassing situation could encourage NIS nationals to pursue illegal methods to obtain the necessary access to economic activity in the EU, by entering into bogus marriages, or other possibly illegal violations of European and national immigration laws. This in turn may force Member States to use national protective measures against third country/NIS nationals, which runs contrary to the recent movement to harmonize EU immigration law. It can therefore be argued that, the objective for the maximum alignment of the legal status of NIS nationals, and third country nationals who are lawfully resident in the EU, can be justified, as it falls within the logic of the internal market, and may deter any illegal consequences due to the existing disparity.

VIII Conclusion

EU law currently states that NIS nationals enjoy indirect rights to pursue their economic activity in the EU, either as employees of EU companies, as family members of migrant workers, or under provisions of

the PCAs. In addition, the case-law of the ECJ has established the principle that the nationality of third country/NIS nationals does not constitute an obstacle in the attainment of the objective of family reunification and the freedom of movement for employees of EU companies. However, the application of direct effect is extremely limited in the PCAs, and NIS nationals can only directly enforce selected provisions of the PCAs, for example the key personnel clause and the right to move freely in order to sign contracts for provisions of services. As a consequence, these directly effective provisions must contain a clear and precise obligation, which is not subject to the adoption of any subsequent measure.

Obviously, the status of third country/NIS nationals needs global reforming in view of the projected expansion of the EU to the East, and the creation of free trade areas with the Central and Eastern European countries. The idea of the internal market will not be jeopardized by the extension of the economic and social rights of third country/NIS nationals, if reforming measures are undertaken according to the principles of the internal market. Therefore, the extension of the *Cassis* doctrine should not only apply to goods, but also to the free movement of third country nationals, and the right to supply services to the EU. Moreover, the directly enforceable wording of future cooperation agreements with the NIS countries, and alignment of the legal status of NIS nationals and third country nationals would be compatible with the logic of the internal market, and would assist in the establishing of a close 'long trade environment' between the EU and the NIS countries.⁶⁰

⁶⁰ Steve Peers, 'Undercutting integration: developments in Union policy on third-country nationals', 22 EL Rev. (1997) 76–84 at 76.

