OPINION OF ADVOCATE GENERAL JACOBS

delivered on 20 September 2001 [1]

1. In this case the Bundesarbeitsgericht (Federal Labour Court), Germany, asks questions about the direct effect, interpretation and scope *ratione temporis* of Article 37(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part. [2]

2. The essential issue is whether that provision precludes the application to Polish nationals of a provision of national law according to which posts for foreign-language assistants may be the subject of employment contracts of limited duration whereas, for other teaching staff performing special duties, recourse to such contracts must be individually justified by an objective reason.

1 — Original language: English.

2 — OJ 1993 L 348, p. 2.

The relevant legislative provisions

The Europe Agreement

3. By Decision No 93/743 [3] the Council and the Commission approved, on behalf of the Communities, the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, done in Brussels on 16 December 1991. Pursuant to Article 121, that Agreement entered into force on 1 February 1994. [4]

4. According to the 15th recital in the preamble to the Agreement, the association between the parties is established in recognition of the fact that the final objective of Poland is to become a member of the Community and that the association, in the view of the parties, will help to achieve that objective.

3 — Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, OJ 1993 L 348, p. 1.

4 — Information regarding the date of entry into force of the Europe Agreement with Poland, OJ 1993 L 348, p. 184.

5. The aims of the Agreement are set out in Article 1(2) as follows:

'— to provide an appropriate framework for the political dialogue, allowing the development of close political relations between the parties,

— to promote the expansion of trade and the harmonious economic relations between the parties and so to foster the dynamic economic development and prosperity in Poland,

— to provide a basis for the Community's financial and technical assistance to Poland,

— to provide an appropriate framework for Poland's gradual integration into the Community. To this end, Poland shall work towards fulfilling the necessary conditions,

— to promote cooperation in cultural matters.'

6. In order to realise those objectives, the Agreement lays down a number of detailed provisions concerning, in particular, free movement of goods (Title III), movement of workers, establishment and supply of services (Title IV), payments, capital, competition and approximation of laws (Title V), economic cooperation (Title VI), cultural cooperation (Title VII) and financial cooperation (Title VIII). Moreover, Article 102 establishes an Association Council which is entrusted with the task of supervising the implementation of the Agreement and (under Article 104) of adopting, pursuant to specific provisions in the Agreement, decisions and recommendations.

7. In issue in the present case are the provisions of Title IV ('Movement of workers, establishment, supply of services') and, in particular, Chapter I ('Movement of workers') of that Title.

8. The provisions of Chapter I do not confer upon Polish migrant workers a right of entry to and stay on the territories of the Member States. However, with regard to Polish migrant workers legally employed in the territory of a Member State, Article 37

of the Agreement provides in so far as is relevant to the present case: [5]

'1. Subject to the conditions and modalities applicable in each Member State:

— the treatment accorded to workers of Polish nationality, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals,

...'

9. Article 37 of the Agreement must be read in the light of Article 58, which is placed in Chapter IV ('General provisions') of Title IV. Article 58 provides in paragraph 1:

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

10. Finally, attached to the Agreement are a number of joint declarations. The second of those declarations, entitled 'Article 37(1)', states: [6]

'It is understood that the concept "conditions and modalities applicable in each Member State" includes Community rules where appropriate.'

5 — Identically worded provisions are to be found in each of the 10 Europe Agreements signed to date. See Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, OJ 1994 L 358, p. 3; Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, OJ 1994 L 360, p. 2; Article 36(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part, OJ 1998 L 68, p. 3; Article 37(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, OJ 1993 L 347, p. 2; Article 37(1) of the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, OJ 1998 L 26, p. 3; Article 37(1) of the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part, OJ 1998 L 51, p. 3; Article 38(1) of the Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part, OJ 1994 L 357, p. 2; Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, OJ 1994 L 359, p. 2; and Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part, OJ 1999 L 51, p. 3.

6 — OJ 1993 L 348, p. 179.

The relevant provisions of German law

11. As I have explained previously,[7] it follows from the case-law of the German courts that, under German law, a contract of employment may be concluded for a limited period of time only where an objective ground exists for such a limitation. I shall refer to such contracts of employment as 'fixed-term contracts'.

12. Provisions on the conclusion of fixed-term contracts by institutions of higher education and research are contained in the Hochschulrahmengesetz of 26 January 1976 (Framework law on universities, hereinafter 'the HRG').

13. The HRG has been amended on a number of occasions. At the time of the events giving rise to the dispute in the present case, the relevant provisions were to be found in the HRG as amended by Article 1 of the Gesetz über befristete Arbeitsverträge mit wissenschaftlichem Personal an Hochschulen und Forschungseinrichtungen of 14 June 1985 (Law on fixed-term contracts of employment for academic staff at universities and research institutes).[8]

14. That amendment inserted into the HRG a series of new Paragraphs 57a to 57f. Paragraph 57a defines the categories of worker to which those new provisions apply, including in particular the 'scientific and artistic assistants' referred to in Paragraph 53 of the HRG, the 'personnel with medical tasks' referred to in Paragraph 54, and the 'teaching staff for special tasks' referred to in Paragraph 56. Paragraph 57b(1) provides that, except when no objective ground is required under the general provisions and principles of labour law, the conclusion of fixed-term contracts with the personnel mentioned in Paragraph 57a is permitted where it can be justified on such a ground.

15. Paragraph 57b(2) provides that, in the case of the workers referred to in Paragraphs 53 and 54, such grounds exist in particular (1) where the activities of an assistant further his scholarly or artistic development or professional training, (2) where he is paid out of funds which are earmarked for activities of limited duration, (3) where he is intended to acquire or temporarily to contribute special knowledge or experience, (4) where he is financed mainly from the funds of a third party, or (5) where he is engaged for the first time.

7 — See my Opinion in Case C-272/92 *Spotti* [1993] ECR I-5185, paragraph 5.

8 — BGBl. 1985 I, p. 1065.

16. According to Paragraph 57b(3) as in force at the material time:

'An objective ground also exists for the engagement on a fixed-term contract of an instructor performing special duties who is a speaker of a foreign language where the instructor is mainly engaged to teach foreign languages (as a "foreign-language assistant").'

17. Paragraph 57c(2) imposes a maximum period of five years for any fixed-term contract limited on a ground mentioned in Paragraph 57b(2), points 1 to 4, or in Paragraph 57b(3). Where an employee is employed on more than one such contract with a single institution, the total period of the contracts may not exceed five years.

18. It can be seen that, under the provisions of the HRG in force at the material time, the employment of foreign-language assistants on fixed-term contracts was permitted but not compulsory.

19. Finally, it may be noted that Article 57b(3) was repealed by the German legislature with effect from 24 August 1998.[9] Foreign language assistants are now subject to the general provisions of Article 57b(1) and (2). However, given that the applicant's contract expired before 24 August 1998, the law as amended does not, according to German case-law, apply to her situation.

The facts and the national proceedings

20. Beata Pokrzeptowicz-Meyer, the applicant in the main proceedings, is a Polish national. After graduating in 1991 in Lodz, Poland, with a master's degree in German, she transferred her residence to Germany in the middle of 1992. By a contract dated 5 October 1992 she was engaged by the defendant in the main proceedings, the Land Nordrhein-Westfalen, for the period from 8 October 1992 to 30 September 1996 as a part-time employee in the post of foreign-language assistant at the University of Bielefeld. Under Paragraph 2 of her contract of service, her employment was — pursuant to Article 57b(3) of the HRG — for a fixed term only because she was to be mainly engaged to teach foreign languages. The job description issued by the defendant stated that the applicant's duties consisted in teaching Polish in class for up to eight hours a week per semester, assessing the language work of the students and convey-

9 — Law amending for the fourth time the HRG (*Viertes Gesetz zur Änderung des Hochschulrahmengesetzes)*, BGBl. 1998 I, p. 2190.

ing knowledge of Poland's culture. The applicant was permitted to provide instruction in linguistics and literature only exceptionally and, in any event, to a limited degree.

21. By an action, which she commenced before the Arbeitsgericht (Labour Court) on 16 January 1996, the applicant sought a declaration that her employment relationship with the defendant would not terminate on account of the fact that its duration was limited to 30 September 1996. Relying on the judgment of the Court of Justice in *Spotti*, [10] which held that such provisions of national law were contrary to Article 48(2) of the EEC Treaty, she argued that that limitation could not be justified under Paragraph 57b(3) of the HRG. The defendant resisted that claim, contending essentially that — until its repeal with effect from 24 August 1998 — Paragraph 57b(3) of the HRG continued to apply to employment contracts with foreign-language assistants from countries which are not members of the European Union.

22. The Arbeitsgericht (Labour Court), Germany, having dismissed the applicant's claim, she appealed to the Landesarbeitsgericht (Higher Labour Court) which granted the application. The defendant appealed against the latter judgment on a point of law to the Bundesarbeitsgericht.

Considering that the case before it raised a point of Community law, the Bundesarbeitsgericht stayed the main proceedings and referred to the Court of Justice the following questions for a preliminary ruling:

'1. Does Article 37(1) of the Europe Agreement of 16 December 1991 establishing an association between the European Communities and their Member States and the Republic of Poland preclude the application — to Polish nationals — of national law according to which posts for foreign-language assistants may be filled by means of employment contracts of limited duration whereas, for other teaching staff performing special duties, recourse to such contracts must be individually justified by an objective reason?

2. If the Court of Justice answers the first question in the affirmative:

does Article 37(1) of the Europe Agreement also preclude the application of national law where the employment contract of limited duration was concluded before the Europe Agreement entered into force and the agreed period comes to an end after its entry into force?'

10 — Case C-272/92, cited in note 7.

23. Written observations have been submitted by the Land Nordrhein-Westfalen, the French Government and the Commission. Oral argument was presented at the hearing by the French Government and the Commission.

Admissibility

24. The Agreement in issue in the present case is an international agreement — concluded between the Communities and the Member States and Poland — which is binding, under Article 300(7) EC, upon the Communities and the Member States. According to the Court's case-law, such an agreement forms, from its entry into force, an integral part of the Community legal order and the Court of Justice is therefore competent to rule on its interpretation in the context of the procedure laid down in Article 234 EC. [11] The questions submitted in the present case are thus admissible.

The first question

25. By its first question, the referring court asks whether Article 37(1) of the Agreement precludes the application to Polish nationals of a provision of national law according to which posts for foreign-language assistants may be filled by means of employment contracts of limited duration whereas, for other teaching staff performing special duties, recourse to such contracts must be individually justified by an objective reason.

26. In order to answer that question, it is necessary to examine two issues. First, does Article 37(1) have direct effect so that it may be invoked by a private person in the applicant's situation against a public authority acting in its capacity as an employer of university teachers? Second, is a national rule contrary to Article 37(1) where it provides that language assistants may be employed on fixed-term contracts without justification by reference in every case to an objective reason?

The direct effect of Article 37(1) of the Agreement

27. According to the Court's settled case-law, 'a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise

11 — Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 5 and 6 of the judgment; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7.

obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. [12]

28. In order to determine whether the first paragraph of Article 37 of the Agreement meets those criteria, it is necessary first to examine its wording.

29. Article 37(1) provides that '[s]ubject to the conditions and modalities applicable in each Member State ... the treatment accorded to workers of Polish nationality, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals'.

30. As can be seen, the wording of Article 37(1) consists of two distinct phrases. The latter phrase ('the treatment accorded ... shall be free from discrimination ...') lays down in clear, precise and unconditional terms a prohibition against discrimination based on nationality against migrant Polish workers as regards working conditions, remuneration and dismissal.

31. A prohibition laid down in such terms is, as the Court acknowledged in *El-Yassini*, [13] capable of having direct effect. In that case, the Court of Justice was asked questions about the effect and interpretation of Article 40(1) of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, under which '[t]he treatment accorded by each Member State to workers of Moroccan nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions or remuneration, in relation to its own nationals. ...'. Considering that Article 40(1) 'prohibits, in clear, precise and unconditional terms, discrimination based on nationality against migrant Moroccan workers employed in the territory of the host Member State as regards working conditions or remuneration', and that 'the conclusion that that principle of non-discrimination is capable of directly governing the situation of individuals is not contradicted by examination of the purpose and nature of the agreement of which Article 40 forms part', the Court concluded that 'individuals to whom that provision applies are entitled to rely on it before the national courts'. [14]

32. According to the Land Nordrhein-Westfalen, Article 37(1) of the Agreement

12 — See, in particular, *Demirel*, cited in note 11, paragraph 14 of the judgment; Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 60; Case C-37/98 *Savas* [2000] ECR I-2927, paragraph 39.

13 — Case C-416/96 [1999] ECR I-1209, paragraph 27 of the judgment.

14 — Paragraphs 27, 28 and 32 of the judgment. See also, for the direct effect of equal treatment clauses in the context of social security, Case C-18/90 *Kziber* [1991] ECR I-199; Case C-103/94 *Krid* [1995] ECR I-719 and, most recently, Case C-179/98 *Mesbah* [1999] ECR I-7955.

is none the less incapable of having direct effect because the parties to the Agreement inserted the phrase '[s]ubject to the conditions and modalities applicable in each Member State' in the wording of its first paragraph. In its view, that phrase qualifies the prohibition on discrimination on grounds of nationality and Article 37(1) cannot, therefore, be considered to be unconditional within the meaning of the Court's case-law on direct effect.

33. That argument cannot be dismissed out of hand. At first glance, Article 37(1) might indeed appear to subject the application of the principle of equal treatment between Community and Polish workers to a certain discretionary power of the Member States.

34. In my view, however, the defendant's argument rests on a misunderstanding of the Court's case-law on the direct effect of provisions of international agreements. According to that case-law, [15] in order to decide whether a provision is unconditional it must be examined whether the obligation laid down in that provision requires (is conditional upon) the adoption of subsequent measures by the parties to the agreement, or whether that obligation is sufficiently precise and complete to be applied by national courts without the adoption of such measures. In view of that case-law, it is not decisive that the wording of Article 37(1) refers to 'the conditions and modalities applicable in each Member State'. Even if — as the defendant contends — it follows from those words that the exercise of the rights granted to Polish workers by Article 37(1) may be subject to certain conditions laid down by national law, [16] the obligation not to discriminate against Polish migrant workers on grounds of nationality as regards working conditions is still perfectly capable of application by the national courts in the absence of any such measures.

35. The contention that Article 37(1) is incapable of having direct effect is also difficult to reconcile with the purpose and the context of the Agreement as a whole. [17]

36. It may be noted, first of all, that neither Article 37(1), nor any other provision of

15 — See note 12 above.

16 — I will consider what those conditions might be below, at paragraphs 42 to 45.

17 — See similarly M. Cremona, 'The New Associations: Substantive Issues of the Europe Agreements with the Central and Eastern European States', in (ed.) V. Konstadinidis, *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market*, at p. 145; D. Martin, 'Association Agreements', in *Assoziierungsabkommen der EU mit Drittstaaten* (1998), at p. 32. M. Hedemann-Robinson, 'An overview of recent legal developments at Community level in relation to third country nationals resident within the European Union, with particular reference to the case law of the European Court of Justice' [2001] *Common Market Law Review* 525, at pp. 571 to 572. Others have spoken in favour of the direct effect of Article 37(1), albeit without explicitly examining the importance of the phrase '[s]ubject to the conditions and modalities applicable in each Member State'. See S. Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union', [1996] *Common Market Law Review* 7, at p. 29; L. Nyssen & X. Denoël, 'La situation des ressortissants de pays tiers à la suite de l'arrêt Bosman', *Revue du marché unique européen* (1996) 119, at pp. 124 to 125.

the Agreement, states *explicitly* that Article 37(1) is not intended to have direct effect. The question is whether — in the absence of such an explicit clause in the Agreement — the phrase 'subject to the conditions and modalities ...' is to be interpreted as depriving the principle of equal treatment laid down in Article 37(1) of such effect.

37. When seeking to answer that question, it must be taken into account that the interpretation favoured by the Land Nordrhein-Westfalen — according to which the equal treatment of Polish migrant workers is subject to 'modalities' and 'conditions' of national law linked directly or indirectly to nationality — would enable, in effect, the Member States to evade the prohibition laid down in Article 37(1). It would thus, as the Commission and the Bundesarbeitsgericht point out, considerably reduce the effectiveness of Article 37(1) and, perhaps, render it nugatory. I find it difficult to accept the proposition, implicit in the Land Nordrhein-Westfalen's argument, that the parties to the Agreement intended such an outcome. In that context, I note that neither the Member States nor the Council have submitted observations to the Court in the present case seeking to defend that proposition, and that the Commission and the French Government are in agreement that Article 37(1) is capable of having direct effect, although — according to the French Government — the right to equal treatment with regard to conditions of employment does not carry with it a right of access to, or stay on, the territories of the Member States.

38. In any event, if the parties to the Agreement had intended to deprive Article 37(1) of direct effect, and thus of much of its effectiveness, they would presumably have expressed that intention more clearly than adding to its wording the rather vague formula '[s]ubject to the conditions and modalities...'. The parties might, for example, have added a provision concerned with the question of direct effect of the Agreement to its Title IX ('Institutional, General and Final Provisions').

39. A comparison of Article 37(1) with other provisions of the Agreement also suggests, contrary to what the Land Nordrhein-Westfalen asserts, that the prohibition of discrimination laid down in Article 37(1) has direct effect. Some of those provisions are purely programmatic in character and depend for their implementation upon decisions still to be taken by the Association Council. [18] That, for example, is the case with regard to the areas of social security for workers under Articles 38 and 39 and the supply of services under Article 55 of the Agreement. Those provisions refer explicitly to measures still to be taken by the Association Council which is given the power to adopt legally binding provisions in order to realise their objectives. It is questionable whether, in the light of the Court's case-law, those

18 — See paragraph 6 above.

provisions have direct effect. [19] In contrast to those provisions, Article 37(1) lays down a rule which prescribes clearly a result to be achieved and which is both sufficiently precise and sufficiently complete to be applied directly by the national courts without measures of implementation. It is thus entirely logical that Article 37(1) makes no reference to any such measures and that, under Article 42 of the Agreement, the Association Council does not have the power to adopt binding decisions to implement Article 37(1), but only to 'examine ... ways of improving the movement of workers' and to 'make recommendations'.

40. The view that Article 37(1) is capable of directly governing the situation of individuals is, moreover, entirely consistent with the purpose and nature of the Agreement. [20] As is apparent from the preamble and Article 1(2), [21] that Agreement creates an association which, by providing a framework for political dialogue, aims to promote trade and harmonious economic relations between the parties as well as the prosperity of Poland in order to facilitate the accession of Poland to the European Union. It cannot be denied that that aim will be furthered if Polish migrant workers are afforded the possibility of relying directly on the equal treatment provisions laid down in the Agreement before the national courts in the Member States.

19 — See *Demirel*, cited in note 11, paragraphs 19 to 25 of the judgment; *Savas*, cited in note 12, paragraphs 41 to 45.

20 — See similarly the Opinion of Advocate General Léger, delivered on 8 May 2001, in Case C-268/99 *Jany*, at paragraph 48.

21 — Cited in paragraphs 4 and 5.

Moreover, the Court of Justice has held that provisions laying down principles of equal treatment on grounds of nationality in agreements which, while establishing economic cooperation between the European Community and non-member countries, do not aim at the integration of those states into the Community, may have direct effect. [22] The considerations which led the Court to take that view apply, perhaps even more strongly, in the context of agreements which aim to prepare States for membership of the Community.

41. It may be added that the fact that the Agreement is intended essentially to promote the economic development of Poland — with a view to preparing its accession to the Community — and that an imbalance may therefore arise between the obligations assumed by the Community and by Poland does not, according to settled case-law, prevent the Court from recognising some of its provisions as having direct effect. [23]

42. The question remains, however, what is to be understood by the phrase 'conditions

22 — Case C-416/96, cited in note 13.

23 — See, in particular, *Sürül*, paragraph 72 of the judgment, and *Savas*, paragraph 53, both cited in note 12.

and modalities applicable in each Member State' in the text of Article 37(1).

43. That question must, in my view, be answered in the light of the structure of the Agreement as a whole. It is, as the French Government has stressed, clear that a distinction is drawn within the Agreement between *access to* employment and treatment *in employment*. While the conditions of access of Polish migrant workers to the labour markets of the Member States are in principle not affected by the Agreement, migrant workers who have been admitted to the territory of a Member State and who are lawfully resident there must be afforded equal treatment as regards working conditions, remuneration and dismissal as compared to the nationals of that Member State. That distinction is apparent from the absence — in Chapter I of Title IV of the Agreement — of provisions explicitly granting Polish migrant workers the right to enter and reside on the territory of the Member States and from Article 58(1) under which 'nothing in [the] Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay ... provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement'. Moreover, annexed to the Agreement is a declaration by the European Community which states that 'nothing in the provisions of Chapter I "Movement of workers" shall be construed as impairing any competence of Member States as to the entry into and stay on their territories of workers and their family members'. [24]

44. In that context, the reference in Article 37(1) to 'the conditions and modalities applicable in each Member State' must, in my view, be understood primarily as a reminder that, since the conditions of access to the labour markets of the Member States remain in principle a matter of national law, the right to equal treatment in employment applies only to Polish migrant workers who satisfy the procedural and substantive conditions for entry and stay on the territory laid down by the relevant national rules.

45. Moreover that interpretation is in no way inconsistent with the joint declaration of the parties to the Agreement which states that '[i]t is understood that the concept "conditions and modalities applicable in each Member State" includes Community rules where appropriate'. [25]

46. I accordingly conclude, in agreement with the Commission and the French Government, that Article 37(1) of the Agreement has direct effect. A Polish

24 — OJ 1993 L 348, p. 183.

25 — See also D. Martin & E. Guild, *Free Movement of Persons in the European Union* (1996) p. 297.

migrant worker legally employed in the territory of a Member State may thus rely on that provision in proceedings against a public authority acting in its capacity as employer.

Compatibility of Article 57b(3) of the HRG with Article 37(1) of the Agreement

47. Article 37(1) of the Agreement provides that the treatment accorded to migrant Polish workers 'shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal'.

48. There is in my opinion no doubt that Article 57b(3) of the HRG is contrary to that provision.

49. First, the Court of Justice has already had occasion to rule that the duration of employment contracts and, more specifically, the use of fixed-term contracts for university teaching staff falls within the concept of 'conditions of work and employment' in Article 48(2) of the EEC Treaty (now, after amendment, Article 39(2) EC).[26] There is, in my view, no reason to interpret the notion of 'working conditions' mentioned in Article 37(1) of the Agreement differently.

50. Second, Paragraph 57b(3) of the HRG drew, at the time of the events giving rise to the main proceedings, a distinction between foreign-language teachers and other university staff. While the former group could be employed on fixed-term contracts, other teaching staff performing special duties could be employed for a fixed term only where that was individually justified by an objective reason. The different treatment afforded to those two groups did not entail any direct discrimination on grounds of nationality. However, it must be kept in mind that the great majority of foreign-language assistants are of a different nationality than that of the State in which they are employed. The difference of treatment inherent in Paragraph 57b(3) of the HRG thus leads to indirect discrimination on grounds of nationality.[27]

51. Third, there is to my mind no doubt that Article 37(1) must be interpreted as

26 — See Case 33/88 *Allué* [1989] ECR 1591; *Spotti*, cited in note 7.

27 — *Spotti*, cited in note 7, paragraph 18 of the judgment.

prohibiting indirect as well as direct discrimination. It is true that interpretations given to Articles of the EC Treaty cannot be applied by way of simple analogy to provisions in Agreements between the Community and third countries. [28] The fact that Article 39(2) EC prohibits, according to settled case-law, 'not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result' [29] is thus not decisive for the interpretation of Article 37(1) although the two provisions are similarly worded. Nor does it follow, as the French Government has emphasised, from the similarity between those provisions that Article 37(1) carries with it a right of entry and residence for Polish migrant workers. However, the terms of Article 37(1), read in the light of the objectives pursued by the Agreement, [30] suggest that the prohibition laid down should not be interpreted narrowly and, therefore, that it covers indirect as well as direct discrimination on grounds of nationality as regards conditions of employment. [31] The different treatment afforded to foreign-language teachers, compared to other university staff responsible for special tasks within the meaning of the HRG, is therefore contrary to Article 37(1) of the Agreement, unless it is justified for objective reasons.

52. Fourth, in *Spotti*, the Court of Justice was asked whether the indirect discrimination — as between German nationals and nationals of other Member States — which flows from Article 57b(3) of the HRG may be justified on objective grounds. In that connection, the Court held that 'the need to ensure up-to-date instruction cannot justify the imposition of a time-limit on the employment contracts of foreign-language assistants. The danger of such assistants' losing contact with their mother tongue is slight in the light of the increase in cultural exchanges and improved communications, and in addition it is open to the universities in any event to check the level of the assistants' knowledge.' [32] That reasoning is, as the Commission points out, applicable to language assistants of Polish nationality in the context of Article 37(1) of the Agreement. There are moreover, in my view, no other reasons justifying the different treatment accorded to foreign-language assistants, as compared with other categories of university staff, under the provisions of the HRG in force at the material time; nor have those

28 — See Case 270/80 *Polydor* [1982] ECR 329, paragraphs 14 to 21; Case 104/81 *Kupferberg* [1982] ECR 3641.

29 — Case 41/84 *Pinna* [1986] ECR 1, paragraph 23 of the judgment. See also *Allué*, cited in note 26, paragraph 11; *Spotti*, cited in note 7, paragraph 18.

30 — See Article 1(2) of the Europe Agreement, cited in paragraph 5.

31 — See similarly, in relation to Article 3(1) of Decision No 3/80 of the Association Council established pursuant to the EEC-Turkey association agreement, *Sürül*, cited in note 12, paragraphs 97 to 104 of the judgment, and the Opinion of Advocate General La Pergola, at paragraph 47.

32 — Paragraph 20 of the judgment. See also *Allué*, cited in note 26, paragraph 14.

submitting observations in this case put forward any such justifications.

53. I accordingly conclude that Article 37(1) of the Agreement precludes the application to Polish nationals of a provision of national law according to which posts for foreign-language assistants may be the subject of employment contracts of limited duration whereas, for other teaching staff performing special duties, recourse to such contracts must be individually justified by an objective reason.

The second question

54. In the light of the reply to the first question, it is necessary to examine the second question referred in the present case. By that question, the Bundesarbeitsgericht seeks essentially to ascertain whether Article 37(1) of the Agreement applies to fixed-term employment contracts which were concluded before, and which were due to expire after, the entry into force of that Agreement.

55. Under Article 121 of the Agreement, its provisions 'shall enter into force on the first day of the second month following the date on which the Contracting Parties notify each other that the procedures referred to in the first paragraph have been completed'. Pursuant to that provision, the Agreement entered into force on 1 February 1994. [33]

56. Apart from Article 121, the Agreement does not contain any transitional provisions. In order to determine the scope *ratione temporis* of Article 37(1), it is therefore necessary to interpret the wording of that provision taking into account its objective and the Court's case-law concerning temporal application of Community legislation.

57. It is possible to deduce at least two principles from that case-law. On the one hand, Community measures do not have retroactive effect unless, exceptionally, it is clear from their terms or general scheme that the legislator intended such an effect, that the purpose to be achieved so requires and that the legitimate expectations of those concerned are duly respected. [34] On the other hand, Community legislation

33 — Information regarding the date of entry into force of the Europe Agreement with Poland, OJ 1993 L 348, p. 184.

34 — See, in particular, Case 98/78 *Racke* [1979] ECR 69, paragraph 20 of the judgment; Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraphs 17 and 20; Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22. See also, with regard to the temporal effect in the Member States of provisions of the Treaty on European Union, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 42 and, with regard to the temporal effect of provisions of the Treaty in a Member State following its accession to the Community Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 21.

normally applies to the future effects of situations which have arisen under the law as it stood before amendment, [35] unless the immediate application of a particular provision would be contrary to the protection of legitimate expectations. [36]

58. The Land Nordrhein-Westfalen argues that the application of legal provisions to an employment contract concluded before the entry into force of those provisions must be categorised as a form of retroactive application of the law. Since the Agreement does not explicitly provide for such an effect, Article 37(1) is inapplicable in the circumstances of the case in the main proceedings.

59. I disagree with that analysis. Applying a legal provision to a fixed-term employment contract which has not finally ended by the time that provision enters into force does not involve retroactive application of the law; it entails only the immediate application of that provision to the effects in the future of situations which have arisen under the law as it stood before amendment.

60. I am reinforced in that view by the case of *Licata*. [37] The applicant in that case, a temporary agent of the Economic and Social Committee, challenged a decision whereby the Committee cut short the term for which she had been elected to a Staff Committee following her appointment as a permanent official. That decision was made pursuant to rules — concerning the representativeness of the Staff Committee — which had entered into force after the election. [38] The applicant argued, *inter alia*, that the application of those rules violated the principle that legislation does not have retroactive effect. However, the Court of Justice held that 'as a matter of principle, new rules apply immediately to the future effects of a situation which arose under the old rule. The application of the [rules in issue] to the remainder of Mrs Licata's term of office does not therefore constitute a breach of the principle that measures must not be retroactive.' [39]

61. The principle that legislation normally applies immediately suggests, then, that Article 37(1) should be considered to be

35 — See, for example, Case 44/65 *Singer* [1965] ECR 965, at p. 972; Case 68/69 *Brock* [1970] 171, paragraph 7; Case 143/73 *SOPAD* [1973] ECR 1433, paragraph 8; Case 40/79 *P* v *Commission* [1981] ECR 361, paragraph 12. See similarly, with regard to the temporal effect of provisions of the Treaty in a Member State following its accession to the Community, Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 14.

36 — See, in particular, Case 1/73 *Westzucker* [1973] ECR 723, paragraphs 6 to 10 of the judgment; Case 96/77 *Bauche* [1978] ECR 383, paragraph 54 to 58; Case 278/84 *Germany* v *Commission* [1987] ECR 1, paragraphs 34 to 37.

37 — Case 270/84 *Licata* v *ESC* [1986] ECR 2305.

38 — The rules in issue were laid down in General Decision No 173/84A of 7 May 1984 of the Chairman of the Economic and Social Committee.

39 — Paragraph 31 of the judgment.

applicable to employment contracts which were concluded before, and which were due to expire after, 1 February 1994. That conclusion is supported by the importance of the aim sought by Article 37(1). The principle that there shall be no discrimination on grounds of nationality is one of the central pillars of the Agreement, as may be seen from several of its provisions.[40] Indeed, it is difficult to think of any step which would contribute more to the realisation of the overall objectives sought by the Agreement than the abolition, in all fields, of discrimination on grounds of nationality between Community and Polish nationals. Equal treatment as regards conditions of employment is, moreover, of particular importance since it affects directly the lives and welfare of the growing number of individuals who have lawfully moved from Poland into the Community in order to work.

62. There are moreover, in my opinion, no compelling reasons of legal certainty to limit the scope *ratione temporis* of Article 37(1) in the present case.

63. First, the fact that the principle of equal treatment laid down in Article 37(1) of the Agreement may interfere with existing contractual arrangements is not, of itself, contrary to the principle of legal certainty. The Court of Justice has consistently held that the principle of legitimate expectations, which is an aspect of the principle of legal certainty, 'cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules.'[41] That statement applies, in my view, to a provision such as Article 37(1) of the Agreement which is liable to change, or affect, the scope of rights and obligations of employers and migrant workers under employment contracts concluded before its entry into force.

64. Support for that view may, perhaps, be found in *Dürbeck*.[42] In that case the applicant argued that a Community measure, which had suspended imports into the Community of dessert apples with immediate effect, violated the principle of legitimate expectations. That principle, it was contended, precluded interference with existing contracts and thus prevented the application of the import suspension to contracts already concluded by economic operators. The Court of Justice rejected that claim on the grounds, first, that the principle of legitimate expectations does not generally prevent the application of

40 — See, for example, Article 44(3).

41 — See, in particular, Case 84/78 *Tomadini* [1979] ECR 1801, paragraph 21 of the judgment; Case 112/80 *Dürbeck* [1981] ECR 1095, paragraph 48; *Germany* v *Commission*, cited in note 36, paragraph 36.

42 — Case 112/80, cited in note 41.

new legislation to the future effects of situations which arose under the earlier rules and, second, that an exemption of contracts already signed would have robbed the suspension of its practical effect. [43]

65. Second, the application of Article 37(1) of the Agreement cannot, in any event, be said to violate the defendant's legitimate expectations. It must be remembered, as the Commission points out, that the Agreement was signed by the parties, including the representative of the Federal Republic of Germany, on 16 December 1991; that is approximately 11 months before the Land Nordrhein-Westfalen entered into a fixed-term employment contract with Ms Pokrzeptowicz-Meyer. In my view, public authorities in the Member States, including the German Länder, may be expected to keep abreast of international developments and thus to be aware of obligations which arise under international agreements to which the Community is a party and which, like the Europe Agreements, are of vital political and legal importance for the Community as a whole.

66. Finally, it has not been suggested to the Court in the present case that the Member States retain the power to decide, as one of the 'conditions and modalities applicable in each Member State', from which point in time the right to equal treatment may be relied upon by Polish migrant workers. In my view, such an argument would in any event have failed. As explained above, the reference to 'conditions and modalities' in Article 37(1) must be understood as a reminder that the right to equal treatment in employment is contingent upon compliance with national rules concerning access and stay. [44] To extend the scope of those words to cover the effect *ratione temporis* of Article 37(1) would limit the effectiveness of that provision and — contrary to the purpose of Article 121 of the Agreement and considerations of legal certainty — cause different provisions in the Agreement to enter into force at different points in time.

67. I accordingly conclude that Article 37(1) of the Agreement applies to fixed-term employment contracts which were concluded before, and which were due to expire after, the entry into force of that agreement on 1 February 1994.

43 — Paragraphs 48 to 50 of the judgment. See also, with regard to the immediate application of Community measures to products which are in transit between a State outside the Community and a Member State, Case C-183/95 *Affish BV* [1997] ECR I-4315, paragraphs 55 to 58 and the order in Case C-51/95 P *Unifruit Hellas* v *Commission* [1997] ECR I-727, paragraph 27.

44 — See paragraphs 43 to 44.

Conclusion

68. In the light of all the foregoing observations, I am of the opinion that the Court should reply to the Bundesarbeitsgericht as follows:

(1) Article 37(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part has direct effect and can be relied on in the courts of the Member States in proceedings against a public authority acting in its capacity as employer.

(2) Article 37(1) of the Agreement precludes the application to Polish nationals of a provision of national law according to which posts for foreign-language assistants may be filled by means of employment contracts of limited duration whereas, for other teaching staff performing special duties, recourse to such contracts must be individually justified by an objective reason.

(3) Article 37(1) of the Agreement applies to contracts of limited duration which were concluded before, and which were due to expire after, the entry into force of the Agreement on 1 February 1994.