Revised version

Part I

EUROPEAN REPORT
on the Free Movement of Workers in Europe in 2006

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GENERAL INTRODUCTION

In this introduction we mention six themes that are discussed in several national reports. For a more detailed discussion of those issues we refer the reader to the relevant chapters of this European Report.

1. Enlargement

It appears that the Enlargement has not resulted in massive movement of workers within the EU. The main movements of EU workers are from Poland and the Baltic States and to the UK, Spain and Ireland.

The approaching end of the first three years transitional period for the free movement of workers from the EU-8 in 2007 has been the occasion for public debate and policy changes on this issue in many Member States in 2006. This debate was influenced by the size of the immigration from the EU-8 in other Member Stated, by the demand for migrant workers and by the forthcoming Accession of Bulgaria and Romania on 1 January 2007.

The reports on Latvia, Lithuania and Poland refer to a sizeable immigration from neighbouring countries outside the EU (Belarus, Russia and Ukrain) or distant countries, such as China and Vietnam, replacing national workers who migrated to the EU-15. In Latvia the government has initiated a policy aiming at inducing national workers who emigrated to the EU-15 to return to the country. For more detail see Chapter VIII of this report.

2. Transposition of Directive 2004/38/EC

In 2006 most Member States have either completed or started the transposition of Directive 2004/38/EC on the free movement of Union citizens and the members of their family. In some Member States the transposition was used as an occasion to correct the incomplete or improper transposition of the previous Community rules on free movement, to implement old or recent case law of the Court of Justice, or to improve the administrative or judicial remedies available against decisions of immigration authorities applying free movement rules.

On the other hand, some Member States have use the transposition of Directive 2004/38 as an occasion to introduce more restrictive national rules on the admission of third-country national family members of EU migrants or on the access of EU nationals to social or public benefits. (See Chapter I)

In several Member States the admission of third-country national family members of EU migrants has been the subject of political debate or changes in national legislation restricting the rights of those family members. In Finland the transposition of Directive 2004/38 was used to introduce the rule that a third-country national is only entitled to an EC residence card if (s)he has had lawful residence in another Member State before. A similar rule has been discussed in Ireland and the Netherlands. The UK introduced new rules making is more difficult for those family members to obtain the required visa. Most of these changes were justified with reference to the *Akrich* judgment of the Court, but did not take into account the judgments in *MRAX* or *Commission/Spain* or the changes were made before the *Jia* judgment delivered by the Court in January 2007. The free movement rights of registered partners of EU migrants were subject of discussion in Cyprus. (See Chapter V)

3. Access to public service

The access of nationals of other Member States to jobs in the public service is still an important issue in several Member States. In Hungary and Ireland national rules were adopted that widen the access of EU nationals to certain categories of work in the public service. The implementation of the ECJ case law on this issue is a subject raised in the reports on Lithuania and Sweden. It remains to be a serious problem in Luxembourg. (See Chapter IV)

4. Old and new barriers to free movement

The reports on Cyprus, Poland and the UK mention a certain reduction of the administrative barriers to the actual exercise of free movement rights, such as long waiting periods, absence of forms, and extra documents required with the application.

On the other hand in Belgium new restrictions have been introduced to reduce the access of (primarily French speaking) students from other EU Member States to higher education for certain paramedical professions. The Dutch reports mention a side-effect of the privatisation of some branches of social security: private health insurance companies that are now in charge of the previously public health insurance scheme develop practices that hamper the free movement of the nationals of other Member States. (See Chapter I and national reports)

5. Little national case law on free movement

Several national rapporteurs point to the absence or scarcity of case law of national courts on free movement. However, their explanations for this phenomenon vary: most major controversial issues of free movement law have been settled by the Court or by Directive 2004/38, the relatively limited used of free movement within the EU, or the correct transposition and application of the Community rules. But other rapporteurs, especially from the EU-10, mention the lack of knowledge or awareness among the administration, the bar and the judiciary of the Community rules that grant Union citizens and their family members, irrespective of their nationality, a privileged treatment in comparison with the national rules applying to third-country nationals generally. See Chapter I and the introductory remarks in national reports.

6. Association EEC-Turkey

Several reports mention case law of national courts on the application of rules under the Association Agreement EEC-Turkey. The correct application of those rules appears to be a major issue, especially in Member States with a large Turkish immigrant community. The Hungarian report mentions that the Association rules are not implemented at all in that Member State (see national reports).

CHAPTER I: ENTRY, RESIDENCE, DEPARTURE AND REMEDIES

Introduction: Transposition of Directive 2004/38/EC

The date of 30 April 2006 was the deadline for the transposition of the EU Citizens Directive (hereafter "the Directive"),[1] which updates and consolidates the Community rules, including the Court of Justice case law, relating to the entry, residence and departure of EU citizens and members of their families. This deadline was not met in a number of Member States, but by the end of 2006 the following Member States had transposed the Directive, either by way of amendments to the relevant foreigners' or aliens' primary legislation and/or the passing of secondary rules to implement it: *Austria*, *Czech Republic*, *Denmark*, *Estonia*, *Ireland*, *Latvia*, *Lithuania*, *Netherlands*, *Poland*, *Portugal*, *Slovakia*, *Slovenia*, *Sweden*, and *United Kingdom*. A number of the country reports provide a detailed overview of the implementing legislation or regulations and demonstrate that the provisions of the Directive have, on the whole, been transposed faithfully and accurately into national law. In the *Netherlands*, the Directive was transposed by a wide range of amendments to the Aliens Decree, which, as observed by the rapporteurs, is the first time that Community free movement law has been implemented in binding law in that country and not partially by way of the Aliens Circular, which they view as a side-effect of the Commission's infringement proceedings against the Netherlands (C-50/06) on the way that Member State has transposed the former free movement rules. In a number of other Member States (*Cyprus*, *Finland*, *Germany*, *Italy* and *Spain*), draft primary legislation or secondary rules were prepared during the course of 2006 and came into force during 2007. The reports for these Member States therefore describe the position before transposition and also consider the effect of the changes. In a few Member States (*Belgium*, *Greece*, *Luxembourg*, *Malta*), however, the rapporteurs note that even though there has been some pre-legislative activity, the Directive has still not been transposed, although in *Belgium* a circular was adopted in May 2006 bringing some aspects of administrative practice regarding the residence of EU citizens in conformity with the Directive. In *France* and *Hungary*, laws transposing the Directive were approved in July and December 2006 respectively but a number of the necessary implementing measures have not yet been adopted.

Two reports (*Germany*, *Spain*) refer to national court judgments, which, following the expiry of the deadline for the transposition of the Directive, hold that certain provisions of the Directive are directly applicable, even though transposition was still pending at the time in the Member State concerned.

A number of similar concerns to those raised in the 2005 Report[2] regarding the rules on entry, residence, departure and remedies reappear in 2006. In the Member States in which the transposition of the Directive did not take effect in 2006, the concerns are essentially the same as in 2005, while in those Member States where transposition did take place in 2006 there is as yet little practice in respect of the operation of the new rules, although in some Member States their previous partial application has resulted in judicial interpretations which will be relevant to the interpretation of the future transposed provisions of the Directive. The application of these Community rules in the laws of the ten Member States which joined the EU in May 2004 (hereafter "A10 Member States") has improved considerably, at least as far as the letter of the law is concerned, and the process of transposing the Directive in those Member States appears to have clearly assisted this situation. However, given the relatively small number of EU citizens from other Member States employed and resident in the A10 Member States and the limited practice, particularly in terms of national court rulings, it is still too early to assess the real impact of Community free movement law in those countries.

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1 European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77; OJ 2004 L 229/35 (Corrigendum).

2 See http://ec.europa.eu/employment_social/free_movement/general_information_en.htm.

This chapter focuses on the principal concerns raised with regard to the application of the rules on entry, residence, departure and remedies. A separate section addresses the treatment of job-seekers, which the rapporteurs were requested to focus on specifically in drafting their reports. While discussing these five areas, the chapter also refers to a number of the concerns identified with the transposition of the Directive where the rapporteurs are of the view that national implementation has not been wholly true to the letter of Community law. In this regard, it is notable that some Member States, through transposition, have taken the opportunity, on the whole, to improve their application of Community free movement law (e.g. *Netherlands*) while others have generally used it to reduce the extent of previously more favourable rules (e.g. *United Kingdom*). In some Member States, there have been both improvements and an element of retrogression in this respect.

Entry

As observed in the 2005 Report, the application in Member States of the rules relating to the entry of EU citizens and EEA nationals is generally uncontroversial and all Member States permit the entry of EU citizens or EEA nationals on the basis of a travel document or national identity card. The less clear questions relate to the other documentation that would be permissible to prove identity and nationality in the absence of these documents, or in the absence of the required visa in the case of third-country national family members (Article 5(4) of the Directive), and the continuing difficulties surrounding the admission of family members and particularly third-country national family members of EU citizens in some Member States.

With regard to the first question, most reports point out that it is possible to enter without the requisite documents as stipulated in the Directive, although it is less clear what other documentation is permissible. In this regard, the report on the *Netherlands* refers to the judgement of the Judicial Division of the Council of State, which, in January 2006, decided the case of *Oulane* (C-215/03) confirming that a receipt of the Postbank with the number of a French identity card does not prove unequivocally Oulane's French nationality. The Court held further that the minister is under no obligation to investigate a person's identity and nationality on the presentation of a number of an identity card alone. While the Court of Justice judgment in *Oulane* (C-215/03) circumscribes the circumstances in which detention might be used for reasons of establishing the identity of an individual, the transposition of the Directive in *United Kingdom* law clearly anticipates detention in the absence of a valid document proving identity although no further details as to this issue are available. In *Finland*, the apparent former absolute requirement (at least on the face of the law) that EU citizens possess a passport or identity card on entry has now been tempered by the amended legislation transposing the Directive where it is stated that, exceptionally and for a weighty reason, it will be possible to take into account in the overall discretion the unreasonableness that would be caused by refusing entry to a EU citizen with the result that admission may be permitted if the EU citizen can confirm his or her identity in some other reliable manner than by identity documents.

As far as the second less clear question is concerned, the Court of Justice's decision in *MRAX* (C-459/99) and the related provision in the Directive (Article 5(4)), enabling a person married to an EU citizen but who does not possess a travel document or visa (if required) to be admitted provided s/he can prove her/his identity and marital status, appear to be implemented clearly in the legal provisions (as amended) and administrative practices of a number of Member States (e.g. *Czech Republic*, *Finland*, *Ireland*, *Spain*, *Sweden*). However, there continue to be both legal and practical obstacles in some Member States concerning the admission of family members, and particularly third-country national family members, of EU and EEA citizens. In *Finland*, proposed legislation in 2006 to implement the Directive, which was adopted in May 2007, relies on a restrictive interpretation of the Directive as only applying to such family members in the context of intra-Community movement and not migration from third countries. The legislation lays down the requirement that third-country national family members must have had previous legal residence in

another Member State (and which is not short-term in duration) as a condition for enjoying free movement rights in Finland. This restrictive approach relies in part on the statement of the Advocate-General in *Yunying Jia* (C-1/05) and the *Akrich* (C-109/01) judgment. Similarly, in the *United Kingdom* the transposition of the Directive has made it virtually impossible for third-country national children over the age of 18 who are dependent on their EU national parent and who are living in a third country to come to the UK to join the parent working in the UK. The UK Home Office contends that national law applies to third-country national family members seeking visas to come to the UK from third countries to join EU national principals in the UK. The same position is taken in respect of dependant relatives in the ascending line arriving from a third country. In *Belgium*, there is conflicting official information whether third-country national family members of EU citizens, who go on holiday to their home countries while their family reunification applications are pending, are required to pay a fee for the visa (contrary to the *MRAX* (C-459/99) judgment) on their return to Belgium. The rapporteurs for the *United Kingdom* observe, as in the 2005 Report, that EEA nationals are generally not questioned on entry into the country, although their third-country family members are routinely asked whether they are still married to an EEA national or if their spouse continues to reside in the UK.

In *France*, the law transposing the Directive is silent on the question of the broader definition of family members found in Article 2(2)(b), which includes "the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State". The rapporteurs observe that such "partnerships" are not treated as "equivalent to marriage" in France and note further that a parliamentary amendment to this effect was rejected on the basis that it would have given more rights to EU nationals exercising free movement than to French citizens.

In some Member States, the grounds upon which entry may be refused to EU citizens appear to go beyond the scope of the public policy, public security and public health exceptions stipulated in Community law even in the light of the transposition of the Directive. For example, as noted in the 2005 Report, this seems still to be the position in the *Czech Republic* where entry can be refused on the ground of obstructing the exercise of court decisions – it is unclear what this relates to precisely. The Aliens Act in *Slovenia*, as amended to transpose the Directive, continues to allow for refusal of entry on the basis of 'international relations', which appears therefore to apply incorrectly to EU citizens one of the grounds for refusal of entry in the EU Borders Code applicable only to third-country nationals at the external border. In *Slovakia*, entry may be denied to an EEA citizen and his or her family member if they are deemed to be undesirable persons, a condition which is listed separately to refusal of entry on the basis of a reasonable suspicion that the person concerned will endanger public security, public order or public health. An "undesirable person" is defined in the legislation as a foreigner, who was expelled administratively or on whom a punishment of expulsion was imposed in criminal proceedings, which is problematic if the EU citizen was expelled in the past for reasons which would have been contrary to Community law. In *Italy*, the consolidated decree on freedom of movement of persons (repealed as from April 2007 by the decree implementing Directive 2004/38/EC) stipulates that EU citizens enjoy the right to enter Italy except for limitations provided by criminal law on the grounds of public policy, public security or public health, although the meaning of 'limitations provided by criminal law' is unclear. In *Latvia*, as noted in the 2005 Report, there is still some doubt whether foreigners, including EU citizens, have to produce evidence of valid health insurance at the border for the duration of their stay, although, according to the interpretation provided by the Office of Citizenship and Migration Department, possession of such insurance on the border is not obligatory.

Residence

With the transposition of the Directive, residence permits are no longer required of EU nationals in most Member States, although a significant majority of the Member States implementing the Directive have exercised the option in Article 8(1) requiring EU citizens to register with the relevant authorities upon which a registration certificate is issued (*Austria*, *Belgium*, *Cyprus*, *Denmark*, *Estonia*, *Finland*, *Germany*, *Italy*, *Latvia*, *Lithuania*, *Netherlands*, *Poland*, *Portugal*, *Slovenia*, *Sweden*). In the *Czech Republic*, *France*, *Ireland*, *Slovakia*, *Spain* and the *United Kingdom*, registration is not obligatory and EU citizens are not required to hold a registration certificate, although this documentation will be issued to them if they elect to apply for it. As noted in the 2005 Report, the possession of such documentation is still important for practical reasons, because it provides proof of the Community right of residence and enables, for example, a third-country national spouse to obtain a residence card, or obtain a visa to travel to a third-country, or to participate in elections. In *Slovakia*, the residence of EEA nationals for more than 3 months is deemed as a "first residence permit" if the purpose of that residence satisfies the criteria in the Directive which are also listed in the implementing legislation. However, the amended aliens legislation in *Hungary* still refers to a "EEA residence permit" and it is unclear whether this is equivalent to "registration" in the Directive or involves more onerous administrative formalities, while in *Greece* a residence permit was still issued in 2006 because of non-transposition of the Directive.

As noted in the introductory section above, a number of Member States have transposed the Directive restrictively to the extent that it is likely to amount to an incorrect transposition or have used the occasion of the transposition of the Directive to narrow previously more liberal national rules.

In *Ireland*, the right of residence for up to three months in the implementing regulations is subject to the condition not provided for in the Directive that the person concerned "does not become an unreasonable burden on the social welfare system of the State". This is contrary to Article 6(1), which stipulates unequivocally that this right of residence is to be afforded "without any conditions or any formalities other than the requirement to hold a valid identity card or passport". In *Italy*, the right of residence for up to three months has been made conditional upon the requirement to hold an identity card authorizing the holder to travel, which is not in conformity with the Directive or Court of Justice case law – *Giagounidis* (C-376/89). In *Lithuania*, requirements for issuing the residence permit (still referred to in this manner as opposed to a residence certificate), such as proof of accommodation for the period of the permit's validity in addition to sufficient resources which also have to be proved and are defined in terms of one month's minimum salary, are contrary to Articles 7 and 8 of the Directive. In *Slovakia*, if the EU citizen or EEA national is temporarily unable to work as an employed person as the result of a non occupational related illness or accident, s/he loses his or her residence status (for residence longer than 3 months) which is contrary to Article 7(3)(a) of the Directive. Furthermore, regarding the right of permanent residence and the exceptions in Article 17 of the Directive referring to those circumstances where EU citizens can acquire this right before the five-year period of continuous residence has elapsed, the rapporteur points to a discrepancy between the condition of the shorter period of residence in the Directive and the implementing legislation which places emphasis on the "continuity" of residence rather than its length. Under the regulations transposing the Directive in the *United Kingdom*, residence cards and EEA family permits can be revoked, including by Immigration Officers at the border. This regime appears to constitute discrimination between EU citizen family members and third-country national family members as the latter group of persons are more likely to be subject to inspection on each entry at the border to determine whether the conditions of their residence in the UK are still valid. Moreover, the UK rapporteurs point out that the implementation of the right of permanent residence in the Directive is flawed because this right under the implementing regulations is interpreted as prior continuous residence for five years in the UK *as a EU citizen*, which

impacts adversely on new EU citizens whose countries acceded to the EU in May 2004 and January 2007.

The scope of national rules has been narrowed in *Finland* and *Lithuania*, where the amended aliens legislation now provides that the right to permanent residence in all cases is to be acquired after 5 years rather than 4 years, which was the rule before the introduction of the amendments. In *Germany*, the Administrative Appeal Court of Baden-Württemberg has interpreted the right of permanent residence in Article 16 of the Directive as applying only in those cases where the EU citizen has been continuously and lawfully resident for five years in Germany at the time of the entry into force of the earlier 2005 Freedom of Movement Act (which had already incorporated some of the Directive's provisions). However, transposition of the Directive has also resulted in the adoption of more favourable national rules. For example, in *Italy*, with reference to Article 7(2)(c) of the Directive, a EU citizen who becomes involuntarily unemployed under the conditions specified retains his or her status as a worker for one year rather than the minimum six months stipulated in the provision.

As observed in the 2005 Report, the full application of EU free movement law with regard to registration of residence is hampered by a number of bureaucratic administrative hurdles. In *Finland*, the registration process continues to take up to three months in certain police districts (e.g. Helsinki), which is explained by the rather large number of registrations compared with the small number of staff responsible for handling them. The same problem was identified in the Finnish 2005 report, which raises the question why more resources have not been put into place to process applications. In *Malta* (where the Directive remains to be transposed), as observed also in the 2005 Report, in order to work in the country, the EU national has to obtain an employment licence, at the cost of 60 EUR for one year and 180 EUR for an indefinite period, which is issued within a period of 10 days, in addition to obtaining a residence permit, although s/he can begin to work before the residence formalities have been completed. In the *United Kingdom*, according to the rapporteurs, there continues to be clear discrimination against EEA nationals and their family members because they cannot use an authorized representative to submit an application for a residence certificate on their behalf to the Home Office's Public Enquiry Office. Moreover, while the administrative instructions stipulate that such certificates should be issued "immediately" on application, in practice it can take up to two months for residence certificates to be issued particularly where non-EEA family member applicants are involved.

In addition to bureaucratic administrative hurdles, some legal provisions in Member States concerning the issue or non-issue of residence permits appear to conflict with Community law. For example, in the *Czech Republic*, a temporary residence certificate can be refused to a EU citizen if *inter alia* he or she is a "undesirable person", which according to the Aliens Act is defined as someone who is a risk to state security, public order or public health or endangers the rights and freedoms of others or similar interests protected by an international treaty. The scope of these provisions is undefined and it is unclear whether they are in conformity with the Community rule that entry, residence and expulsion can only be restricted if the person concerned constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In *Hungary*, as observed also in the 2005 Report, the conditions for rejecting the application for or withdrawing the residence permit on account of the EEA national suffering legally defined diseases endangering public health occurring within 3 months of his or her arrival is not in conformity with Article 29 of the Directive especially as HIV Aids is included in the national list of diseases endangering public health.

Treatment of Job-Seekers

In some Member States, there are explicit rules on job-seekers from other Member States, whereas in others it can be implied from the rules that such persons enjoy the right of residence. In a few Member States, however, little has been done to address their particular situation, even in those where primary or secondary national legislation has been amended to transpose the provisions of the Directive, which includes Article 14(4)(b) providing that

"Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged".

In *Denmark*, EU citizens can reside for up to 6 months without a residence certificate if they are seeking work, although they have to sustain themselves within this period. They can also stay longer than 6 months if they are able to demonstrate that they are still looking for work and that they have actual chances of finding employment. The report of the *Czech Republic* observes that EU citizens and their family members are treated on equal terms with Czech citizens in employment matters, such as access to employment and access to public employment services, including registration to seek work. Consequently, EU citizens and their family members may register as job-seekers at the local employment office, which will then try to find work for them by offering relevant jobs, etc. Job-seekers are entitled to unemployment benefits, although they are also under an obligation to cooperate with the employment office (to come for interviews, etc.) as otherwise they may be excluded from the register of job-seekers. In *Hungary*, the amended aliens legislation makes provision for the residence of EU citizens who are documented job-seekers if they have a well-founded chance of finding employment within a six-month period. In *Italy*, the decree transposing the Directive stipulates expressly that EU job-seekers cannot be expelled provided they are able to demonstrate that they are registered with an employment centre for a period of not less than 6 months or have made themselves available for work. In *Latvia*, the regulations implementing the Directive provide that EU citizens are not required to register their residence if they have a valid travel document and are residing in Latvia for up to six months as a job-seeker. However, as observed in the 2005 Report, it is unclear whether there is any possibility of extending residence beyond six months even though the EU citizen in question is able to provide evidence that s/he is continuing to seek employment and has a genuine chance of obtaining it. In *Malta*, the stay of EU citizens can be extended for up to six months, without the need to apply for a residence permit (as noted in the introductory section the Directive has still not been transposed) where they can demonstrate that they are genuinely seeking employment and have real prospects of securing a job within that six-month period. In the *Netherlands*, the amendments to the Aliens Decree include explicitly as EU workers persons who are looking for employment and have a genuine chance of finding it. The report on *Poland* observes that job-seekers from EU Member States, EEA countries and Switzerland are treated on equal terms with Polish nationals, which is guaranteed by the legislation on promotion of employment and the institutions of the labour market. In *Portugal*, the 2006 law transposing the Directive stipulates that an expulsion measure cannot be adopted against EU citizens if *inter alia* they entered Portugal to seek employment and can provide evidence that they are continuing to look for work. In *Spain*, the rapporteurs find that there is an apparent absence of direct or indirect discrimination with regard to the treatment of EU citizens and members of their families who are job-seekers (e.g. regarding the assistance provided by employment offices and work placement agencies as well as access to unemployment benefits subject to their registration as job-seekers) and refer to the provisions of the 1996 Resolution on the registration of foreigners in the offices of the National Employment Institute (INE). The Aliens Act (as amended) in *Sweden* refers to the categories of EU citizens with the right of residence, which include job-seekers having a real chance of obtaining a job. According to the rapporteur, the key issue in future practice will concern how a job-seeker is defined, particularly the question how the chance of obtaining a job is determined. Finally, in the *United Kingdom*, the three-month residence period is extended indefinitely under the regulations transposing the Directive so long as the person in question remains a "qualified person" or a family member, who *inter alia* include job-seekers.

In *Ireland*, however, the regulations giving effect to the Directive contain no specific provisions on the residence of EU job-seekers, although by implication such persons enjoy the right of residence for more than six months given that there is a provision in the regulations which precludes the grant of social welfare assistance *inter alia* to a EU citizen who entered Ireland "for the purpose of seeking employment, for such period exceeding 3 months, during which he or she is continuing to seek employment and has a genuine chance

of being engaged". Similarly, in *Slovakia*, while the 2006 law contains no special provisions regarding the treatment of job-seekers a clause provides that if there is an assumption that an EEA national will be employed his or her residence in the country is considered as a first residence permit. The report on *Slovenia* does not discuss job-seekers explicitly, although it notes that one of the conditions for issuing a registration certificate to a EU citizen is if s/he *wishes* to be employed or to be self-employed.

As referred to in the 2005 Report, the legislation transposing the Directive in *Lithuania* has deleted the provision in the earlier law allowing EU workers or job-seekers to extend their stay in the country beyond the three-month period without the need to meet formal procedures, which casts doubt on the proper application of Article 14(4)(b) of the Directive and the Court of Justice's judgment in *Antonissen* (C-292/89). Previously, job-seekers were not required to register their residence for up to six months. In *Estonia*, no special rules have been foreseen for job-seekers who are coming from another Member State, while in *Luxembourg* the treatment of job-seekers is under review in the light of the Directive. But the rapporteur points out that there is *de facto* discrimination in Luxembourg between resident unemployed persons and those EU citizens who come from neighbouring countries (Belgium, France and Germany) to look for work in Luxembourg as frontier workers. A 2006 survey on EU workers in *Cyprus* also found that EU job-seekers in that country face a number of serious obstacles (i.e. discrimination, racism and social isolation), although there are no specific provisions to address this situation.

Departure

The new "sliding scale" rules relating to the expulsion of EU citizens in the Directive in Articles 28(2) and (3) have by and large been implemented faithfully in those Member States which have already transposed the measure. However, it is interesting to note that the former rules in *Germany* determining the loss of the right of EU citizens to permanent residence on "particularly serious grounds" have been replaced with "serious grounds", which copies the terms in the EU Citizens Directive (Article 28(2)) but which nonetheless appears to constitute the introduction of a slightly less favourable provision. The amendments also define "imperative reasons of public security", which constitute the only permissible grounds of expulsion in respect of EU citizens who have resided in the country for the previous ten years (Article 28(3)(a)), and which are proven *inter alia* if the EU citizen has been sentenced as a result of one or more intentional criminal offences by a final judicial decision to a term of imprisonment of at least five years. This appears to be rather a generous interpretation of a provision that is supposed to be very restrictive in its scope.[3] In *Ireland*, the regulations transposing the Directive appear generally to conform to Community law requirements in relation to departure, including the possibility of expelling minors in accordance with Article 28(3)(b) of the Directive where this is in the best interests of the child, although there is no express reference to the 1989 UN Convention on the Rights of the Child as provided for in that provision. In the *Netherlands*, Article 28(1) of the Directive according to which Member States are required to take account of a number of individual considerations before making an expulsion decision on the grounds of public policy or public security has not been transposed in the Aliens Decree with the result that the vaguer general administrative law rules relating to the weighting of interests are applied.

As observed in the 2005 Report, there still appear to be problems in some Member States where authorities wish to expel EU citizens after they have served their criminal sentences without examining the personal conduct of the individual concerned to determine whether s/he constitutes an actual and serious threat to the fundamental interests of society (public order and public security). In the *United Kingdom*, the rapporteurs continue to express concerns over the Home Office's interpretation of the Court of Justice judgment in *Bouchereau* (C-30/77) and the rather prescriptive approach taken to the definition of seri-

3 The German report also refers to a May 2006 decision of the Administrative Court of Düsseldorf, which considers Article 28(3) as directly applicable and finds that the provision only requires permanent residence of 10 years and not permanent lawful residence.

ous offences (i.e. by reference to periods of custodial sentences). This approach lists a number of offences which would justify deportation of EEA nationals without the need to show that the personal conduct of the person concerned constitutes a new and serious prejudice to the requirements of public policy as evidence of the propensity to offend. Furthermore, in May 2006, changes to the UK Immigration Rules creates a presumption that EEA citizens who have been sentenced to terms of imprisonment of 24 months or more should be considered for deportation, with the result that numerous EEA nationals were made the subject of decisions to deport following convictions for relatively minor offences and without regard to their personal conduct. However, given the number of successful appeals by EEA nationals, the Home Secretary announced that this presumption in favour of the deportation of EEA nationals cannot be operated effectively, a position underscored subsequently by a parliamentary committee on human rights. In *Hungary*, as noted also in the 2005 Report, expulsion of an EEA permit holder will be ordered if s/he has not left the territory voluntarily and *inter alia* on his/her release from imprisonment for an intentionally committed offence. In *Spain*, the report refers to an interesting judgment of the Contentious Administrative Court of November 2006, which ruled that a non-national arrested in Spain and convicted for a criminal offence punishable by imprisonment for more than one year could not be subject to non-Community rules (i.e. expulsion and prohibition of entry to the Schengen area for 10 years) because the person was the daughter of a EU citizen resident in France.

More generally, there is little or no indication in the national implementation of Community rules in some Member States of what is actually meant by public policy and public security. For example, in *Lithuania*, there are still no special provisions in the aliens legislation regarding the departure of EU citizens and therefore this lack of specific rules makes them vulnerable to expulsion on broader grounds than those stipulated in the Directive. Similarly, no specific rules exist on the detention of EU citizens. While there were no court cases on the departure/expulsion of EU citizens submitted or decided in 2006, application of the broad aliens legislation to EU citizens would clearly be contrary to Community law. However, one positive amendment that has been introduced is to extend the period of the EU citizen's time limit for departure from the territory from 15 days to one month in accordance with Article 30(3) of the Directive. In *Slovakia*, there are no specific provisions in the amending legislation transposing the Directive on the meaning of public order and public security nor guidance as to the criteria that should be taken into account when deciding to expel EU citizens (see Article 28(1) of the Directive). In this regard, the position is essentially the same as that discussed in the 2005 Report in that the provisions continue to be ambiguous leaving considerable room for police discretion. Similarly, the report on *Slovenia* observes that given the lack of national case law in this area it is not possible to confirm or deny that the "public order" ground is applied in the strict Community sense. However, the grounds upon which entry or a residence certificate may be refused to EU citizens appear to go strictly beyond Community criteria, referring to the person posing a threat to *inter alia* "international relations" of the country or if s/he is suspected of the "performance of other criminal activity" bearing in mind with regard to the latter that the commission of criminal offences alone cannot justify expulsion of EU citizens in Community law.

As noted in previous Reports, the courts in a number of Member States have confirmed that EU nationals cannot be given the option of expulsion in lieu of serving a term imprisonment (where this possibility exists for foreign offenders under national law) because this would not conform to Community law (see the report on *Italy* referring to a Supreme Court judgment in 2004), or cannot receive an additional penalty of expulsion except in connection with public order or public security grounds (see the report on *Portugal* referring to a Supreme Court judgment in 1991). The former position has now also been confirmed in *Spain* by way of a November 2006 Memorandum of the Director of Public Prosecutions, which stipulates that the substitution of imprisonment by expulsion cannot be applied to a EU citizen, and moreover it would not be possible to implement this in practice because of the abolition of internal borders in those Member States participating in the Schengen arrangements.

Remedies

The reports refer to a number of miscellaneous issues with regard to remedies that relate to the possibility of appeal against refusal of entry decisions based on public security grounds, the suspensive effect of expulsion orders, and the transposition or otherwise of the provisions on remedies in Directive 2004/38/EC.

As noted in the 2005 Report, while the law in *Latvia* was amended in June 2005, in response to a Supreme Court judgment in December 2004, providing for the possibility of appealing the Interior Minister's decision to include a foreigner on the "blacklist" (also applied to EEA nationals) to the Senate of the Supreme Court, amendments to the Immigration Law, adopted in January 2006, stipulate that refusal decisions, taken on the basis of information provided by national security institutions and acquired as a result of intelligence or counterintelligence activities (and if confirmed by the Public Prosecutor General), are not subject to appeal proceedings. This is not in conformity with the procedural safeguards Article 31 of the Directive.

In *Slovakia*, the amending legislation transposing the Directive has reduced the scope of the protection of previous national provisions concerning the suspensive effect of expulsion decisions. This would appear to be contrary to the Directive which stipulates in Article 31(2) that an application for an interim order to suspend enforcement of the decision suspends removal from the territory until the decision on the interim order has been taken with the exception of certain defined situations (including *inter alia* where the expulsion decision is based on imperative grounds of public security under Article 28(3)). The new provisions stipulate that appeals against expulsion decisions do not have suspensive effect, whereas previously only in those cases where the reason for expulsion related to unlawful entry or residence was there no suspensive effect.

In *Austria*, in 2006, continuing a story described in the 2005 Report, both Supreme Courts (i.e. the Constitutional Court and the Administrative Court) have now interpreted the rules implementing the Court of Justice's judgment in *Dörr and Ünal* (C-136/03), which calls for a remedy with suspensive effect under Article 9 of Directive 64/221/EEC (since repealed by Directive 2004/48/EC), as applying to Turkish workers. Consequently, some pending cases were withdrawn from the Administrative Court but there are conflicting judicial decisions regarding whether the national provisions are applicable to third-country national family members of Austrians who have not exercised their free movement rights.

CHAPTER II. ACCESS TO EMPLOYMENT

1. Equal treatment in access to employment

Most national reports give a short overview of the general provisions in their country prohibiting discrimination in the field of employment between EU citizens and own citizens. There is no formal discrimination in access to employment, although language requirements are permitted for specific jobs. In most countries more specific provisions deal with the entitlement to public employment services, including assistance of employment agencies. These provisions make no distinction between EU citizens and citizens of the Member State. Generally, there are four other mechanisms that in practice may work as a barrier for employment of an EU migrant getting access: (1) the recruitment procedures, (2) the security checks for jobs with private employers designated as security functions, (3) language requirements, and (4) the recognition of foreign diplomas.

In *Poland* in 2006 the transitional periods in the field of "access to employment" remained in force, but the rules adopted in 2001 and 2004 required some amendments. Three new regulations were adopted on 21 July 2006. The most important was the regulation on the scope of restrictions on the undertaking of work by foreigners within the territory of Poland, based on reciprocity. These restrictions referred to nationals of: Austria, Belgium, Denmark, France, Luxemburg, the Netherlands, Germany, Italy and also Switzerland, Liechtenstein and Norway. The "life" of this Regulation was very short. On 17 January 2007 a new Regulation4 in this field was adopted annulling all restrictions regarding EU citizens. In 2006 there was no change in reciprocity and the 12 months rule on employment of EEA nationals in Hungary. It means that *restrictive* implementation of labour authorisation regarding nationals of Member States that apply the transitional regime to Hungarian workers has also remained. Hungarian legal norms on access to employment intended to implement the Accession Treaty.

In *Austria*, the Equal Treatment Act has a specific provision on non-discrimination in the field of employment. But exceptions are stipulated. According to ECJ judgments (C-281/98 and 379/87), the knowledge of the local language could be a permissible requirement if this knowledge is required by the specific job**.** The Austrian Act on the State's employment agencies has no specific provision regarding non-discrimination

The *Cyprus* report mentions that the three-month period within which an EU worker has to apply for a residence permit in this country in practice can lead to exploitation (especially seasonal ones) by the employer including not being paid and being dismissed.

According to the *Employment Act*[5] of the *Czech Republic* the citizens of other Member States and their family members have an equal position with the Czech citizens in the field of employment (i.e. access to employment, access to the public employment services including registration in order to seek work etc.)

In *Denmark* EU citizens can register with employment agencies ('job centre'[6]), make use of these facilities and receive guidance on the conditions in Denmark.[7]

In *Hungary*, EU citizens are entitled to use job-seeker assistance services by the employment agencies regardless the fact whether they are required to hold a work permit or not.

Nationals of other Member States enjoy in *Ireland* equal treatment in relation to access to employment as a matter of law. This has been clarified in 2006 by amended Regulation,[8]

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4 Journal of Laws [Dziennik Ustaw] 2007, no 7, item.54.

5 Zákon č. 435/2004 Sb., o zaměstnanosti (Act No. 435/2004 Coll., Employment Act, as amended), available at http://portal.gov.cz/wps/portal/_s.155/701?number1=435%2F2004&number2=&name=&text= (Czech language only).

6 Act No. 522 of 24 June 2005 on Responsibility for and Regulation of the Active Employment Initiative; cf. Act No. 685 of 29 June 2005 on Active Employment Initiative, and later amendments.

7 www.ams.dk/jobcenterguide/Tre_typer_jobcentre/eures.asp and www.workindenmark.dk.

8 Regulation 18(1)(a) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

which provides that nationals of other Member States and qualifying family members "shall be entitled ... to seek and enter employment in the State in the like manner and to the like extent in all respects as Irish citizens". This includes full access to the services provided by FÁS as the National Training and Employment Authority.[9]

Concerning assistance by employment agencies, the *Lithuanian* report emphasizes the active role of the EURES network in facilitating the implementation of free movement of persons in Lithuania and outside it.

In *Luxembourg* in 2006 legislation was introduced abolishing the need of a work permit for spouses (being themselves EU citizen or a third country national) of workers of European Union citizens. This legislation covers also the situation of a Luxembourg citizen married to a third-country national, thus putting an end to reverse discrimination.

The *Belgian* report raises the question on the conformity of the registration system of temporary and posted workers with the *Commission v. Germany* judgment of 19 January 2006 (the so-called *Van der Elst* visa). It seems that the Belgian system of registration is not incompatible with this case law as the registration is neither a condition for visa delivery nor a condition for posted workers to enter on the Belgian territory. It is not a control *ex ante*, but *ex post*. This problem is also raised in the *UK* report regarding the provision of services. See chapter XI.

In *France* the Tourism Code has been changed in 2006, opening up professions as director of a tourist office for EU citizens and regulating the recognition of diplomas or qualification for guides coming form other Member States.

2. Language requirement

In the majority of the Member States (*Austria, Belgium, Denmark, Finland Greece, Ireland, Malta, The Netherlands, Slovenia, Sweden, UK*) there are no formal language requirements for employment in the private sector (unlike the situation in the public sector, see Chapter IV). However, employers in the private sector are usually free to set up language requirements if necessary and as long as these requirements do not interfere with anti-discrimination law. The starting point for judging the legitimacy of language requirements is what qualifications are needed for the performance of the work concerned.

A survey of EU workers in *Cyprus* carried out in 2006 by the Research Center of Cyprus College for EURES for instance reported that companies are wary of recruiting staff from other EU Member States because of the language problems.

Knowledge of the *Czech* language is required to the extent that it is necessary for the pursuit of various regulated professions (doctors, dentists, pharmacists and paramedical personnel).

In practice it is rather common in *Finland* to require that to get a job in the private sector the person concerned has to command either Finnish or Swedish.

Language requirements can be found in *Hungarian* law in two aspects. First, in the laws regarding recognition of foreign diplomas, and second, in the acts dealing with the legal status of civil servants and public officials (see in Chapter IV.).

In *Ireland* as far as the private sector is concerned, there is no general legislative requirement that English and/or Irish be spoken. However, in practice, employers throughout Ireland are likely to require the linguistic competency that is necessary for the position to be filled and, in certain areas, notably the *Gaeltacht* (Irish-speaking localities) Irish is more likely to be required. There are also special provisions for the legal profession, nurses and pharmacists

In *Italy* the recognition of a primary and secondary school teacher diploma is conditional upon the proof of knowledge of the Italian language.

The language requirements in *Latvia* are complicated and in certain cases disproportionate. The employer bears all responsibility for the fulfilment of requirements of the Latvian language by the employee. In case of insufficient knowledge of Latvian or non-use of Latvian in professions and posts where it is obligatory, the employer can be punished with

9 See, generally, www.fas.ie.

an administrative fine. After the elections in October 2006 the new Minister of Justice stated that strengthening of Latvian language as well as stricter requirements for naturalization would be among his priorities.

In *Lithuania* language proficiency, divided in three categories, is still applied in certain spheres of the private sector, including the maritime sector, with specific exceptions made in the past for certain professions (e.g. advocates, doctors).

In *Malta*, generally speaking, most jobs would require candidates to have a good command of the Maltese and English languages, these being both official languages in Malta

In *Poland*, EU nationals who intend to work in any regulated profession should submit a declaration on their language capability, but do not need to pass an exam.

In *Slovakia* there are no language requirements for access to employment in the private sector in general, but providers of health care are required to know special terminology in Slovak language to the extent necessary for the execution of a medical profession.

The official language of the *United Kingdom* is English and the ability to speak and write it is an important requirement for jobseekers. Welsh is also spoken in parts of Wales and some jobs require you to be able to speak this as well as English.

3. Recognition of diplomas

In most of the reports there is an overview of the regulation which implements the relevant general and sectoral Directives on recognition and describes the procedures to get the necessary recognition. Sometimes it is difficult to make a strict separation between the requirements regarding the private and the public sector, which is dealt with in Chapter IV. Several reports *(Cyprus, France, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, and Spain*) focus in some detail on the implementation of the rules relating to medical doctors, nurses, dentists, veterinarians, lawyers and architects.

In *Austria* there are no specific rules on the recognition of diplomas in the private sector. By addressing both the Sectoral as well as the General System, *Cyprus* has facilitated labour mobility. However, the survey of EU workers in Cyprus carried out in 2006 by the Research Center of Cyprus College for EURES found that the qualifications of EU citizens wishing to work are not recognized and are used as possible grounds for discrimination against them.

The statistics on the administration of the rules on *Access to Take up Certain Jobs in Denmark*[10] show that there are quite few negative decisions on applications to be allowed to take up employment according to the national rules implementing the Directives on recognition of exams and professional qualifications (5 % in September 2005 - August 2006).[11]

The *Czech Republic* has a large number of regulated professions (approx. 480).[12] A problem with national measures implementing Directives 78/686/EEC and 93/16/EEC on the mutual recognition of the diplomas of practitioners of dentistry and doctors occurs in Czech Republic. The problem relates to provisions of laws stipulating that doctors and dentists from other EU Member States working in the Czech Republic for a short period of time need to register with the Czech medical chamber while under EU legislation they only need certificates from their home countries. The European Commission has brought an action against Czech Republic before the European Court of Justice in 2006 (see Case C-203/06). Czech members of Parliament proposed a change of the legislation, but a veto was placed on the draft by the president. The new Parliament will discuss a new draft in 2007.

The *Greek* report mentions the problem of not recognizing diplomas granted by foreign universities collaborating with private institutes operating under licence on a franchise basis in Greece. An infringement procedure against Greece is pending before the ECJ regarding not recognizing certain optical diplomas issued by an Italian educational establishment on

10 Act No. 476 of 9 June 2004.

11 http://www.ciriusonline.dk/Default.aspx?ID=3770, see "Beretning for 2006 om vurdering og anerkendelse af udenlandske uddannelseskvalifikationer" pp. 26-29 and p. 4.

12 The list of regulated professions is available at http://uok.msmt.cz/ru_list.php.

the basis of a franchise agreement concluded with a Greek educational establishment (Case C-84/07).

The *Irish* Department of Education and Science has recently published an updated list of contacts for all professions which deal with recognition of diploma's, with information on the designated competent authorities.[13]

The *Italian* report mentions several court cases of nationals of 'new' Members States against the refusal to recognize a diploma. In one case a Polish citizen challenged the refusal of recognition of her Polish qualifications as a nurse responsible for general care. The judge dismissed the claim. It held that the accession of Poland to the European Union did not have the effect of transforming a Polish diploma into one admitted to recognition according to Directive no. 77/452. The report also refers to the request for a preliminary ruling to the ECJ (C-311/06, *Consiglio Nazionale degli Ingegneri v Ministero della Giustizia, Marco Cavallera*) on the recognition of a Spanish diploma of an Italian engineer, which was challenged by the National Council of Engineers.

In *Latvia* the *Law on Regulated Professions and Recognition of Professional Qualifications*,[14] which provides for general guidelines for recognition of diplomas and qualifications, was amended on 2 November 2006.[15] The list of regulated professions was updated.[16]

In *Lithuania*, a number of new legal acts were adopted during 2006 in this field and the adoption of new legislation in the field of recognition of professional qualifications was the most dynamic of all sectors analysed in the Lithuanian report during the year. It shows a significant and constant attention devoted to this area by the Lithuanian authorities.

In *Luxembourg* a new regulation[17] adopted in 2006 allows an easier recognition of diplomas for countries that have not ratified the Council of Europe Convention of 11 December 1953, signed in Paris and the Council of Europe Convention of Lisbon signed on 11 April 1997.

In 2006, the *Malta* Qualifications Recognition Information Centre received a total of 856 requests for the recognition of academic qualifications, of which 761 were from Member State nationals. 710 were from Maltese citizens.

In *Slovenia* the relevant rules provide procedures of i) recognition with a view to access to education in the Republic of Slovenia and ii) recognition with a view to access to employment in the Republic of Slovenia. The system of mutual recognition of qualifications within EU Member States applies to the nationals of EU Member States and also to the nationals of third countries who have obtained their qualifications in the territory of the EU and who wish to pursue in Slovenia a certain regulated profession or professional activity either in a status of employee or self-employed person.

In *Spain* new regulation came into force in 2006 regarding the conditions for approval and validation of foreign higher education certificates. In some cases the recognition procedure can require the passing of an aptitude test or a period of training, which could be incompatible with Community law according to the Spanish rapporteurs.

In *Sweden* in 2006 another four professions were regulated in accordance with the Riksdag's approval of a Government proposition on demands on certification concerning the following professions: audionom (*audionom*), biomedical analysts (*biomedicinsk analytiker*), dietitian (*dietist*) and orthopaedist engineer (*ortopedingenjör*).[18] Further, the fol-

13 See http://www.education.ie/home/home.jsp?maincat=17216&pcategory=17216&ecategory=28970&sectionpage=12251&language=EN&link=link001&page=1&doc=26573 .

14 OG No. 105 06.07.2001.

15 OG No. 183 15.11.2006.

16 This list is available at : http://www.aic.lv/rec.

17 *Règlement grand-ducal du 27 octobre 2006* pris en exécution de l'article 4 de la loi modifiée du 18 juin 1969 sur l'enseignement supérieur et l'homologation des titres et grades étrangers d'enseignement *supérieur*. http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=11&SID=aa940b9aa5362d7e92a436ebb385eaad

18 Government's proposition 2005/06:43 Legitimation och skyddad yrkestitel. See Lag om 1998:531 ch. 3 § 2, amended in 2006 through SFS 2006:50.

lowing occupational groups – where there already were demands on certification – got their professional titles protected in 2006: optician, chiropractor and *naprapath*.[19]

There are virtually no *British* cases on the mutual recognition issue which tends to suggest that the practical application of the law has not proved too contentious. There is also very little academic literature on the subject

According to the *German* report a candidate from another EU Member State has for the first time successfully passed the examination for accession to the legal traineeship programme (*Rechtsreferendariat*).[20] The individual examination for Union citizens is admissible since March 2006 on the basis of a recommendation of the ministers of justice of the Länder. By establishing a uniform type of individual examination the Länder transpose the judgement of the ECJ of March 2003 in the *Morgenbesser* judgment.[21] But there still remain difficulties to find out whether a legal diploma of another EU Member State can be considered as equivalent and to what extent compensatory knowledge of the German law must be proven in the examination.

Another controversial issue in *Germany* is the recognition of diplomas issued by public and private universities in other EU Member States often based on a distant learning programme. According to a judgement of the Bavarian Administrative Appeal Court the German authorities are not entitled to challenge the correctness of acquisition of academic degrees by recognised universities registered in another EU Member State. In all recent laws of the Länder there is a clause that the recognition can be refused if the foreign institution is not entitled to grant an academic degree according to the domestic law of the respective country. There is also generally a provision that degrees which may be acquired through payment must not be recognised.

New 2006 *French* legislation regulates the conditions under which EU citizens can teach sport as a profession.

Initiatives to transpose Directive 2005/36/EC in 2006

Directive 2005/36/EC which will come into effect on 20 October 2007, will consolidate and modernise 15 existing Directives covering all recognition rules, except for those applicable to lawyers, activities in the field of toxic substances and commercial agents. This is the first comprehensive modernisation of the EU system of recognition of diplomas since its introduction over 40 years ago. No initiatives have been taken in 2006 to transpose Directive 2005/36/EC in *Austria, Germany, Greece, Hungary, Latvia, Luxembourg, the Netherlands, Malta, Portugal, Slovakia, the UK* and *Spain* (although in Spain in some court decisions reference was already made to this Directive). The German report mentions as a complicating factor that the transposition of Directive 2005/36/EC is within the competence of the federation as well as in the competence of the16 Länder depending on the specific subject.

In *Belgium* the government decided in 2006 that a "mixed" method of transposition will implement this Directive. On the one hand, a "horizontal" transposition will be used through a basic law and, on the other hand, a "vertical" transposition will be used as soon as concerned authorities will be entitled to adopt enforcement measures of execution for regulated professions for which they are competent.

In the *Czech Republic* there was no draft law containing provisions on transposition of the Directive 2005/36/EC presented to the Parliament in 2006. The works on it has started, but the draft is not yet available to the public.

In *Denmark* already parts of Directive 2005/36/EC have been transposed into Danish law. In *Ireland* new regulations on pharmacists, doctors, architects and safety in the construction branch have already transposed the relevant provisions of Directive 2005/36/EC. Also in *Sweden* already regulations concerning the recognition of foreign educations for occupational activities were amended with reference to Directive 2005/36/EC.

19 Government's proposition 2005/06:43.
20 *NJW Aktuell* 36/2006, p. XII.
21 Judgment of 13 November 2003, C 313/01, *EuZW* 2004, p. 61.

The *Italian* Parliament enabled the Government to issue a decree having the strength of ordinary law (i.e. a legislative decree) for the transposition of Directive no. 2005/36/EC by August 2007. In *Finland* the Ministry of Education has started the project of transposition of the provisions of the Directive 2005/36/EC. The Government Proposal shall be given to the Parliament by the end of 2007. No fundamental changes to the national system are expected on grounds of the Directive.

In *Lithuania* the process of drafting the Law on Recognition of Professional Qualifications, which will transpose the provisions of the new Directive 2005/36/EC, was not finalised during 2006. The draft law is already prepared, but has not yet been made public.

On 23 June 2006 in *Poland* the draft of the new Act on principles of recognition of professional qualifications obtained in the EU Member States, transposing 2005/36/EC was published. *French* legislation has entered into force in 2007 (see also chapter IV).

4. Specific issue: Nationality condition for captains of ships

According to the ECJ cases C-405/01 (*Colegio de Oficiales de la Marina Mercante Española vs Administratión del Estado*) and C-47/02 (*Albert Anker and others vs Bundersrepublik Deutschland*) a Member State may restrict the posts of master and chief mate of ships flying that Member State's flag to its nationals only if the rights under powers conferred by a public law on masters and chief mates are actually exercised on a regular basis and do not represent a very minor part of their activities. Not all countries have adapted their regulation to this case-law yet.

In *Austria, Cyprus, Ireland, Estonia, Latvia, Luxembourg, Malta, Poland, Slovenia, and the UK*, it is explicitly expressed that there are no relevant nationality requirements for captains and first officers of ships flying the flag of that country. In *Poland*, however there is specific regulation containing training programs and exam requirements for seafarers which is a barrier for non-Polish nationals. Also in *Germany* the certificate of a naval officer may be acquired by EU nationals provided that they fulfil certain training requirements. The access to posts in the maritime sector in *Portugal* is subject to an inscription. Such an inscription is also open to EU citizens, without excluding the posts of master, chief mate and master of vessels of merchant ships flying Portuguese flag.

In the *UK* there exists a temporal residence requirement. To become a captain one has to have lived in the UK for a year.

In 2006 the legislation in *Hungary* and in *Sweden* has been brought in line with the ECJ judgments mentioned above.

The maritime navigation act of *Slovakia* does not contain a requirement that captains has to be Slovak citizens, but there is one provision in this act that implies that Slovak citizens are preferred above other EEA citizens.

There is the requirement of Czech nationality for the captain of the ship flying the flag of the *Czech Republic*. The Greek rules also still restrict the posts of captains and first officers of all vessels to Greek nationals. There are no measures planned to change these rules. Citizens of the EEA Member States are exempted from the rule that requires captains of Dutch ships to have Dutch nationality, but this exemption does not apply to captains of fishing vessels. The implementing regulation of the Italian Navigation Code also still requires an Italian citizenship certificate in order to matriculate as seafarer.

In *Denmark* in October 2006 an Executive Order was issued,[22] exempting persons encompassed by the rules on free movement from the requirement on nationality, but captains of merchant ships must have a Danish recognition certificate. There is an exception to the exemption from the requirement on nationality: The Danish Maritime Authority in consultation with the organisations of the ship owners and the mariners can impose a demand in the crews contract for the ship in question that the captain must hold Danish citizenship when it is documented that rights under powers conferred by public law granted to the cap-

22 Executive Order No. 1010 of 9 October 2006 on exempting captains of merchant ships and fishery vessels from the nationality conditions in the Act on Ships' Crew (Access for captains from EU and EEA), entering into force on 18 October 2006.

tain of a passenger ship or a ship transporting troops, military materiel or nuclear waste are in fact exercised on a regular basis and do not represent a minor part of their activities.

The captain of a *Finnish* commercial ship still has to be a Finnish national. In a reply to a formal notice by the Commission in 2005, Finland stated that the nationality requirement concerning captains of commercial ships shall be abolished. The Government Proposal amending the Sea Act in this respect will be given in 2007. At the maritime sector there are no other statutory requirements concerning nationality. Nevertheless, in practice members of crew of Finnish ships are normally Finnish nationals. This is to a great extent caused by the requirement that the members of crew have to command the working language of the vessel well enough to understand the security information and orders given in that language and the fact that the working language at the Finnish ships is normally either Finnish or Swedish. Thus the requirement concerning language proficiency may in practice impede the access of the citizens of the other Member States to the Finnish maritime sector.

According to a *Lithuanian* provision not less than 2/3 of the crew of the ship (including the master of the ship and chief assistant to the master) should be composed of nationals of the EU Member States or permanent residents of the Republic of Lithuania. The post of the master of the ship and his chief assistant, however, remain reserved to the citizens of Lithuania.

A careful reading of the *Spanish* legislation seems to indicate that the posts of captain and first officer are reserved as government employment which means that they are to be held by Spanish nationals in the first instance, although it introduces the possibility of opening these up to Community nationals on condition that they pass the exam on Spanish maritime legislation. The 2006 Draft Bill on Maritime Navigation raises serious doubts on a real opening up of this profession to EU nationals.

An infringement procedure against *France* for failing to respect Article 39 TEC regarding nationality conditions of captains of ships has led the French authorities to put an end to this situation, resulting in legislation which comes into force in 2007.

CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

1. Working conditions, social and tax advantages

In all EU countries exists formal equality of treatment between own nationals and other EU citizens regarding working conditions. This equal treatment is mostly regulated in the general labour legislation.
The report on *Cyprus* raises as an issue of serious concern the fact of discrimination against EU workers receiving lower payment than native local workers. A 2006 survey showed that 58% got les than the minimum wages.

The equality provisions in the *Czech Republic* in the legislation on the access to employment have their counterpart in the labour legislation. According to the Labour Code employers are obliged to treat all employees equally as regards the conditions of work including the remuneration and other financial obligations. Schemes of state social support and social assistance are primarily based on permanent residence. To be eligible for a benefit, the recipient must reside permanently in the territory of the Czech Republic. Migrant workers can have access to these kinds of benefits by applying directly Article 7(2) Regulation 1612/68.

The *Danish* report describes in detail the issue of working conditions of Polish seafarers on ships sailing under Danish flag. There was a complaint presented to the Commission services on a possible discrimination as far as salary and working conditions are concerned, of Polish seafarers not residing in Denmark and employed in the Danish ships, by virtue of Danish legislation. [23] At present, the Danish government is in process of elaborating an amendment in order to comply with Community legislation on free movement, ast has been interpreted by the ECJ in Case 9-88 (*Lopez Da Veiga*).

EU citizens residing in Denmark as a jobseeker for the first time are entitled to no other economical assistance than the coverage of costs related to the return to their home country,[24] see also chapter VI.

The *Finnish* system of social security is by and large based on residence. The precondition for residence-based social security is that the employment or the self-employed activities last at least for four months. If the employment is estimated to last at least for four months, the right to residence-based social security starts when the employment or the activities of a self-employed person start. This 'four months rule' covers national health insurance, child care subsidies and family allowances, accruing credits towards national pension and survivor's pension and to being covered by the Act on unemployment allowances. The compatibility of the 'four months rule' with EU legislation has been questioned in Finland.

The *Greek* report mentions a discriminatory rule in regarding a special pension including free medical care for Greek citizens older than 68 years, not having sufficient resources. This pension is not available to EU citizens residing in Greece.

The *Hungarian* report gives a detailed overview of the way the principle of equal treatment is effectively regulated in the rules concerning employment, access to housing and entitlements to social advantages. New in 2006 is the implementation of equal treatment in public transport benefits for young children and persons over 65 years of age. There is an infringement procedure against Hungary because the regulations regarding the admittance to museums of EU citizens are contrary to the equal treatment principle

In 2006 a *Dutch* Act implemented ECJ judgment of 14 October 2004 (case C-299/02), in which the Court held the nationality and residence requirements for the owners or board members of companies owing Dutch seagoing vessels to be a violation of the Articles 43 and 48 EC Treaty.

In *Ireland* the application of the equality principle has also arisen in relation to the application of the "habitual residence" test introduced in 2004 for access to social welfare payments. This is discussed in Chapter X below. The new regulation which implements Di-

23 Article 10 of the Danish International Register of Shipping (DISR).
24 Section 12a Act on Active Social Policy.

rective 2004/38 contains explicit provisions on entitlements implementing the equal treatment provisions in Article 24 of the Directive.

The derogation from the equal treatment provision, laid down by Article 24 (2) of Directive 2004/38, is implemented in more liberal terms by the *Italian* (draft) legislation. While the Directive allows the Member States to deny both entitlement to social assistance during the first three months or the longer period the EU citizen can stay and search for a job, and maintenance aid for students, the implementing provision restricts the application of this derogation. The derogation is limited to the grant of social security benefits. In any case rights to social benefit associated with the activity pursued or otherwise granted by the law shall not be affected by this derogation.

The *Latvian* Law on Social Services and Social Assistance has been slightly amended in 2006.[25] The Law still provides that Latvian citizens, non-citizens as well as foreigners and stateless persons who have been granted a personal identity code can be entitled to social services and assistance. The Law does not apply to persons with a temporary residence permit.

In *Portugal* new 2006 regulation (transposing Directive 2004/38) provides that the Union citizens residing in the Portuguese territory enjoy equal treatment with the national citizens, without prejudice to the restrictions admitted by Community law. Portugal does not confer to the Union citizens' entitlement to social assistance during the first three months of residence or during a longer period if the Union citizen entered in Portugal in order to seek a job. Neither does it grant, prior to acquisition of the right of permanent residence, scholarships, student loans or any other maintenance aid for studies, including vocational training, to persons other than workers, self-employed persons, persons who retain such status and members of their families.

The *Swedish* report also deals in this section with the transposition of 2004/38, which introduced new regulation stipulating that an EU citizen, who is not qualified for a right of residence could be expelled if the person constitutes an unreasonable burden to the social benefit system.[26] EU citizens who are not a worker or an economically active person do not have the right to social assistance during the first three months of their stay. However, if there is an emergency situation these persons should be entitled to assistance. In *France* the rules on income support (RMI), transposing 2004/38 were changed in a similar way.

Regarding tax advantages new 2006 regulation exempt Swedish seamen employed by European ship-owners from Swedish taxes if they work outside Sweden for at least six months per year in the same way as under Swedish ship-owners.[27]

In 2006 the main issues in *the UK* which have arisen for citizens of the Union on equality of treatment have been in respect of the differential treatment of A8 nationals whose access to the labour market has been subject to obtaining a worker registration document. Although these documents are supposed to be issued very rapidly and amended very quickly when a worker changes job, in practice problems do arise (See also Chapter VIII). Recent court decisions indicate the unwillingness of the UK authorities to extend social benefits to EU and EEA citizens who have not exercised free movement rights as workers.

The *German* report extensively describes the case law on access to job-seekers allowances in the light of the transposition of 2004/38. Union citizens looking for a job for the first time are excluded from access to job-seekers allowances according to the German Social Code II. But they are entitled to social assistance benefits under the German Social Code XII as long as their right of free movement has not been explicitly terminated or repealed. According to a judgment of the Social Appeal Court of North Rhine Westphalia this also counts for Union citizens from the new Member States who were not yet entitled to full free movement under the accession treaties. According to the court a national rule depriving Union

25 OG No. 168 19.12.2002 as amended until 25.05.2006, OG No.92 14.05.2006.

26 Compare Government's proposition 2005/06:77 Genomförande av EG-direktiven om unionsmedborgares rörlighet inom EU och om varaktigt bosatta tredjelandsmedborgares ställning, pp. 193 f. See also Edström, Svensk arbetsrätt i EU – mellan lag och kollektivavtal, i Edström (editor), *Svensk rätt i EU*, Uppsala 2007, pp. 81-98.

27 Government's proposition 2005/06:21 Förändring i sexmånadersregeln för sjömän, m.m.

citizens from access to social benefits staying lawfully in Germany could not be considered as compatible with community law if an equal rule were not applicable for German nationals in order to obtain access to social assistance.[28] This is diametrically opposed to the UK approach.

2. Other obstacles to free movement of workers?

This section contains a variety of obstacles from the acquisition of immovable property (*Malta*) to the opening of bank accounts *(UK*).

A large number of EU citizens working in *Finland* in 2006 were hired workers from the new Member States, in particular from Estonia. According to the occupational health and safety authorities and the Central Criminal Police, in this kind of situations it is rather common that the minimum labour conditions are not applied and that, for example, the wages are below the minimum wages. New legislation concerning the treatment of workers hired from abroad was adopted in 2006.

Based on the provisions of the *Hungarian* Labour Code a manpower agency (employer) located in another Member State seems to be barred from the possibility to send workers to Hungary without having legally established there. This might be an obstacle to free movement of workers. However, this question is extremely complicated because of its relationship to the free movement of services topic and the lack of harmonisation of EC law in this area. Another obstacle of mobility mentioned in the Hungarian report could be the acceptance or validity of a driving licence issued by non-Hungarian authorities.

In *Italy* the Region of Sardinia passed a legislation concerning the taxation of capital gains arising from the sale of residential buildings used as second homes. Taxable person is the vendor who is not resident in the territory of the Region or who is resident in the territory of the Region from less than twenty-four months. Vendors born in Sardinia and their spouses, irrespective of the place of residence, are exempted from the tax. The Italian government challenged the law, claiming that it exceeded the competences of the Regions. This case is pending for the Constitutional Court.

Every person (whether Maltese or any other EU citizen) not fulfilling a five-year continuous residence requirement is to be considered as a non-resident for the purpose of the acquisition of immovable property in *Malta* by such person.[29] The fact that such Maltese or other EU citizen are in possession of a valid residence permit is irrelevant.

The *Polish* report mentions in this context the problem of the obligation to use the Polish language for drawing labour contracts. Although the relevant provisions were found unconstitutional in 2006, there were no amendments made on this topic yet.

In *Spain*, new 2006 regulation, suspending the possibility of export of unemployment benefits could be considered to be an obstacle to the movement of unemployed workers from Spain.

One of the obstacles for EU workers coming to the *UK* is a border control check on all persons entering the UK. In the UK also problems continue to exist for EU nationals to open bank accounts which may be a necessary adjunct to taking work.

3. Specific issue: frontier workers

Most reports state that there are no specific provisions with regard to frontier workers in the context of equality of treatment in their country. Various reports (*Denmark, France, Italy, Latvia, Poland, Slovenia*) mention tax problems for different categories of frontier workers.

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28 Social Appeal Court for North Rhine Westphalia 3 November 2006 L 20 B 248/06 AS.

29 In section 2 of the said Act, a "non-resident person" is defined as including:
"(a) any individual who is not a citizen of Malta or of another Member State; or
(b) a citizen of Malta or of another Member State, even in either case, if in possession of a valid residence permit, who has not been resident in Malta for a minimum continuous period of five years at any time preceding the date of acquisition…".

French Nationals who cross the border every day to work in *Belgium* seem to earn higher salaries than Belgian workers because of an advantageous tax system and social security contributions, which are lower in Belgium than in France. The Belgian Employment Minister gave figures revealing that between 1999 and 2004, the number of French workers who cross the border increased by 50% from 16.364 to 24.536.

The report on the *Czech Republic* mentions a particular problem on the allocation of the individual identification number. This number serves as a unique identification of a physical person for all public bodies (social and health insurance institutions, social and tax authorities, property registration etc.) but also for private institutions as banks. There is no provision that would enable the citizen of another Member State who is a frontier worker,[30] and therefore, resides in his state of origin, to be allocated this identification number. This can lead to considerable administrative complications.

The *Danish* rules on unlimited tax liability, providing full access to tax relief, do not apply to frontier workers who earn less than 75% of their global income in Denmark.

If the income of the frontier worker is taxable both in *Italy* and in the country of employment, and if there is no double taxation convention, the tax already paid abroad will have to be deduced from the income taxable in Italy.

The *Latvian* Law on Income Tax of Residents has been amended in 2006 in order to bring it in line with requirements of EU law regarding frontier workers.[31]

In the *Polish* report it is stated that if individuals do not reside within the territory of Poland they are liable to pay taxes in relation to income obtained in Poland (limited tax obligation). These provisions may affect (but not necessarily) the situation of the frontier workers in Poland.

In *Slovenia* some problems appeared in a field of personal income tax of frontier workers, especially Slovenian (e.g. performing work in Austria on a daily basis). In order to avoid double taxation of personal income Slovenia has concluded 41 bilateral double taxation conventions. According to the principle of world's income and the conventions, frontier workers enjoy special treatment. Slovenian frontier workers, who are Slovenian residents, are usually obliged to cover difference between taxes paid in a country where they work and taxes they would pay in Slovenia. This formula is relevant when in the country where the work has been performed law stipulates lower tax obligation. As far frontier workers, residents of an EU member state, working in Slovenia are concerned, they are as non-residents obliged to pay personal income tax in Slovenia on a basis to the principle of world's income.

Regarding the *UK* the accountancy firm, Price Waterhouse Coopers carried out a study on obstacles to mobility between Northern Ireland and the Republic of Ireland in November 2001. The problems identified in that study seem to be still current.[32] Regarding the situation in Gibraltar two issues improved: (1) the pensions of Spanish workers formally employed in Gibraltar and who left when the border was closed in 1969; (2) border delays and administrative issues.

30 It concerns also other categories of workers employed in the Czech Republic who do not reside there – for example drivers in international transport.

31 29.12.2006, OG No.207, 29.12.2006, Annotation available on http://www.saeima.lv/saeima9/lasa?dd=LP0113_0 See also Grozījumi likumā "Par iedzīvotāju ienākuma nodokli" *(VID Galvenās nodokļu pārvaldes 17.01.2007. vēstule Nr.15.1.1-9/2332)* http://www.valka.lv/faili/1355840105.doc.

32 Price Waterhouse Coopers, *Obstacles to Mobility* November 2001, North/South Ministerial Conference. Hikkla Becker, solicitor, Immigrant Council of Ireland.

CHAPTER IV. EMPLOYMENT IN THE PUBLIC SECTOR

1. Access to public sector

1.1. Nationality condition for access to positions in the public sector

Member States are only allowed to restrict public sector posts to their nationals if they involve the exercise of public authority and the responsibility for safeguarding the general interest of the State.

In 2006 the Austrian Presidency took the initiative for a study on the legal specificities of cross border mobility of public sectors. This report covers a lot of the subjects, dealt with in this chapter. It gives an extensive overview per country on nationality conditions for access in the public sector.[33]

In most Member States there exist specific rules (Constitution, laws, royal or presidential decrees) regarding the public sector posts which are reserved for nationals. Several national reports list posts reserved for their nationals (*Cyprus, Czech Republic, Estonia, Finland, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Slovakia, Slovenia, Sweden*). In 2006 the list in *Slovakia* was reduced, deleting some departments of civil service (International cooperation, Financial means of the European Communities; Legislation; and Control, complaints and petitions, Internal audit). The national legislation of some other Member States provide a general clause that access to public service can be made dependent upon nationality if the tasks so require, working this out in criteria or guidelines for the posts or sectors concerned. This system makes a case-by-case decision necessary (*Austria, Belgium, Denmark, Germany, Greece, United Kingdom*). *Luxembourg* still allows the access of EU nationals as civil servants in principle only for the six sectors[34] that have been decided by the European Court of Justice to be open to other EU citizens and only for rather minor positions. In *Poland* an extensive list of legislation for posts in the public and uniformed service contains a nationality condition. In 2006 a new Act on civil service was adopted. This Act defines the status of officials of the State administrative agencies, *voivode*-ships and other offices which are the responsibility of ministers and other central administrative agencies. Recently in *Malta* a list of posts which meet the criteria of exercising public authority and responsibility for safeguarding the general interest of the State has been drawn up centrally and determines when a Maltese-only nationality requirement is inserted in a call for applications. After adapting its legislation already in 2005, the conditions for access to the public sector in *France* have been brought even further in line with Community law by a Decree, which came into force in February 2007. This Decree also enables to take into consideration professional experience for both French candidates and EU nationals. This Decree also re-examines the system of recognition of diplomas completely and implements Directive 2005/36/EC in French law.

Although in *Portugal* the Constitution is in line with Community law, restricting only posts implying direct exercise of public authority to Portuguese citizens, the legislation concerning the admission to open competitions and recruitment to public sector posts requires Portuguese nationality of the applicants, except in those cases exempted by specific legislation or international convention.[35]

On *Cyprus*, interestingly, EU citizens cannot apply for the position of Judge or Supreme Court President or Court Registrar, but can do so for the post of Legal Officer in the Judicial

33 See K. Thienel & Th. Böhm (eds.), *Cross-Border Mobility of Public Sector Workers*, Austrian Federal Chancellery, 2006.

34 These sectors are research, education, health, inland transport, posts and telecommunications and the water, gas and electricity distribution services.

35 For example, the Decree-Law 437/91 of 8th of November, amended by Decree-Law 414/98 and Decree-Law 411/99, establishes the legal regime for the nursing career, concerning the access to the public career and foresees in the Article 27, as condition to be admitted in the competition, to have the Portuguese nationality.

Service. Similarly, even though a citizen of a Member State cannot apply to join the police, he can be employed on a fixed-term contract.

As already mentioned in chapter II, the *Danish* Maritime Authority may require that the captain of a merchant ship holds Danish citizenship when it is documented that rights under powers conferred by public law granted to the captain of a passenger ship or a ship transporting troops, military materiel or nuclear waste are in fact exercised on a regular basis and do not represent a minor part of their activities.

According to the *Greek* report in some cases it is doubtful if the specified posts (like IT specialists and firemen) really imply the exercise of public powers or the responsibility to safeguard the interests of the State.

In *Hungary* the nationality requirement applies not only to positions where public authority has to be exercised, but also to various other public services where this exercise is absent. However, an Act passed in the last days of December 2006 amended numerous acts providing equal legal treatment for EEA nationals (more precisely for persons with rights for free movement), deleting nationality requirements.

In relation to access to the public service, it is noteworthy that in *Ireland* access to the police service – *An Garda Síochána* – has recently been opened up not only to nationals of the other EU Member States but also to resident third-country nationals.

In *Czech Republic*, Czech citizenship is also required for the personnel of the state institutions, for employees who participate on exercising public authorities (civil servants, not including auxiliary, manual and technical support). The relevant Act was already adopted in 2002, but is still not in force as its entry into force has been postponed twice.

In *Italy* the Supreme Court clarified in 2006 that the Constitution requires Italian nationality as a condition for access to public service. The only exception to this requirement, also based on a constitutional rule, is the access to the employment in the public sector guaranteed to the EU citizens by law.

The employment in the public service in *Lithuania* remains restricted to Lithuanian citizens except a few jobs that are available to foreigners under labour contracts without performing the function of public administration. It may be questionable if positions of secretaries, pilots, bodyguards etcetera fall within the narrow understanding of the public service by the ECJ. The situation in Latvia is very much the same as in Lithuania. In Latvia the *Law on Civil Service* was amended in 2006 twice, excluding some professions as policemen and fire fighters from the status of civil servant.[36]

Also in *Sweden* requirements of Swedish citizenship are still present for various jobs in the public sector.

The *Dutch* police have the practice of accepting foreign nationals resident in the Netherlands for their training programmes, on the condition that the candidates will apply for naturalisation and thus will have Dutch nationality at the time of appointment as police officer.

The *Portuguese* report mentions a 2006 Court case[37] on the refusal of access of a German citizen to a technical post in the Public sector. The Court affirmed that Article 39 (4) of EC Treaty should be interpreted restrictively.

In *Slovenia* the Civil Servants Act does not require Slovenian nationality for the employment as a civil servant, but there are still nationality requirements for the functions with the courts, the public prosecutor's office, the attorney general's office, the police, the defence and the customs service.

An Act modifying *Spanish* legislation concerning civil servants was in 2006 still pending. In Spain new 2006 legislation on the military service includes the access of nationals from Middle and South American countries, but excludes Community citizens. 2006 Autonomous Communities legislation require firemen to be Spanish.

There is no reference in the reports to an application of captains of ships' jurisprudence to posts in the public sector.

36 14.09.2006, OG No.65, 26.04.2006 and 02.11.2006, OG No.180, 9.11.2006.

37 Ruling 5021/00 of the South Administrative Central Court of 11th of October 2006.

1.2. Language requirement

Although this is not always explicitly laid down in regulation, in all countries it is taken for granted that persons working in the public sector command the language of that country. Some Member States even promote the use of the national language

In *Finland* the requirements concerning language proficiency are rather rigid and they may therefore impede the access of the citizens of other EU States to the public sector. In 2006 attention was drawn in Parliament to the fact that due to these rigid requirements concerning the proficiency of both Finnish and Swedish laid down in the national legislation concerning police, there are difficulties in recruiting qualified police officers to open posts. Although EU candidates are exempted from the nationality condition for jobs in some public sectors in *Luxembourg*, the knowledge of all three national languages (Luxembourgish, French and German) is still required for these jobs.

In *Greece* and *Poland* knowledge of the language is a formal condition for employment in the public sector. In Slovakia the knowledge of the language is also one of the conditions for admission to the civil service, but there are no specific provisions how this knowledge has to be examined. The *Austrian* legislation requires "good command in word and writing; if the job requires less, an adequate command has to be shown."

In *Estonia* there exists the requirement of language proficiency on three different levels (basic, intermediate and advanced). The requirements concerning linguistic competence of professors and other teachers at universities are not as strict as the requirements concerning civil servants. Persons who have passed an Estonian language proficiency examination receive a certificate. In *Latvia* there are also strict language requirements for civil servants. New 2006 regulation caused significant problems for fire-fighters of whom 1/5 did not have the required level of knowledge of Latvian language.

In the *Italian* report special attention is paid to the fact that although the official language is Italian in some regions other languages like French, German and Slovenian have a special status. In these regions besides Italian the knowledge of the other language concerned for that region is a condition required for posts in educational institutions (French and Slovenian) or even for all posts in the public service (German).

Language requirements in the *Czech Republic* depend on the conditions for participation in a recruitment procedure, which are stated by the employer.

On *Cyprus* EU citizens applying for a job in the public service for which knowledge of the Greek language is required, have to provide the same evidence as Cypriot citizens

An *Irish* language requirement for posts in the National University of Ireland, Galway has been removed in 2006.[38]

1.3. Recruitment procedures: follow-up of Burbaud *case*

The decision of the ECJ in the *Burbaud* case (C-285/01) is of particular interest to the Commission. In this case, the ECJ decided that France cannot oblige migrant workers fully qualified in their country of origin to participate in a competition which is intended to recruit people for a training and which is a precondition for access to the employment concerned. The *French* law has been adapted along the line of this judgment in 2005. The *Austrian, Cypriot, Czech, Danish, Dutch, Estonian, Finnish, German, Greek, Hungarian, Irish, Latvian, Slovak, Slovenian* and *Swedish* legislation does not provide for a system of recruitment of civil servants or employees in the public service comparable to the system of *concours* applied in France. Therefore there is no follow-up. However, in *Ireland* the system for recruiting auditors in the Office of the Comptroller and Auditor General could be mentioned. So far, the *Burbaud* judgment had also no impact in *Lithuania* and *Spain*. The same applies to the *Luxembourg* concours system. The *Italian* procedures on recruitment of the management staff in the public sector are similar, but not identical to the French ones: the candidate that successfully pass the exam at the end of the training course is not automatically hired. In Italy it is not possible to exempt a national of a Member State in the position simi-

38 Act No. 1 of 2006.

lar to Ms Burbaud from the procedure. In *Portugal* a system of competition exists for posts in the public sector, which are open to EU citizens. It is questionable whether this system is compatible with the *Burbaud* judgment, but until now, no measures have been taken or planned by the Portuguese government to alter the system.

1.4. Recognition of diplomas

In most countries the decision on recognition of diplomas for access to the public sector is based on individual applications. These decisions are usually not related to the particular post the applicant has applied or is going to apply for. The system of recognition in *Denmark, Estonia, Poland, Portugal, Slovakia and Slovenia* does not make a distinction for posts in the public sector compared to posts in the private sector. Given the fact that *Lithuanian* public service is restricted to Lithuanian nationals only, the recruitment issue of EU nationals is not relevant in this respect

The *Greek* competent authority does not recognize the diplomas granted by foreign universities collaborating with private Institutes operating on a franchise basis in Greece. The Irish Public Appointments Service operates a non-published procedure for the recognition of diplomas. The lack of transparency and predictability may cause concern.

The *Spanish* report summarizes a whole range of court cases on (mostly a rejection of the) recognition of diplomas. Important are the judgments by the Spanish Supreme Court on the recognition of an Italian civil engineer diploma, giving effect to the decision of the ECJ of 19 January 2006 in case C-330/03 by limiting the scope of the permission to those activities which that diploma allows to be taken up in the Member State in which it was obtained.

1.5. Recognition of professional experience for access to the public sector

Although most Member States have rules on the recognition of professional experiences for access to the public sector, there is an absence of specific rules concerning the way professional experience acquired in another Member States should be taken into account (except for *Austria, Denmark, Italy*). Some reports (*Estonia, Finland Portugal, Sweden*) stress that this should happen in a similar manner as corresponding experience acquired in the Member State itself. According to the *Portuguese* report the new 2006 legislation, providing all Union citizens residing in Portugal to enjoy equal treatment with the Portuguese nationals, strengthens the obligation for the Portuguese State to take into account the professional experience acquired in another Member State. In some countries (*Malta, Slovakia, the Netherlands*) there are no legal rules on the recognition of professional experience at all.

The *Austrian* report mentions a case pending before the ECJ (C-339/05) in which the Advocate-general stated that working periods in Switzerland prior to 1st June 2002 also had to be counted as relevant years of professional experience. As this case was removed from the list in 2006, there will be no ECJ judgement. But the Austrian provisions appear to be unlawful. As far as recognition of professional experience and seniority are concerned, on *Cyprus* a distinction has to be made between a promotion position where experience is a prerequisite, and a first entry position, where this is not. In *Denmark* previous employment in other Member States shall be taken into account to the same extent as if had it been employment in Denmark.[39] *Italy* also has a special procedure for the recognition of professional experience for the access to posts in the public sector, taking into account experience in another Member State. In an Italian judgement in 2006 the teaching experience acquired in Great Britain was recognized for the purpose of fulfilling a requirement necessary to participate to a recruiting competition. In *Hungary* in 2007 a new system for access to the public sector will be introduced. The newly defined rules will aim at honouring the applicants' different abilities (professional, language, communication skills) including former employment relationships.

39 Guidance on Personnel Administration, 2004, chapter 18.

The *UK* report raises the question whether, if recognition of experience is to be required in recruitment, this is perhaps because of the principle of non-discrimination on grounds of nationality, rather than the specific principle of recognition of qualifications.

2. Equality of treatment

2.1 Recognition of professional experience for the purpose of determining the professional advantages

Regarding salary, the *Danish* Guidance on Personnel Administration, 2007 states that *professional experience obtained in another EEA country* has to be accounted for in the same manner as had the occupation been in Denmark.

There are no statutory rules on the recognition of professional experience in *The Netherlands*.

In *Slovakia*, the salary in civil service is not dependent on professional experience at all, it depends just on the position of the person concerned and on assessment of the work of the person concerned by the superior officer. Public service performed in another Member State will not be taken into account when calculating remuneration for the public service in *Latvia*.

Experience in the Public Service in *Ireland* or in the EU Member States will have to be relevant to the work of the grade to be taken into account. A *Greek* regulation explicitly provides that the seniority in the public sector of another EU State is also taken into account in order to determine the salary of the employee. The seniority in the private sector is not taken into account.

In its opinion in the case C-205/04 the Court has held that, by failing to adopt a law which expressly provides, in respect of the Spanish civil service, for account to be taken, for financial purposes, of previous periods of employment in the public service of another Member State, *Spain* has failed to fulfil its obligations under Article 39 of the EC Treaty and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

According to a Spanish court decision the prevalence given to certificates of Spanish internships above other experience and merits to get the title of specialist doctor is discriminating doctors of other Member States.

CHAPTER V. FAMILY MEMBERS

In this chapter we will focus primarily on the problems of family members who are third country nationals. Certain issues, such as the non-recognition of registered partnership or the requirement to present documents not mentioned in Directive 2004/38, relate both to family members who are EU nationals and those who are third-country nationals.

1. Residence rights

In eleven Member States the transposition of Directive 2004/38 had not been completed or was in the stage of draft legislation in 2006: *Belgium, Cyprus, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Malta* and *Spain*.(See also Chapter I). Hence some or all of the new rules on the admission or residence of family members were not (yet) transposed.

In the majority of the Member States that completed the transposition of the Directive in 2006 the new definition of family members also covered **registered partners**, durable cohabiting partners or both categories (*Cyprus, Czech Republic, Denmark, France, Lithuania, Netherlands, Portugal, Sweden* and the *UK*). In five Member States the personal scope was explicitly limited to spouses of EU nationals, excluding all other partners: *Greece, Latvia, Malta, Poland* and *Slovenia*. In *Italy* this point is unclear. Since the legislator simply copied the text of the Articles 2 and 3 in the Decree, the exact consequence of this form of transposition remains to be decided. In *Spain* a court in the Basque region applied the free movement rules in 2006 to the Romanian registered partner of a Spanish citizen.

In the *UK* there are no national rules on the admission of third-county national children over 18 years of EU nationals. In the reports on *Hungary* and the *Netherlands* it is mentioned that the national legislation does not deal with the residence rights of third-country national family member who return with a national who has used his freedom of movement.

Several national reports mention that **visa** are issued to third-country national family members free of charge and in a special or accelerated procedure. Only the *UK* levies a fee for the family permit issued abroad. The legislation of several Member States provides that in case the family member arrives at the border without the required visa, the visa may be issued at the border (*Slovakia*) or may be applied for inside country (*Hungary*) or the absence of the visa is no ground for refusal of the residence card (*Netherlands*). In some Member State there are special provisions providing for procedural guarantees that do not apply to decisions on visa generally: written and motivated decision on the refusal of visa to third-country national family members, refusals only to be made not by consular officers abroad but at the ministerial level, and administrative or judicial remedies against such refusal (*Finland, Greece*).

The rule that third-country national family members should not be refused **entry** solely on the basis of an alert in the SIS, but only if the Bouchereau criteria are met, was explicitly stated in an instruction to immigration officers in *Denmark*. Courts in *Italy* explicitly or implicitly referred to this rule as well. On the contrary, from the reports on *Latvia* and *Poland* it appears that refusal of entry is allowed on far broader public order grounds than are permitted by Directive 2004/38. In *Finland* a lenient interpretation of the Bouchereau criteria is supported in the Proposal of the Government to the Parliament for the Act Amending the Aliens Act with a reference to a provision in the Finnish Constitution that the inhabitants should be protected, implying that the expulsion could be justified by that aim.

In *Cyprus, Denmark, Finland. Portugal, Slovenia* and the *UK* admission of third country nationals family for workers, self-employed person and service providers, is conditional on meeting **income or maintenance requirements.** In Slovenia this requirement has been abolished in 2007. In *Denmark* courts have held this requirement not to be discriminatory, since Danish nationals have to comply with the same requirement. That reason does not answer the question whether the requirement is in conformity with Directive 2004/38.

The *Czech Republic, Lithuania, Poland, Slovakia* and the *UK* apply their general rules against **marriages of convenience** to third-country family members of EU migrants as well. The relevant clause in the Polish immigration enumerates seven circumstances that allow an immigration officer to disqualify a marriage as a marriage of convenience and refuse a residence on that ground. The national law has become more restrictive on this issue. It is subject to doubt whether such a list is in conformity with the case-law of the Court on misuse of community law rights.

The rules in the Articles 12 and 13 of the Directive on the **retention of residence rights** in case of death, departure of the EU national principal or in case of divorce or separation have not been properly transposed in *Austria, France* and *Slovenia*. The *Italian* immigration legislation provides for retention of residence rights to victims of domestic violence that goes beyond the protection provided by the Directive.

In the national reports a plethora of **administrative and procedural problems** with the implementation of Directive 2004/38 are mentioned. *Cyprus, Greece* and *Ireland* require applicants for a visa or a residence card to produce documents not mentioned in the Directive. *Ireland* requires a third-country national family members applying for a visa to have a passport that is valid for at least 12 more months. *Portugal* requires the family member to file an application for the permanent residence card at least three months before the expiry of his or her residence card and to present a valid passport. Both conditions are not mentioned in the Directive. In the Articles 4 – 8 a "valid passport" is required. Article 16 does not mention passports. The *Greek* Ombudsman had to convince the national immigration authorities not to insist that the family member of an EU national should produce a special certificate on the family situation, although the embassy of the country concerned had confirmed that no such document existed in that state. In *Cyprus* the relevant legislation suggests that the Minister has discretion to deviate from the rules on entry and residence of family members. According to the *Italian* report immigration officers often apply the general immigration rules to third-country national family members rather than the more favourable free movement rules.

The reactions of Member States to the ***Akrich* judgment** are surprisingly diverse. In three Member States previous lawful residence in another Member State was introduced in legislation as a new condition for the admission of third country national family members in 2006 (*Denmark, Ireland, UK*). The Irish legislation for this purpose introduced the restrictive concept "permitted family members" or "qualified family members". In *Finland* a similar proposal was under consideration. In *Latvia* and *Lithuania* this requirement only applies to nationals who return to their country after having used their freedom of movement. Their third-country national family members are only admitted if they had a residence permit in the other Member State. The national reports on *Belgium, Germany, Poland* and *Portugal* explicitly mention that no such condition has been introduced in the legislation. In Germany no such condition was in the bill on the transposition of Directive 2004/38 that entered into force in 2007. Nevertheless, some national courts introduced this condition in their judgments. The *Dutch* government announced its intention to introduce this requirement, but refrained from doing so pending the *Jia* case. After the judgment in *Jia* no action has been taken yet in the Netherlands. According to the *Swedish* report the situation on this issue is unclear in that country. Considering the diversity in reactions, the statement the *Czech* report that the Aliens Act is in conformity with the *Akrich* judgment is rather puzzling.

In the few Member States that introduced this new requirement in their legislation, its exact meaning is unclear. What does constitute 'lawful residence' in another Member State: a temporary or a permanent residence permit, or lawful residence as a visitor or a tourist or any residence on the basis of a visa? Is lawful residence anywhere in the EU or the EEA sufficient (so the new UK rules), is previous lawful residence in the Member State of the principal required (the Finish proposal) or lawful residence in the other Member State where the EU national used his freedom of movement (so Latvia and Lithuania for their returning nationals)?

2. Access to employment

The free access to employment of third-country national family members of EU nationals or their exemption from the general work permit obligation for non-citizens is explicitly provided for in the legislation of most Member States. In *Luxembourg* this essential element of free movement was explicitly recognized in 2006, i.e. almost forty years after Regulation 1612/68 entered into force. In *Sweden* the transposition of Directive 2004/38 resulted in a liberalisation with regard to access to self-employment. In *Hungary* the equal treatment explicitly covers jobs in the public service too, with the exception of jobs that under the free movement rules may be reserved for nationals.

Contrarily, in *Malta* work permits are still required and in *Lithuania*, the free access to employment of third country national family members has not explicitly been codified in national law. In two Member States (*Czech Republic* and *Latvia*) those family members have to inform or register with the official labour agency, an obligation that, apparently, is not imposed on national workers.

In some Member States the access to employment of family members of nationals of the EU-8 and the EU-2 is still restricted under the transitional regime.

In the *UK* the actual access to employment is impeded by long delays in issuing of the residence cards to third country national family members. Moreover, the third-country national parent of a minor EU child is allowed to reside in order to care for the child (*Baumbast* judgment), but not allowed to work. In *Austria* the access to employment of third-country family members is explicitly restricted to spouses and minor children.

3. Access to education

In the majority of the Member States family members of EU migrants are entitled to the same treatment as nationals with regard to access to public education at primary, secondary and university level. The report on *Lithuania* is the only one mentioning the absence of explicit rules on equal treatment on this issue. However, in several Member States the actual access is hindered by less favourable rules concerning enrolment, fees, study grants or the recognition of foreign diploma.

Austria applies its stricter rules on **enrolment** dates for third-country nationals to family members of EU nationals too. This Member State does not provide explicitly for equal treatment with regard to students grants and it applies a **quota system** for medical students, favouring students with an Austrian secondary school diploma. The legislation in certain Member States allows universities considerable freedom in setting rules on admission and **admission fees**. In the Netherlands some universities used this power to set higher fees for students form third countries that were applied to family members of EU workers as well.

The *UK*, the country against which the *Bidar* judgment was decided, requires three years of residence in the UK or another EEA country for the low university fees paid by nationals. Other third-country national family members have to pay the much higher fees for overseas students. In *Denmark* education is free for students who are EEA nationals, but all third country national students have to pay fees for admission to a university.

In many Member States the equal treatment with regard to **scholarship, study grants or student loans** is restricted to third-country nationals with a permanent residence permit (*Finland, Malta Portugal, Slovakia, Sweden, UK*) or who have an employment record in the country or are a family member of a worker (*Denmark, Netherlands, Portugal* and *Sweden*). In Sweden the equal treatment is also extended to third-country nationals having "a strong connection with Sweden", in practise requiring a lawful residence of two years. The *UK* applies a three years residence requirement for equal treatment of family members with regard to student grants and loans as well. *Finland* explicitly excludes those coming primarily for the purpose of study from the equal treatment concerning student grants. In *Slovenia* the rule restricting scholarships to Slovenian nationals was annulled

by the Constitutional Court in 2003. But a similar restriction of the right to student loans was still in force and applied in 2006.

Certain reports mention other (potential) barriers impeding access to education: language requirements (*Czech Republic*) or the registration and recognition procedure for foreign school diploma (*Poland*).

4. Equal treatment to social benefits and taxes

In many Member States the transposition of Directive 2004/38 was used as an occasion to introduce clauses in their law explicitly excluding EU nationals and their family member from entitlement to public assistance during the first three months of residence in another Member State.

Most national reports contain statements with regard to equal treatment concerning access to specific social benefits of tax advantages, or concerning the exceptions to that equal treatment, e.g. the exclusion of third-country national family from equal treatment with regard to housing in *Hungary*, the habitual residence requirement in *Ireland*, or the exclusion from free language and integration courses that are offered in the *Netherlands* to Dutch nationals of immigrants origin.

5. Miscellaneous

Several national reports make reference to the issue of **reverse discrimination.** Such references occur either explicitly or implicitly in the reports on *Belgium, Czech Republic, Denmark, Hungary, Italy, Luxembourg, Netherlands* and *Slovakia*. In reaction to stricter rules on family reunification of nationals who have not used their free movement rights, those nationals decide to live or work in an neighbouring Member State in order to be able to live with together with their third-country family members under the more liberal free movement rules. Once they return to the Member State of origin they issue of the free movement rights of their third-country family members arises. The *Danish* report extensively discusses the Danish nationals living or working in Sweden in order to avoid the strict national rules on family reunification. In the *Netherlands* the so-called Belgium-route in 2006 was subject of repeated discussions in parliament and in the media again. Dutch nationals move to Belgium in order to avoid the obligatory integration test abroad per computer, the high income requirements (120-200% of the statutory minimum wage), the absolute minimum age limit for spouses (21 years) and the high fees (830 euro for a visa or a residence permit for family reunification). EU nationals of immigrant origin are more often confronted with those strict national rules than indigenous EU nationals. Dutch courts have held that a Moroccan-Dutch father, who retained his Moroccan nationality, after naturalization could no long rely on Directive 2003/86 on the right to family reunification in order to live with his minor Moroccan son in the Netherlands. In the reasoning of the courts he now is a Union citizen who has not used his free movement, who can rely neither on Directive 2004/38 nor on Directive 2003/86 and thus is subject to the national Dutch rules on family reunification that are stricter than the Community law rule for third-country nationals. It is subject to doubt whether this case-law is in conformity with the concept of Union citizenship and with the prohibition of discrimination on the basis of nationality.

According to most national rapporteurs there are few if any published judgments of national courts on the implementation of the free movement rules. In some national reports it is suggested that this lack of national case-law is an indication of the correct implementation of the rules by the national authorities (*Belgium*), other rapporteurs ascribe this paucity to ignorance of the EC rules among practising lawyers or judges (*Hungary*). The *Danish* report signals a certain reluctance of the national courts to scrutinize the administration's effective compliance with EU law on free movement.

CHAPTER VI. ECJ JUDGMENTS

Introduction

A number of Member States have taken action to bring national law into line with decisions of the ECJ. However, there are still problems with delay, particularly in fields where there is a substantial financial stake such as social benefits and football. In this section we review the developments in the Member States regarding specific ECJ judgments in three main fields: equal treatment for EU workers in the fields of social benefits and vehicle tax; sports.

Follow up to: Trojani, Collins, Ioannidis; Van Lent and Commission v Denmark.

The cases of *Trojani, Collins and Ioannidis* deal with issues of citizenship of the Union and access to social benefits. In the first case a French national sought a social assistance benefit in Belgium. This was refused although the authorities had granted him a residence permit. The ECJ found that although the right to reside as a citizen of the Union is subject to the specified limitations and conditions, those limitations and conditions must applied in compliance with the general principles of Community law, in particular the principle of proportionality. Further, once a citizen of the Union is in possession of a residence permit, he or she may rely on Article 12 EC in order to be granted a social assistance benefit. In *Collins* the ECJ held that an Irish national who was seeking work in the UK and while doing so had sought access to a social assistance benefit (one scheduled in Annex IIa Regulation 1408/71 as a special non-contributory benefit) could be subject to a residence test in respect of the benefit. But that residence test had to be applied in a proportionate manner and be legitimate in respect of the national objective. *Ioannidis* raises similar though slightly different issues. In this case a Greek national sought a social assistance benefit in Belgium which was refused on the ground that he had undertaken his training in France (rather than in Belgium). The ECJ held this was discrimination contrary to Article 12 EC.

The cases of *Van Lent* and *Commission v Denmark* also raise questions about the reach of the non discrimination provision but this time in respect of the registration of vehicles. In *van Lent* the ECJ condemned the Luxembourg authorities for seeking to fine a Belgian worker for failure to have a car registered in his name when the car belonged to his employer, based in another Member State and he used it both for work in the other Member State and recreational purposes. *Commission v Denmark* proceeds along the same lines.

In the summaries below, the rapporteurs indicate where relevant what steps have been taken in their Member State to bring national law into line with the ECJ's judgments.

Austria: no change was required by these judgments.

Belgium: while the *Trojani* decision is now correctly implemented problems may arise as regards the more recent decision in *De Cuyper*.

Cyprus: as regards *Trojani,* there is only a limitation on social assistance within the first three months or residence; there is no equivalent benefit to that in *Collins* or *Ioannidis*; the situation in *van Lent* has not yet arisen but the authorities have indicated they will apply it if a case arises. The same applies as regards *Commission v Denmark*.

Czech Republic: only the *Van Lent* and *Commission v Denmark* cases raise questions. There is a time limit on the use of vehicles registered in other Member States.

Denmark: national law which excludes EU citizens from social assistance in specific situations was passed before the *Collins* and *Trojani* decisions and has not been tested against them. There is a long residence requirement (7 years) for a social assistance cash benefit and while accommodation has been made for Danes and EU citizens who have lived outside Denmark some questions remain. Regarding *Van Lent* and *Commission v Denmark* legislation has been adopted to comply with the rulings.

Finland: the authorities have amended the Aliens Act to take account of *Trojani* and using the concept of unreasonable burden. No change is required for the other cases except *Van Lent* and *Commission v Denmark* where again the legislation has been changed.

Greece: there is no consequence here of the above decisions.

Hungary: the *Trojani* decision is not exactly taken into account but the question is rather wider – the law is not clear whether all foreigners (not just EU citizens) are entitled to claim social assistance immediately without consequences for their residence. The other two social assistance cases are not relevant. The *Van Lent* and *Commission v Denmark* judgments may have relevance but the law is sufficiently unclear that no firm conclusion can be reached at the moment.

Ireland: nothing has been done to bring the law into conformity with *Trojani* yet. While the social benefits rules were questioned by the Commission in April 2006 it declared it was satisfied that their application was consistent with EU law. *Van Lent* and *Commission v Denmark* raise important questions which have not been answered yet. In particular a national requirement that a vehicle is 'primarily' used in the other Member State is not obviously compatible.

Italy: there is a special allowance which comes within the category of benefits at issue in *Trojani*, and EU citizens can apply for it. There are no consequences from the *Collins* and *Ioannidis* cases are there are no such benefits. *Van Lent* has resulted in a circular from the authorities disapplying a reciprocity requirement.

Latvia: the social benefits cases are not relevant as similar benefits do not exist in Latvia. *Van Lent* and *Commission v Denmark* do not appear relevant as well.

Luxembourg: the conditions of residence for a variety of benefits are likely to fail the *Trojani* and *Collins* tests.

The Netherlands: the national courts are now using the *Trojani* decision to support the legality of residence even when an EU citizen is poor.

Poland: the Constitutional Court is still working on the principle of the supremacy of EU law. Fortunately, neither the *Collins* nor the *Ioannidis* cases are relevant in Poland. The *Trojani* decision might be relevant but this is not clear. The *Van Lent* and *Commission v Denmark* decisions do not appear relevant.

Portugal: the authorities require an EU citizen to have a residence permit before he or she can access social benefits. Notwithstanding the *Collins* decision the authorities are still applying this rule. The *Ioannidis* decision was used by the courts to justify a decision on derogation. The *van Lent* decision is not relevant.

Spain: while the decisions in *Trojani* and *Collins* have not been mentioned, the *Ioannidis* case was used in a national decision to reject the claim of a Spanish national to reimbursement of his hotel costs when obtaining medical treatment in France.

Sweden: as a result of an official report on *Trojani* and *Collins* the Aliens Act was amended to include expulsion of EU citizens on the basis of being an unreasonable burden to the social benefit system. The *Ioannidis* decision is relevant although the authorities have been limiting the benefit. The *Van Lent* and *Commission v Denmark* situations are relevant in Sweden. Similar situations could arise. There has been no change yet of the rules.

United Kingdom: there have been follow up cases to *Collins* in the UK; new guidance was issued in 2006 on the lawful residence test (see chapter X); a new regulation on the right to reside is particularly narrow and does not appear fully to implement the decision. In particular, EU citizens with temporary jobs are excluded from benefits. The *Van Lent* and *Commission v Denmark* cases are relevant as there is a difference between temporary and permanent import of a vehicle based on a six month out of 12 months rule.

Other Judgments

In some Member States, specific issues have arisen regarding other decisions of the ECJ. These are summarized below with a brief word on the relevant ECJ judgment.

Austria: The authorities here required a wide range of documents and conditions for businesses seeking to send third country national employees to Austria to provide services. The Commission considered that these requirements exceeded what was permitted as they constitute an obstacle to service provision. Following the judgment in *Commission v Austria* C-168/04, the authorities have change national practice to comply with the decision though there is still an outstanding problem on the material criteria for refusal of a permit which need to be changed. Also the authorities have changed the law to permit migrants to be elected to workers councils (required by judgments in C-171/01 and C-465/01).

Denmark: a recent decision of the Appeal Board appears not be comply with the ECJ judgment in *Tsiotras* as the period of residence in another EU Member State was not followed by the individual becoming a worker in Denmark before seeking a social benefit.

France: in *Commission v France* C-255/04 France was found wanting regarding the treatment of artists. Specifically, a provision of national law which created a presumption that artists are salaried (rather than self employed or service providers) for the purposes of tax assessment was inconsistent with the right to provide services contained in Article 49 EC. A recent decision of the Cour de cassation does not appear to take full note of the judgment. A decision of the Conseil d'Etat regarding article 14 Decision 1/80 raises questions.

Germany: following the *Beuttermüller* decision, various Länder have introduced legislation to comply regarding recognition of diplomas but not yet all.

Greece: decision C-310/90 and C-199/91 have now been cited by the State Council regarding the recognition of diplomas.

Ireland: The *Chen* decision was followed by a referendum to remove the right to citizenship on the basis of *ius soli*. In the *Chen* judgment the ECJ held that no matter how a citizen of the Union acquired citizenship the rights that go with it in EU law apply. Thus the fact that the baby Chen was born in Ireland only so that she would acquire citizenship of that country did not diminish her EU citizenship rights.

Italy: C-212/99 on foreign language assistants has been implemented by a national law to require non-discrimination in wages and working conditions and retrospective compensation. In its judgment of 18 July 2006 the ECJ considered that this legislation was an appropriate solution as regards Community law for re-establishing the careers of the language associates (lettori)

Luxembourg: C-445/03 on posted workers has still not been applied. This decision condemned the Luxembourg requirement that third country national employees of service providers based in other Member States who are sent to Luxembourg to provide services for their employer are required to have work permits issued by the Luxembourg authorities. The Commission has send a letter before action. There are also problems in the treatment of income for tax purposes which appears discriminatory on the basis of nationality.

The Netherlands: the State Council has held that differential treatment in voting rights depending on where the citizen is registered to vote is contrary to Community law (*Eman & Sevinger*). The *Oulane* decision, where the ECJ condemned the Dutch authorities for the detention and expulsion of a French national on grounds that the authorities were unsure of his identity, was implemented in national law through a new circular requiring presentation of an ID card or passport. The *Bidar* decision, which provides for an integration test as part of the measure whether a citizen of the Union should be entitled to social benefits, has caused further amendments to the student reimbursement rules though the distinction between those entitled on the basis of the *Raulin* decision and others is maintained. The problem of residence requirements in the shipping industry which was condemned in *Commission v the Netherlands* 299/02 has now been resolved. The uncertainty about the legal regime applicable to the admission of third country family members of migrant EU nationals created by the *MRAX*, *Akrich* and *Jia* decisions continues. The key issue is whether third country national family members of citizens of the Union must obtain permission under national law to enter the EU territory before moving with their EU citizen spouse across the EU. The *Ninni-Orasche* decision entitling students to grants where they work part time has been the subject of discussion – how should the part-time work be interpreted? How many

hours per month are required before the student qualifies as a worker? At the moment a rule of thumb of 32 hours is being applied.

Poland: the ECJ's rulings in *Vander Elst* and *Rush Portuguesa* have been invoked in explanatory memorandum by the authorities. Both these judgments relate to the right of businesses to deploy their employees to provide services in other Member States even where the individuals themselves do not hold a right of free movement as workers.

Slovakia: there is still a fairly extensive lack of knowledge and experience of working with the ECJ decisions.

Spain: recognition of diplomas is an issue with a national court refusing to approve a diploma obtained in another Member State (see C-330/03). In that case while the ECJ held that if an EU national's diplomas and experience were not sufficient for mutual recognition in the host Member State the state could require further training but it could not refuse, except on derogation grounds, to permit partial take up of the activities. The ECJ decision C-205/04 against Spain is also important – in that decision Spain was condemned for failing to take into account periods of employment in the public service of another Member State to calculate the salaries of persons in the public service in Spain.

United Kingdom: The *Chen* decision has been the subject of controversy as parents in the position of baby Chen's mother are permitted to reside but not to work. This is causing hardship.

Special issue: The Sports Sector

Austria: there continue to be doubts about the compatibility of the football association rules for the third division; there may be indirect discrimination in the first and second divisions.

Cyprus: there are no restrictions on professional sports persons holding EU citizenship though there are quotas in the second and third league divisions which are amateur.

Czech Republic: there are no national quotas for EU nationals on teams (other than the Czech national team).

Estonia: there are no restrictions against EU citizens in the sports sector; however, the club rules are less clear.

Germany: national quotas affecting EU nationals and nationals of countries with which the EU has agreements including working conditions non-discrimination clauses have been abolished however it has been replaced by a local player rule which requires a relevant connection with the football club.

Greece: there is no discrimination against EU nationals in professional football as players but in the capacity of trainers there are aspects of concern – particularly the need for permission from the General Secretary of Sport. In amateur sports there is discrimination on the basis of nationality in the rules. There are also some questionable rules relating to basketball trainers.

Hungary: the National Male Basketball Championship failed to apply the non discrimination requirement of the Cotonu Agreement when it excluded a Senegalese player. The case does not appear to have gone to court. Further the rules on professional athletes are highly complex while at the same time leaving a wide margin of appreciation to the sports leagues. The legislation still uses the term Hungarian as the point of departure which results in all non Hungarians being treated equally without regard to the privileged position of EEA nationals.

Ireland: there are no problems at the moment in this sector.

Italy: there is discrimination on the basis of nationality still evident in the regulations of the Italian Sport Federations of football, rugby and water polo. So far the courts have upheld the discrimination.

Latvia: there have been some improvements to the regulations to provide for non discrimination particularly in the basketball sector but there is no significant change regarding football where there are still problems.

Lithuania: problems are still clearly there in many sectors including basketball and volleyball.

Luxembourg: measures have been taken to bring the regulations into line with the ECJ jurisprudence. In practice problems still arise but most recently they appear to be subject to non-judicial resolution.

Malta: the sports sector is problematic. There is still discrimination on the basis of nationality in the football rules.

Poland: in light of the ECJ decisions, the Polish Football Union Board has changed its rules to permit EU players without a quota.

Portugal: there are still some discriminatory rules in non-professional sports – such as differential fees for EU and other foreign nationals, or limitations on the basis of the Schengen border. The Commission has written a reasoned letter to the Portuguese authorities about discrimination in the sector which resulted in a notification from the Secretary of State that the clubs should stop discriminatory practices against EU citizens. A new law was under consideration in 2006.

Slovakia: the discriminatory rules in ice hockey have now been changed to permit EU citizens without a quota.

Slovenia: the rules in basketball do not expressly discriminate against EU citizens but reserve 5 places on each team for Slovenian nationals for the first part and four in the second. The football rules do not contain similar limitations. Slovenian nationals under the age of 18 are prohibited from moving to another Member State to play football unless their parents moved to the other Member State for a reason unconnected with football.

Spain: the rules of the football association were changed in 2006 to remove quota restrictions on EU citizens. The rules of the basketball association are not so clear.

Sweden: The UEFA recommendation on young players has been followed. The Swedish football association's assembly decided in 2006 that out of 16 players seven should have been registered with a Swedish football club for at least three years when the player was between 15-21 years old.

United Kingdom: in football out of 25 players at least two must be club trained (registered for a minimum of three years between the ages of 15 and 18).

CHAPTER VII. POLICIES, TEXTS AND/OR PRACTICES OF A GENERAL NATURE WITH REPERCUSSIONS ON FREE MOVEMENT OF WORKERS

Introduction

The principal policies, texts and practices addressed by the country rapporteurs in this chapter, in large part, cover similar issues to those discussed in the 2005 report. The chapter considers the following topics:

- family reunification of third-country nationals and treatment of third-country nationals who are long-term residents, including in those Member States that are not participating in the transposition of the relevant EU directives in these fields (*Denmark, Ireland* and *United Kingdom*);
- application of the Community preference principle regarding access to the labour market;
- economic/ labour migration of third-country nationals and their treatment after admission;
- developments in integration policy;
- citizenship and naturalisation;
- anti-discrimination law and policy;
- measures to prevent unauthorised employment; and
- miscellaneous issues.

Four reports provide limited information in these main areas of interest, or refer to other chapters. The report on *Germany* refers to Chapter III of the report on equality of treatment on the basis of nationality while, as in 2005, the report on *Italy* notes that the treatment of third-country nationals is governed by the 1998 consolidated law on immigration as amended by the Bossi-Fini Act of 2002. As a general rule, this law does not apply to EU citizens unless the provisions therein are more favourable to them than those found in other applicable laws. The Italian rapporteur adds that the new Government formed after parliamentary elections held in April 2006 conducted a review of the current immigration rules and presented a first draft of amendments in October 2006. The report relating to *Spain* lists a number of measures adopted in 2006, which have some repercussions on the free movement of workers, such as the November 2006 Memorandum of the Director of Public Prosecutions, which is discussed in Chapter I in connection with the non-applicability of the substitution of expulsion for imprisonment in respect of EU citizens who have been convicted of criminal offences. The report on *Hungary* refers to a number of recent surveys which point out that the poor level of mobility and competitiveness of Hungarian workers is connected closely with deficiencies in the public education and training systems in the country.

Family reunification and long-term residents

A number of reports refer to the adoption in 2006 of national measures to transpose the Directives on the right to family reunification for third-country nationals and the Directive concerning the status of third-country nationals who are long-term residents.[40] Transposition of the Family Reunification Directive is described in some detail in the reports of *Belgium*, *Cyprus*, and *Greece*, while transposition of the Long-term Residents Directive is discussed in the reports of *Cyprus*, *Greece*, *Latvia*, and *Malta*. The report on *Portugal* mentions a new Immigration Act drafted during 2006, which will transpose these two Directives as well as a number of others.

40 See respectively Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and, OJ 2003 L 251/12 and Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2003 L 16/44.

The transposition of these Directives has also resulted in the adoption of new integration measures, which is discussed below. With regard to the Family Reunification Directive, it is interesting to note which third-country nationals qualify for the right of family reunification in the transposed national rules. It appears that this is a very limited group in *Cyprus* as most third-country nationals are only entitled to work for a maximum of four years and therefore have no or few prospects of obtaining the right of permanent residence as specified in Article 3(1) of the Directive. According to the rapporteur, the only third-country nationals entitled to this right are those who hold a residence permit of 5 years or more (i.e. those granted long-term resident status). In *Greece*, however, the qualifying group of third-country nationals comprises those persons who have been lawfully in the country for a period of two years. Third-country nationals in this category may therefore request the entry and residence of family members subject to conditions such as the possession of sickness insurance, stable and regular resources assessed by reference to the level of the minimum salary, and appropriate accommodation.

Reverse discrimination continues to be an issue in a number of Member States in respect of the treatment of third-country national family members of those nationals who do not exercise free movement rights. In *Austria*, a challenge to the stricter rules for Austrian nationals married to third-country nationals is pending before the Constitutional Court. The restrictive family reunion rules in *Denmark* were discussed once again in the 2006 report, although in comparison with previous years, only minor amendments were introduced to the Aliens Act in this regard. While these rules do not apply to EU citizens exercising their free movement rights, they continue to be relevant for Community law on free movement because many Danish nationals who are unable to comply with the strict requirements of the Aliens Act, or unwilling to submit to the cumbersome procedures, are invoking Community law to circumvent them. In *Finland*, proposed amendments to the aliens' legislation on issuing residence permits to family members of Finnish citizens envisage more stringent rules where the latter have not exercised free movement rights.

While *Ireland* has not opted into the Family Reunification Directive, the Department of Justice, Equality and Law Reform issued guidelines in January 2007 on the "Family Reunification for Workers", which offer guidance on the visa application procedures for the spouse and dependant unmarried children of non-EEA nationals who are in possession of valid work permits/visas and fulfil a number of other conditions. The *United Kingdom* has not opted into the Family Reunification or the Long-Term Residents Directive, although it appears that these measures have nevertheless had some influence on changes to the national rules in this area. In April 2006, the UK Immigration Rules were amended increasing the qualifying period for indefinite leave to remain (i.e. permanent residence) for foreign workers from four to five years lawful residence, which was justified in the Explanatory Memorandum to the Rules *inter alia* on the basis of bringing the UK "in line with the European norm…".

Applicability of the Community preference principle

The application of the Community preference principle is described in a number of the reports (*Cyprus*, *Czech Republic*, *Finland*, *Ireland*, *Latvia*, and *Portugal*). For example, in *Cyprus*, first priority regarding access to employment is given to Cypriot nationals and EU citizens and their dependants together with Greek nationals who possess a special identity card. Next come nationals from the accession countries (Bulgarians and Romanians until the end of 2006) followed by resident third-country nationals (including asylum-seekers) and, finally, newcomers from third countries. In some of these Member States, the preference for Community workers is realized through the operation of a labour market test in respect of the employment of third-country nationals. For example, in *Ireland*, the employer is required to advertise the job vacancy for three days with the EURES employment network and in local and national newspapers to ensure that an Irish, EEA or Swiss national is not available to take up the vacancy in question, and evidence of this labour market test must be submitted with the employment permit application to the Department of Enterprise, Trade

and Employment. Moreover, the application must also confirm that at the time of the application more than 50 per cent of the company employees are Irish, EU/EEA or Swiss nationals. The objective of this provision is to comply with the Community obligation to give preference to EU citizens or EEA nationals and to ensure that third-country nationals do not displace jobs that could be filled by the former. In *Latvia*, a vacancy must be advertised for at least one month before a third-country national may be hired.

Economic migration of third-country nationals

A number of reports discuss recent changes or proposals for amendments to the rules for the admission of third-country nationals for the purpose of employment. In general, there continues to be a need for skilled as well as lower-skilled migrant workers from third countries in certain sectors of the economy in many Member States. The three Baltic States continue to report labour shortages due to a significant emigration of their nationals. Indeed, in *Latvia*, measures have been put into place to make it easier for employers to hire workers from third countries such as Belarus, Moldova, the Russian Federation and Ukraine, by simplifying previously onerous and bureaucratic criteria and by making the process less expensive. It remains to be seen, however, whether such measures will succeed in their objectives, and indeed a January 2007 government policy paper on this topic has been criticised as insufficient by the Employers Confederation. In *Estonia*, however, and as outlined in previous reports, employers who are interested in hiring qualified workers, particularly in the construction and IT sectors, are discouraged from doing so by the rather complex rules applicable to hiring workers from third countries. *Lithuania* continues to experience a decrease in its population, although the rate of this decrease slowed in 2006 with approximately 10,300 persons leaving the country for six months or more as compared with over 15,500 in 2005. As a result, labour shortages have been reported in construction, the retail industry, and the education and health care sectors. Perhaps not surprisingly, therefore, more work permits were issued in 2006 (2,944) than in 2005 (1,389 – see the 2005 Report). In 2006, most foreign workers were from Belarus (37%) and then Ukraine (32%) and Romania (14%).

With regard to skilled migrant workers, 1,125 "key personnel" were admitted in Austria in 2006. Such workers are required to earn more that 2,250 Euros per month and possess a needed qualification. The report on the *Czech Republic*, as in 2005, describes the pilot project on the "Selection of Qualified Foreign Labour "from specified third countries, which has attracted 530 participants since 2003. The objective of the programme is to attract skilled workers for permanent settlement subject to a positive integration assessment. In December 2006, there were 139 participants in the project who had been issued with permanent residence permits. In the *Netherlands*, an evaluation of the legislation relating to the admission of "knowledge migrants" concluded positively in 2005, although problems with the application process were identified and amendments were introduced in March 2006 with the result that the number of "knowledge migrants" admitted in 2006 (until November of that year) was more than double the number admitted in 2005 (i.e. 2,898 as compared to 1,393).

In the *United Kingdom*, consultations took place during 2006 in respect of the adoption of a new points system applicable to the admission of third-country nationals for employment purposes, which will be phased in over the next couple of years. Tier 1 of this system will replace the current Highly Skilled Migrant Programme (HSMP), which underwent revision during the course of the year. This revision attracted considerable criticism because it means that migrants who have already been admitted for 2 years under the Programme risk losing their status if they are unable to demonstrate that they comply with the new stricter criteria. Tier 2 of the proposed scheme concerns skilled workers with a job offer and will modify the ordinary work permit scheme, while Tier 3 will be aimed at low-skilled workers, although the UK Government currently holds the view that labour shortages in the occupations in question are being met adequately by nationals from the new Member States. In this regard, it is interesting to note that even though transitional arrangements are in place in respect of Bulgaria and Romania, the two low-skilled schemes currently in operation in the UK, the Seasonal Agricultural Workers Scheme (SAWS) and the Sectors Based

Scheme (SBS) for workers in the food processing sector, are now largely limited to nationals from these countries.

In *Ireland*, a number of the policy developments mentioned in the 2005 report have come to fruition in 2006. While the new Immigration and Residence Bill to consolidate and enhance the current body of legislation has finally been prepared (and was presented to Parliament in April 2007), the Employment Permits Act was passed in 2006 and came into force in February 2007. As described in the 2005 report, this Act provides for a new employment permit system including *inter alia* the establishment of a "Green Card" scheme for occupations in which there are skills shortages; new labour protections for employees, such as granting the permit directly to the worker rather than the employer, the inclusion of a statement of rights and entitlements in the permit itself, including the right to change employment by obtaining a permit for another employer, and prohibitions on employers from deducting expenses associated with recruitment from the worker's pay and from retaining the worker's personal documents; and sanctions, including significant fines as well as prison sentences, for infringements of the legislation.

In *Sweden*, an official Government committee report published in 2006 discusses the need for labour migration from third countries with a view to filling labour shortages in certain sectors of the economy. The report proposes *inter alia*: a two-year renewable temporary work permit, possibly leading to permanent residence, to address immediate labour shortages; a seasonal work permit (already in place); a permit for permanent residence linked to labour market reasons; a resident permit for family members granted for the same period as the worker; and a visa to third-country nationals for the purpose of seeking employment in Sweden for a period of three months. The report underlines that these proposals, if adopted, would not exempt third-country nationals from meeting a labour market test and would be applied in accordance with the Community preference principle.

Two reports describe the employment quota for third-country nationals. In *Austria*, about 7,500 persons annually receive a temporary work permit and 7,000 are admitted for seasonal work. In *Slovenia*, the labour migration quota for 2006 was set at 16,700 third-country nationals.

In some Member States, in addition to the possibility of working outside their period of study, which is provided for in the Students Directive,[41] information is provided on policies to facilitate access to employment for third-country national students after completion of their studies. In *Ireland*, a scheme has been put into place to allow recent graduates to stay in the country for a limited period after completion of their studies to seek employment. Students can also apply for an employment permit if they are offered a job prior to completion of their degree course. In *Slovenia*, amendments to the Employment and Work of Aliens Act have been proposed to facilitate access to the national labour market for third-country nationals in shortage areas, including for researchers and students.

Developments in integration policy

As in 2005, there have been further developments regarding integration policy in a number of Member States. In the *Netherlands*, the Act on Preliminary Integration Abroad was passed on 22 December 2005 and entered into force on 15 March 2006. It is supplemented by the Act on Integration, which entered into force on 1 January 2007. The first measure provides for an integration test abroad and the second for a compulsory integration programme after arrival in the Netherlands, although these will not apply to EU citizens, EEA or Swiss nationals, and third-country national family members of EU citizens. The original plan to apply the law to certain categories of Dutch nationals born outside the Netherlands and to naturalized Dutch nationals was not implemented in the legislation, which in turn has given rise to some doubts whether the Act can be applied to migrants who are entitled to equal treatment under Community law, such as Turkish nationals and their family members

41 Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ 2004 L 375/12, Article 17.

whose right of residence flows directly from the EEC-Turkey Association Agreement and long-term resident third-country nationals under the Directive concerning this status.

The report of *Finland* discusses the personal integration plan, which was also referred to in 2005. All migrants, including EU citizens and their family members, who moved to Finland after 1 May 1997, who have been entered into the population data system of their home municipality and who are eligible for a labour market subsidy and/or social assistance are entitled to have their own personal integration plans, which remain optional however. The Finnish report observes that no significant developments took place in this respect in 2006. In *Ireland*, in 2006, the Minister of Justice, Equality and Law Reform set up a Fund of EUR 5 million to support integration projects that meet the following criteria: they facilitate and support access by migrants to mainstream provision and enhance their participation in society generally; avoid duplication with existing projects and services; and reflect the basic principles of integration as set out by the EU Council of Ministers. The report of *Portugal* refers to the Plan for Immigrants' Integration, which was presented for public discussion in December 2006. The plan establishes a national strategy for the reception and integration of immigrants and includes measures in several key areas such as employment, vocational training, residence, health, education, culture, sport, social solidarity and justice.

As noted above, the question of integration has also arisen in some Member States in the transposition of the Long-term Residents Directive. In *Cyprus*, the original Bill transposing the Directive would have provided for language and history knowledge requirements for third-country nationals applying for permanent residence, but these provisions are no longer found in the adopted text. However, the law transposing the Directive in *Latvia* does require persons applying for long-term resident status to demonstrate basic proficiency in Latvian. Moreover, proposed amendments to the draft law to exempt resident non-citizens from this requirement were not accepted.

Citizenship and naturalisation

Issues relating to citizenship and naturalisation are discussed in two reports, which also indirectly affect the position of EU nationals resident in the countries concerned. In *Lithuania*, a November 2006 judgment of the Constitutional Court declared 23 provisions of the Citizenship Law and the implementing legislation as unconstitutional. One of these concerned the exception to the constitutional prohibition on dual citizenship which, in the opinion of the Court, was being applied much too widely and also only in respect of Lithuanian citizens of Lithuanian origin and not those with other national/ethnic origins (e.g. Russians, Poles, etc.). In *Poland*, while it would appear that EU nationals are no longer in a more favourable position than third-country nationals as far as the grant of Polish citizenship is concerned in that the conditions for qualification are five years of residence, possession of EU long-term resident status (acquired after 5 years residence) or the right of permanent residence, in practice third-country nationals are more likely than EU nationals to face additional obstacles in accessing Polish citizenship.

Anti-discrimination law and policy

As in 2005, developments in anti-discrimination law and policy and their impact on the free movement of citizens is discussed in some reports. In particular, in *Luxembourg*, the two EU equal treatment directives[42] have finally been transposed by way of two laws adopted in November 2006, the first a general non-discrimination law applying to the employment area outside the public sector, and the second applicable to all public sector employees and employers. The new legislation is a significant improvement on previous anti-discrimination legislation in the country.

42 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

Measures to prevent unauthorised employment

Irregular labour migration remains a concern in *Cyprus*. The number of unauthorized foreign workers in the country in 2006 was estimated at between 30,000 and 35,000, which is in addition to the 63,000 lawfully admitted workers from non-EU as well as EU Member States, thus reflecting the dependency of the Cyprus economy on foreign labour. The prevailing popular view in Cyprus is that unauthorized workers impact adversely on the employment and job opportunities of Cypriot and EU workers because they are paid considerably lower wages.

The report on *Denmark* refers again to the initiatives launched in recent years to address unauthorized employment. These include amendments to the Aliens Act in 2004 and 2005, which increase the level of sanctions on employers for the unauthorised employment of foreigners to a period of two years imprisonment. Foreigners taking up unauthorized work can also face up to one year of imprisonment. As in previous years, the report on *Slovakia* refers to the Government document on the "Migration Policy Conception of the Slovak Republic", adopted in January 2005, which is mainly concerned with irregular migration and asylum. In the *United Kingdom*, the proposals discussed in 2005 to replace existing criminal sanctions for the employment of irregular migrant workers with administrative fines have now been adopted in the Immigration Asylum and Nationality Act 2006, although these new measures were not brought into force during 2006. Moreover, Regulations were also introduced during 2006 making it a criminal offence to employ nationals from Bulgaria and Romania (which are subject to transitional arrangements in the UK regarding free movement of workers). The Regulations also make it a criminal offence for Bulgarian and Romanian nationals to take up employment in the UK without authorization.

Miscellaneous issues

An important development in *Belgium* with possible repercussions on free movement of workers is the creation of a new jurisdiction, the Alien Litigation Council (ALC), to hear the cases of all non-nationals, including EU citizens. While this body is endowed with full competence to consider matters of fact and law in respect of asylum cases, EU citizens only have recourse to it for the purpose of "legality control". The earlier consultation procedure for EU citizens prior to the adoption of a removal decision is still in place but nonetheless the new jurisdiction and its discriminatory application in respect of EU citizens raises equal treatment concerns.

In *France*, the January 2006 law on the fight against terrorism and various measures on the security and control of frontiers include several provisions which increase the possibility of controls on foreigners on French territory and which thus may have adverse repercussions on the free movement of workers. For example, identity checks are envisaged on international trains in respect of all persons suspected of having committed or committing an offence.

In the *Netherlands*, the compatibility of high fees for long-term residence visas for family reunification (EUR 890 each for one family member and EUR 188 each for other accompanying members) with Article 8 ECHR and the EEC-Turkey Association Agreement has been a topic of debate in Parliament and is the subject of infringement proceedings by the Commission, which is of the view that the fees for issuing or extending residence permits under the application of the Association Agreement should be equivalent to the fees for EU or EEA nationals (i.e. EUR 30).

CHAPTER VIII. EU ENLARGEMENT

Introduction

This chapter deals specifically with events occurring in 2006 but in view of the accession of two Member States on 1 January 2007, the position in respect of the transitional provisions for them are included

On 1 May 2006 the first phase of the transitional arrangements for workers from eight Member States[43] (A8 workers) ended. The pre 2004 Member States were required to notify the Commission before that date whether they would continue to apply transitional arrangements limiting labour market access for A8 workers or not. While in the first phase which ran from 1 May 2004 – 31 April 2006 only three pre 2004 Member States, Ireland, Sweden and the UK, had not applied transitional arrangements (though the UK which did institute a worker registration scheme), in the second phase nine Member States have opened their labour markets to A8 workers (the three plus Finland, Greece, Italy, the Netherlands Portugal and Spain). Most other pre 2004 Member States have relaxed their labour market access rules for A8 workers.

Concerns have arisen in a number of Member States (including pre 2004 Member States and those which joined on that date) regarding working conditions and wage levels of A8 workers. There is concern that the equality right is not fully complied with. In some Member States concerns arise regarding the application of transitional provisions for A8 workers.

For workers from the two Member States, Bulgaria and Romania, which joined on 1 January 2007, (A2 workers) quite a different group of Member States chose not to apply transitional arrangements: Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Poland, Slovenia, Slovakia, Finland and Sweden.

Information on transitional arrangements regarding EU 8

Changes in national law and practice

Austria: the transitional arrangements were extended for a further three years.

Belgium: the transitional arrangements were extended for a further three years.

Denmark: there has been a relaxation of the transitional arrangements on A8 workers though the transitional arrangements have been extended.

Finland: Parliament decided not to continue the transitional arrangements on workers after 1 May 2006.

France: continues to apply the transitional arrangements but is gradually lifting them sector by sector.

Germany: continues to apply the transitional arrangements for a further three years.

Greece: decided not to extend transitional arrangements on A8 workers.

Hungary: applies reciprocity to those EU 15 Member States which apply transitional arrangements on workers. On 1 May 2006 it lifted transitional arrangements on nationals of Finland, Greece, Netherlands, Iceland, Portugal and Spain. For nationals of Denmark, Norway, Belgium, France and Luxembourg work permits are issued without a labour market assessment.

Italy: the transitional arrangements were extended until 27 July 2006 when they were lifted.

Luxembourg: while extending the transitional arrangements it has opened up some sectors to A8 workers.

Netherlands: transitional arrangements on A8 workers were lifted on 1 May 2007.

Poland: lifted the reciprocity restrictions on workers from other Member States applying transitional arrangements.

43 Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

Portugal: lifted the transitional arrangements on A8 workers.

Slovenia: lifted reciprocal transitional arrangements which applied to workers from other Member States.

Spain: lifted the transitional arrangements on A8 workers.

UK: the first fee for worker registration, obligatory for A8 workers, has been increased to GBP 90 (EURO 130.36).

Changes in position with regard to the second phase of the transitional arrangements

Austria: Some changes have been made to facilitate access by both A8 and A2 nationals to jobs in the health sector subject to a minimum salary of 1,125Euro per month (amendment II 55/2006). Also there is preferential treatment for A8 and A2 nationals who work for a maximum of six months.

Belgium: The authorities have accepted that A8 nationals can be recruited for labour shortage jobs in exceptional circumstances. Four lists of such jobs have been drawn up.

Denmark: clarified its EU/EEA Order to state that A8 nationals who are self sufficient, students, retired persons or those remaining in Denmark after ceasing economic activities need a work permit if they want to take a job. Students however get work permits for 15 hours work per week during term and full time in the holiday months.

Following questions from the Commission, the Danish authorities clarified the law that after 12 months consecutive employment A8 nationals enjoy free movement rights as workers. On 5 April 2006 the political parties agreed to lighten the restrictions applying to A8 nationals which include prior approval for employment of A8 workers for employers covered by a collective agreement, access to part time jobs, the right to continue work during the processing period and easier rules for lorry drivers.

Finland: has put in place a registration system for A8 nationals (muuttamisesta 419/2006) where any employment of more than 14 days must be registered. There are no sanctions for failure to register. Its objective is statistical only. Further, in 2006 an act on posted workers (1146/1999) applies national minimum wage to them. A amendment was also made to tax law to require workers hired abroad to declare income in Finland.

France: is permitting access to employment in 61 sectors, including the public building sector, hospitality sector, agriculture, metal workers and industrial processing; commerce, sales and cleaning.

Hungary: There is a strict reciprocity rule applied in this Member State.

Luxembourg: greater flexibility is now applied to work permit applications from A8 workers in some sectors including agriculture, viticulture and hospitality.

Netherlands: An active campaign to fine and expel A8 workers without permits led to substantial increases in detection of illegal working in 2006. The gradual extension of the sectors in which A8 workers were granted work permits under a flexible regime led to increased scrutiny of other sectors.

Spain: Employment Ministry instruction of 25 April 2006 formed the legal base for the lifting of the transitional arrangements. It applies Royal Decree 178/2003 to A8 workers. Detailed transitional rules for the national administrative regime were spelt out. There is some concern regarding the definition of family members though this seems to be subsumed into Directive 2004/38.

Details of the legal regime, including relevant legislation applicable to the second phase

Austria: the Aliens Employment Act (Federal Gazette 218/1975 as amended by I 157/2005).

Belgium: Royal Decree adopted 24 April 2006. This follows the advice of the High Council for Employment.

Denmark: it takes between 25 and 74 days for the authorities to issue a permit.

France: circular DPM/DMI2/2006/200 of 29 April 2006 now applies.

Greece: circular 30269/9.2.2007 now applies.

Hungary: The most recent change is found in 8/1999 (XI.10) SZCSM as amended by Ministerial Decree of Employment and Labour No 5 of 12 May 2006.

Ireland: Employment Permits Act 2003 applies – there are no transitional arrangements applicable.

Malta: Immigration Regulations LN205/2004.

Portugal: Law 37/2006 now applies.

Slovenia: Ur.1.RS, 66/2000, 101/2005, 4/2006 apply now.

Spain: Employment Ministry instruction of 25 April 2006.

Practical problems, individual cases and national case law pertaining to the transitional arrangements

Austria: The Supreme Court of Civil Affairs found that a Polish national who set up a limited partnership to avoid the application of the transitional arrangements by being self employed was entitled to do so.

Czech Republic: the concerns here relate to Czech workers in other Member States. The Czech authorities are concerned that their nationals are being issued work permits for periods under 12 months in order to exclude their right of free access to the labour market.

Finland: the issue of posted workers from A8 states was central to the decision to lift the transitional arrangements. The majority are Estonian but better opportunities in Estonia seem to be causing a decrease in the number coming to Finland.

Germany: a social court decision of 2005 regarding a self employed miner providing services applied a restrictive interpretation of the excluded sectors in the Accession Agreement thus excluding him from the service market. A number of German courts have puzzled over the expulsion power in respect of A8 nationals.

Hungary: the main problems have been in respect of Hungarian workers going to Member States applying transitional arrangements. There are reports of short work permits being issued (ie 50 weeks rather than 52) to limit the possibility that the workers will acquire rights. No specific Member State is cited.

Ireland: there has been substantial media discussion regarding the numbers of A8 workers in Ireland with specific examples of labour exploitation of A8 nationals highlighted. Some problems have occurred in access to social benefits (see chapter XI).

Lithuania: the exercise of free movement of worker rights by nationals has caused substantial labour shortages. From the Lithuanian statistics available, most workers who moved to other Member States had high or higher education or were students. The vast majority were under 34. The authorities receive reports from their nationals working in other Member States of obstructive treatment (in particular Belgium was singled out).

Malta: while the issue of work permits to EU workers is supposed to be automatic, the legislation states that workers may not take up employment until the employer has been issued an employment license.

Netherlands: problems with short work permits being issued occur here. Substantial parliamentary and press interest in the conditions of work and concerns about housing standards and pay levels encouraged the authorities to lift the restrictions completely in 2007. There have been five decisions of the State Council on 8 February 2006 on service provision and work permits. The Council held that unless the companies which were fined for employing Polish workers under a service provision contract with a Polish company could prove that more than just the workers were sent to provide services, the authorities were justified in fining the companies.

Slovakia: the main concerns are for Slovak workers in other Member States.

Sweden: there has been little concern expressed about workers from the A8. However, service providers and self employed A8 nationals have been the subject of attention, mainly in relation to wage levels. A reference to the ECJ is pending.

UK: there has been substantial criticism of the worker registration scheme which has been attacked as inefficient and not performing any effective role in ensuring that there is equality of treatment in the working conditions and wages of A8 workers in the UK. There

have been numerous cases before the courts in particularly regarding denial of social benefits. So far the results have not be satisfactory for the A8 workers.

Workers from Bulgaria and Romania

Austria: applies transitional arrangements to nationals of both these countries.

Belgium: A Royal Decree of 20 December 2006 applies the restrictions to nationals of these states until 1 January 2009. For A2 workers the Employment Minister was awaiting an opinion from a national commission before applying the same rules on labour shortage jobs to them.

Cyprus: does not apply transitional arrangements to A2 workers. There were approximately 6,000 workers from these Member States in Cyprus at the end of 2006.

Czech Republic: Resolution 1345/2006 November 2006 provides for free access to the labour market for A2 nationals. This decision was influenced by the unpopularity of the restrictions which apply to Czech nationals in some other Member States. The relationship with the right to provide services and establishment is also mentioned.

Denmark: A2 nationals enjoy the same treatment as A8 nationals including the relaxation of the transitional provisions which applied from May 2006.

Estonia: is not applying transitional arrangements to workers from the A2.

Finland: is not applying transitional arrangements to A2 workers.

France: is applying transitional arrangements to A2 workers. Further a very strict application of Directive 2004/38 is resulting in the issue of expulsion decisions against a number of them.

Germany: is applying the transitional arrangements on A2 workers.

Greece: is applying transitional arrangements to A2 workers.

Hungary: There has been substantial research carried out into expected rates of migration from Bulgaria and Romania to Hungary. In light of this research the authorities have decided to lift the labour market test for 219 occupations as regards A2 workers with a simplified work permit procedure (Government Decree No 354 of 23 December 2006).

Ireland: introduced transitional arrangements on A2 workers but has faithfully applied the transitional protections for workers with 12 months continuous employment. Concerns about the exercise of service provision and establishment rights as a way around the restrictions have already begun to surface. As in France, expulsion decisions have been taken against Romanians on uncertain grounds.

Italy: some judicial rulings in 2006 held that A2 nationals should be treated as EU citizens in particular as regards expulsion. The authorities adopted circular no 2, 28-12-2006 applying a one year transitional period in general and free access to employment in specified sectors including agriculture, tourism, hospitality, construction, domestic work, mechanical engineering, management and highly skilled work and seasonal work. In other sectors a labour market test is applied.

Latvia: no transitional arrangements are applied to A2 workers. The numbers are exceedingly low – until May 2006 only 19 work permits had been issued to Romanians.

Lithuania: no transitional arrangements are applied to A2 workers.

Luxembourg: transitional arrangements apply to A2 workers.

Malta: transitional arrangements apply to A2 workers.

Netherlands: transitional arrangements apply to A2 workers.

Poland: No transitional arrangements apply to A2 workers. The numbers of A2 workers in Poland seem to be low and the exercise of free movement rights by Polish nationals has led to labour market shortages.

Portugal: is applying transitional arrangements to A2 workers though it is possible these will be lifted at the end of the first phase. The courts seem to be applying national law on expulsion to permit expulsion of A2 nationals where they have been sentenced to a six month prison term.

Slovakia: no transitional arrangements are applied to A2 workers. The authorities did not consider there to be any threat to the labour market from these workers.

Slovenia: no transitional arrangements are applied to A2 workers. The decision was taken after consultation with the Economic and Social Council which includes the social partners.

Spain: transitional arrangements apply to A2 workers. The transitional provisions appears to have been corrected implemented for those who have worked for 12 months or more already in Spain. No visa requirement applies to A2 workers who work in Spain for less than 180 days. Students are allowed to work.

Sweden: no transitional arrangements apply to A2 workers.

UK: transitional restrictions apply to A2 workers. A skills test is applied. Students are permitted to work .

CHAPTER IX. STATISTICS

The apparent differences between the Member States in the availability, the quality and the level of detail of statistical data have been noted in previous reports. Several national reports on 2006 provide more detailed statistical information than in previous reports. Again, the data in reports on some of Member States that acceded to the EU in 2004 are more detailed and recent than the data presented in some of the reports on the EU-15 Member States. The availability of certain data on certain EU-8 Member States may also be related to the fact that those Member State require workers from other Member States to register with the official labour agencies or apply for a work permit. In the *UK* detailed information is available on workers from the EU-8 since those workers are required to register as well. If such registration or application is no longer required, as is the case in most Member States, the relevant data will no longer be available. One can only hope that the data that will have to be made available by Member States to Eurostat on the basis of Regulation EC No 826/2007 on Community statistics on migration and international protection (OJ 2007 L 199/23) will improve the available of comparable data. That regulation requires Member States to make statistical data as specified in the regulation available for the year 2008 for the first time.

The absolute **number of residents who are nationals of other EU Member States** and the relative share of those EU nationals in total foreign population of Member States varies considerably. The absolute number varies from 8,200 registered EU nationals in *Greece* to 650,000 nationals of other Member States in *Spain*. In a few Member States, such as *Belgium, Luxembourg* and *Ireland,* EU nationals are the large majority of the foreign population (in *Belgium* 61%). In *Ireland,* EU nationals make up 7% of the total economically active population. In a second group EU nationals count for between one fifth to one third of the foreign population: *Spain* (21%), *Portugal* (25%), *Czech Republic* (30%) and *Netherlands* (33%). In a third group (e.g. the *Baltic States, Greece and Poland*) EU nationals make up only a tiny minority of the total foreign population.

The traditional pattern that in most Member States the majority of resident EU nationals originates from the neighbouring Member States, is apparent from the nationals reports on 2006 as well. Migrants from Poland and the UK are the exception to this rule. Migrants from *Poland* count for a large share of the EU immigrants not only in neighbouring states as *Czech Republic* and *Slovakia*, but also in *Cyprus, Greece, Ireland, Netherlands* and the *UK*. *British* nationals are the largest EU immigrant groups not only in *Ireland*, but also in *Portugal* and *Spain*; they are the third largest group in *Finland* and *Greece*.

In most of the EU-15 the number of resident EU nationals clearly increased after the Accession of the EU-10. In *Spain* the number of registered EU nationals doubled between 2001 and 2006; the number of registered third-country national in Spain tripled in those five years. Compared with the figures on 2005, the number EU nationals in 2006 in *Italy* increased with 12% and with 19% in Spain.

Data on the nature of the resident EU migrants are available in the *Czech Republic*: 50% are workers, 35% are family members, 12% settlement permit holders, 4% self-employed or managers and 1% are students. The share of each group is surprising similar to the data on **EU immigrants** in 2006 in *Sweden* and *France*. In the latter country EU migrants are 45% workers, 32% family members, 17% students, 5% self-employed or service-providers. Only the share of the students from other Member States is considerably higher in Sweden. In *Sweden* 80% of the students and only 30% of the employed persons came the EU-14; thus, 20% of the students, 70% of the workers and 55% of the family members came from the EU-10. In *France* immigrants from EEA countries (data on 2004) make up only 20% of the total immigration. The EEA nationals are mainly workers (37%) or not economically active (40%), family member and minors (20%) and students (2%).

The data on **immigration and emigration** in the national reports indicate that in most EU-15 Member States the immigration of EU nationals increased after the accession of the EU-10 in 2004. This increase is most visible in *Ireland*, *Spain* and the *UK*. Polish immigrants are the (second) largest group in *Austria*, *Belgium, Ireland, Netherlands, Slovakia,*

Sweden and the *UK*. In some Member States the total immigration decreased in comparison with previous years (in *Austria* it was the lowest since 2001) in other Member States (e.g. *Hungary*) the level of immigration is stable.

Some Member States have a clear emigration-surplus: the Baltic States, Poland and the Netherlands. In the first four states emigration to EU-15 Member States far outnumbers the limited immigration from those states (both returning nationals and nationals of the EU-15) and the increasing replacement migration from third countries, either states just across EU external borders (Russia, Ukraine, Belarus) or more distanced countries, such as China, India and Vietnam. In *Estonia* the mass emigration has triggered an upward pressure on salaries in order to make it more attractive for Estonian workers to remain in the country and for emigrant workers to return to the country. In the *Netherlands* the persistent emigration-surplus since 2003 has other causes (among others cross border movement to Belgium and Germany and the dominant anti-immigrant climate). A considerable part of the intra-EU migration from and between the EU-10 will not appear in migration statistics, because the workers come and go for short periods of employment, seasonal or cross border work without the need to register in the population registers of the host Member State.

Data on **residence documents** issued are available for less than half of the Member States. In some Member States EU, such as *France* and *Germany*, migrants are no longer obliged to apply for a residence card. This policy change makes that those data are no longer available or only with regard to specific categories, e.g. third-country national family members. In *France* used to issue more than 50,000 EC residence cards a year. In 2005 only 7,100 residence cards were issued, out of which 1,431 for third-country national family members. In the *Netherlands* there has been a sharp decrease of the number of EC residence cards issued in 2006 due to the implementation of Directive 2004/38 and a centralisation of the application procedures.

In *Hungary* almost 13,000 applications for a residence card were made in 2006, about the same number as in the previous year. In *Denmark* 12,800 residence cards were issued in 2006 (10,000 in 2005), mostly to nationals of EU-8 countries (primarily Poland and Lithuania); 45% were issued to students, 29% to employees and 15% to family members. In *Estonia* 1,100 residence cards were issued, almost the same number as in 2005. In *Latvia* over 3,000 temporary or permanent residence permits were issued to EU nationals, mostly to nationals of the two other Baltic States. In *Lithuania* 1,250 applications were filed and 1,013 granted: 40% to students, 30% to employees and 10% to family members. Among the latter were only 19 residence cards for third-country national family members. In *Finland* the number of third-country national family members registered was even lower: 5 in the year 2006. In *Poland* in January-August 2006 a total of 6,713 applications for an EC residence card were filed and 6,562 were granted; 3 applications were refused and 142 discontinued. 12 of those applications were for third-country national family members. In the *Netherlands* refusal of an EC residence card occurred far more often: 11% of the applications were refused.

The data on **work permits** relate mainly to EU-8 workers in EU-15 Member States or to nationals of the Member States employed in the EU-10. In *Malta* 1,184 of the 2,157 EU nationals issued with work and residence permits are actually employed, one third of those persons are UK nationals. In the *Netherlands* 58,000 work permits were issued to EU-nationals in 2006, out of which 93% for Polish workers. This was a clear increase in comparison with the 29,500 work permits issued in 2005 and a prelude to the abolishment of the transitional regime for EU-8 workers in 2007. Less than 10% of those permits had a validity of one year or more. This is also an indication of the low level of qualification required for the work performed on the basis of those permits. In *Poland* 880 work permits were issued to EU nationals, mainly to technical experts; 90% of the work permits in Poland in 2006 were issues to workers from third countries. In *Slovakia* almost 4,800 permits were issued, mostly to nationals of the Czech Republic and Poland. In *Slovenia* 3,450 work permits were issued in 2006, almost half of those permits were issued to Slovak nationals. More than half of the permits for EU nationals were issued for posted workers and only one quarter to regular employees. The number of work permits issued in Slovenia to nationals of the

other republics of the former Yugoslavia was four times higher than the number of permits for EU nationals. Two national reports present data on the number of EU nationals paying social insurance contributions. In Cyprus a monthly average of 17,000 nationals of other EU states were paying social insurance contributions. In *Spain* 287,000 registered residents who were paying such contributions, that is 51% of the total of 559,000 registered nationals of other Member States. Among third-country nationals the share of the contributors to the social security was clearly higher: 63%. In the *UK* most of the EU-8 workers who registered came from three countries: *Poland, Lithuania* and *Slovakia*. Information in the British report indicates that the reliance of those workers on social security or public benefits is extremely limited considering the large inflow of workers from those countries.

With regard to the **branches of employment and the level of the jobs** performed the information presented in the national reports provides indications for four general patterns. Firstly, the employment pattern of EU-15 nationals in other EU-15 Member States is fairly similar to that of the nationals of the host country, although the EU migrants may be overrepresented in some branches. *Spain* is a good example of this pattern: 75% of the nationals of other EEA states are employed in the service sectors and 50% of those EEA nationals are employed at high professional level, whilst 44% of the Spanish workers and only 10% of the workers from third countries are employed at that level.

The second pattern is the widespread underutilisation of the qualifications of EU-6 workers employed in the EU-15 Member States. The reports on *Denmark, Ireland, Netherlands* and the *UK* mentions clear indications for this pattern. In *Ireland* 26% of the EU-8 workers are employed in the construction sector and another 21% in manufacturing. In *Denmark* most of the EU-8 workers are employed in agriculture, gardening, forestry and construction. In the *Netherlands* 93% of the EU-workers are employed in jobs shorter than one year, mostly in seasonal jobs in horticulture, construction, manufacturing and food industry. In the *UK* only 10% of the EU-workers at the time of registration expected their work to last for one year or more. Many of them are employed in seasonal jobs. There is however, an interesting development that in 2006 the share of EU-8 workers registered as working in 'administration, business and management' has overtaken the category 'hospitality and catering', that used the be the dominant category in the first two years after Accession.

The third pattern is that EU-15 nationals in EU-8 Member States are employed mainly in jobs requiring high qualifications, as technical experts, managers in commercial, financial or real estate jobs or self-employed person in the liberal professions. This is the case in *Estonia, Czech Republic* and *Poland***.**

The fourth pattern is that EU-8 workers employed in other EU-8 Member States often are employed on short term contracts (Slovak nationals in *Slovenia*), in cross border employment (Slovak workers in *Hungary*) or as posted workers (Polish workers in *Slovakia*). In Slovenia EU-8 nationals are working primarily in the following jobs: construction (Slovakia, Poland), driver (Slovakia, Poland), dancers (Czech republic, Slovakia), butcher (Hungary) machinist (Slovakia) and welder (Slovakia). In *Cyprus* the employment pattern is different: most EU migrant workers are employed in hotels and restaurants (31%), in construction (16%) or in wholesale and retail (12%). The rapporteur on Cyprus remarks that EU migrant workers avoid certain jobs where the demand is the highest: animal husbandry and domestic work. This increases the demand for workers from third countries for those jobs.

Generally, the large majority of EU migrants is of the working **age** (20-64 years). In Spain three quarter of the EEA nationals is of working age. Young children are underrepresented among EU migrants as compared with the share of minors in the total populations of the host country: in Malta 1%, in France 9% and in Spain 6% of the EU migrants are under 18 years. The share of older and mostly retired persons among the EU migrants varies considerably. In Malta 11% of the nationals of other Member States is over 50 years, in France 11% is over 60 years and Spain 15% of the EEA nationals is over 65 years.

Information on **gender** of the EU migrants is available in seven national reports. The percentage of female residents from other Member States ranges from 40% in the Czech Republic to 50% in the Netherlands. Greece (41%), Ireland (46%) and Spain (47%) are in between. In the Netherlands the share of female EU migrants gradually increased from 45%

in 1995 to 50% in 2006. These aggregated data hide considerable gender difference between countries of origin. In Finland migrants from the EU-14 are mostly male and migrants from the EU-8 are in mostly female: 55% of the Estonian nationals in Finland are women. Similar differences can be observed in Portugal: the majority of immigrants from Belgium, Czech Republic, Estonia, Latvia, Lithuania, Hungary and Poland are women, whilst the immigrants from Bulgaria and Romania are mostly men.

The **regional distribution** of EU migrants in the host Member States is fairly similar to the one reported in previous years. Most EU migrants are concentrated in the capital or the surrounding area, in the border regions and in some special regions. In *Ireland* the greatest number of nationals of other Member States lives in the Dublin area. In Italy most EU migrants live in certain Northern areas and in Central Italy, especially the Lazio region. Almost 90% of the EU migrants in *Portugal* live in three of the twenty regions: Lisbon, Faro and Aveiro. In *Spain* 60% of the EU migrants lives in the main tourist areas. In the *UK* the greatest numbers live in Anglia, followed by London and the Midlands. The lowest numbers of EU migrants live in Northern Ireland and Wales.

With regard to **naturalisation** trends mentioned in our previous report are visible in 2006 again. Firstly, trend is that EU nationals relatively seldom and only after long residence in the host Member State apply for naturalisation. The absolute numbers and naturalisation quotes are low. Nationals from the EU-8 might form an exception to this trend. In *Finland* in 480 EU nationals were naturalized, among them 290 citizens of Estonia and 190 Swedish citizens. In the *Netherlands* the number of naturalized German and Polish nationals was almost equal (both just below 350), but the number of Germans is four times higher than the number of Polish nationals living in the Netherlands. Moreover, it is clear that the propensity to apply for naturalisation is further reduced. Once EU migrants are confronted with new barriers to naturalisation, such as a formal language and integration test, that are introduced on the basis of policies aimed at immigrants from third countries that are applied to immigrants for other Member States as well. That effect is clearly visible in the Netherlands since 2003. The other trend is that some of the (few) Member States that have an official policy opposing dual nationality, in practice are more liberal in the actual application of their national legislation or apply more liberal rules on the basis of reciprocity to the nationals of some Member States or, generally, to all other Member States. The number of nationals from Belgium, Germany, Great-Britain and Italy resident in the Netherlands also having Dutch nationality equals the number of nationals of those four Member States resident in the Netherlands having only one nationality.

CHAPTER X. SOCIAL SECURITY

Relationship between 1408/71 and 1612/68

The *Belgium* report pays detailed attention to the decision of the Constitutional Court of 19 April 2006 to ask 4 questions to the ECJ concerning the Flemish care insurance scheme (Case C-212/06). This decision involves a new Flemish Decree modifying the right to obtain care insurance coverage, depending on the place of work and the place of residence. The example given by the applicants is about a Belgian or French worker who works in Flanders. This worker would be covered by the Flemish care insurance as long as he lives in France, in Flanders or in Brussels. However, he would lose the benefit of the insurance coverage if he moved to the Walloon Region.

In 2006, the competent *Czech* authorities responsible for applying Article 17 of Regulation 1408/71, regarding the provisions that enable to divert from the principle of payment of social insurance contribution in the state where the activity is exercised, changed the approach to these provisions slightly

The *Hungarian* expert raises an interesting legal question whether it is practically possible to apply Article 7 (2) of Reg. 1612/68/EEC when Articles 1-6 are suspended. Hungarian law only awards social advantages to those persons who are able to fall within the personal scope of that Regulation. It would be interesting to see how other Member States deal with this issue. As regards social security and free movement of workers, another issue in Hungary is the connection between the transition period and Regulation 1408/71. The Accession Treaty envisages a transition phase during which certain EC law norms are suspended. Reg. 1408/71 is not suspended meaning that the obligations following from that Regulation must be fulfilled by the Member States. Reg. 1408/71 foresees the right for *unemployed persons* to export their benefits to other Member States in order to search for work there. However, Articles 1-6 of Reg. 1612/68 are suspended, out of which Article 5 regulates the right to search for work. On the one hand, there is a right to benefit export and search for work, on the other hand, there are restrictions to that right. Some Member States (mostly the EU-15) strictly oppose to except unemployed persons intending to make use of the provisions of Reg. 1408/71, some (mostly the new Member States, but Austria as well), however, accept these unemployed.

The precondition for residence-based social security in *Finland* is that the employment or the self-employed activities last at least for four months. If the employment is estimated to last at least for four months, the right to residence-based social security starts when the employment or the activities of a self-employed person start. The compatibility of this 'four months rule' with EU legislation has been questioned in Finland.

The adopting of a "habitual residence" test for access to social welfare benefits in 2004 in *Ireland*, caused some confusion as to how this test should be applied, vis-à-vis beneficiaries of free movement, to social advantages under Regulation 1612/68 and "family benefits" under Regulations 1408/71 and 574/72. An in 2006 published guideline on the Habitual Residence Condition[44] makes it clear that persons entitled to payments under EU law do not have to satisfy the habitual residence condition. It is stated that a "Deciding Officer should have due regard to EU law when deciding such cases" and that "in general EU law takes precedence over National Law". The guideline states that people who move in search of employment, benefit only from equal treatment under Regulation 1612/68 as regards access to employment. First-time job seekers do not qualify for equal treatment with regard to social and tax advantages within the meaning of Article 7(2) of that Regulation.

The report on *Lithuania* pays attention to two specific issues. The first deals with the application of Regulations 1408/71 and 574/72 between Lithuania and Estonia/Latvia as

44 In the Observatory for 2005, this guideline was only available through the freedom of information section of the Department of Social and Family Affairs website. The guidelines is now a separate publication and information on the habitual residence condition is more accessible; http://www.welfare.ie/foi/habres.html.

concerns the calculation of employment periods of workers in the former USSR before restoration of their independence. Bilateral draft treaties which will prevent that these periods will be counted double or triple are negotiated in 2006 and will be signed in 2007. The other issue concerns the social security position of Lithuanian sailors working on ships of other EU/EEA countries. Lithuania refrained in 2006 from amending the Law on State Social Insurance, supporting sailors, because this would be in conflict with the EU internal market rules.

On *Malta* an international relations unit (IRU) has been set up within the department of Social Security in order to deal specifically with issues related to the applications of Regulations 1408/71 and 574/72. The IRU was restructured as of 1 January 2006, on the basis of recommendations put forward by the experts at the end of a Twinning Light project.

In *Poland* the rules of granting social assistance, family benefits and social pensions have been amended in 2006 by the Act of 14 July 2006 on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members. The group of foreigners entitled to these benefits consists now of "the nationals of European Union Member States, States of the European Economic Area which are not Member State of the European Union or States that are not party to the Agreement on the European Economic Area who may enjoy free movement of persons on the basis of agreements signed by these countries with the European Community and its Member States residing and staying in the territory of the Republic of Poland, having the right of residence or right of permanent residence in the territory of the Republic of Poland".

The fact that EU workers residing in *Portugal* have the same social security rights as Portuguese citizens has been confirmed by Article 20(1) of Law 37/2006, which has transposed Directive 2004/38 into the Portuguese legal order in 2006.

The application of Regulation 1408/71 as well as the relationship to Regulation 1612/68 at the application of *Swedish* national law can be foreseen to be clearer following from the new Social Security Act. The reason is the marked line between social benefits based on residence or work and, further, the principle that a national from a Member State should be considered to have his residence in Sweden even if this literally is not the case, if the benefit in question is under Regulation 1408/71.

Supplementary schemes

National legislation on supplementary pension insurance is an important factor for achieving free movement of workers within the Community. Protection of their supplementary pension rights is also an important social issue which given the diversity and complexity of these schemes could not be dealt only within the scope of Regulation 1408/71. In order to safeguard vested rights and guarantee payments, which are not subject of Regulation 1408/71, the Council adopted Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community. This Directive aims at preserving the supplementary pensions right accrued by those EEA nationals who stop paying contributions because they move to another Member State as well as the payment of benefits in the Member States of the EU. Moreover, the Directive provides the possibility for posted workers to remain affiliated to the supplementary pension scheme of the Member State of origin under the same conditions foreseen by Regulation 1408/71 in case of posting in the area of statutory schemes. The Directive covers voluntary and compulsory supplementary pension schemes that do *not* fall within the ambit of Regulation 1408/71

A non-exhaustive list of supplementary pension schemes covered by Directive 98/49/EC and a list of adopted measures per country to ensure equal preservation, to guarantee cross border payments and cross border membership of posted workers, and to ensure adequate information can be found in a Commission Staff working document of 26 January 2006 SEC(2006) 82.

The legislation of most of the countries seems to be in line with the Directive although the Directive has not been transposed explicitly in every country.

Supplementary pension schemes are not commonly used in all countries. In *Finland* and *Sweden* for instance the pension system is by and large based on regulatory schemes and only 2-3 % of pension coverage is based on supplementary schemes.

The *Austrian* pension system does not provide for a minimum pension, but there is a supplementary benefit (*Ausgleichszulage*) which is a means-tested compensatory supplement granted by the pension insurance institutions.

In *Denmark* there is a different treatment regarding taxation of pension schemes established in Denmark and pension schemes established outside the country. The ECJ decided on 30 January 2007 in a case from the Commission against Denmark (C-150/04) that, by introducing and maintaining in force a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts entered into with pension institutions established in Denmark, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States, the Kingdom of Denmark has failed to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC. Following this judgment the Ministry of Taxation introduced in June 2007 a proposal to amend the Act on Taxation and Pensions in order for the Act to comply with EC law.45 This proposal allows tax relief on contributions paid to pension institutions not established in Denmark according to a 'bargaining model'. This bargaining model has the effect that foreign pension institutions must enter into a binding agreement on conducting reporting, withholding and payment of tax on similar lines as Danish institutions.

In *Ireland* the Occupational Pension Schemes (Cross-Border) Regulations 2006[46] came into force and both revoked and replaced the 2005 Regulations. The 2005 Regulations were made under section 3 of the European Communities Act 1972 due to uncertainty with regard to using the powers under the Pensions Act.[47] The 2006 Regulations are made under the Pensions Act powers.

The *Maltese* government's pension reform proposals, issued in 2005, have not tackled the issue of supplementary pension benefits in detail.

The *Portuguese* supplementary pensions system makes a distinction between a legal, contractual and optional scheme.

In response to Directive 98/49 the *UK* government introduced the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 which has subsequently been amended by the Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2007. The UK Government has set out its position in July 2006 on the Draft Portability of Supplementary Pensions Directive 2005. Specifically the government has highlighted concerns around the scope of the Directive, including precision and clarity of definitions; costs, including administrative costs; vesting periods; preservation/up-rating; minimum age of entry; incoming transfers/transfer values; and provision of information.

Judicial practice

The *Austrian* Constitutional Court[48] judged the exclusion of EEA-pensioners from the claim to regional care allowance of the province Upper Austria unconstitutional since there was no justified reason for that differentiating (and discriminating) provision, referring inter alia to the judgments of the ECJ in *Jauch* (C-215/99) and *Hosse* (C-286/03).

The *Luxembourg* report pays attention to 6 court cases on social security in which free movement issues are referred to (one on unemployment benefit of a frontier worker. One on the suspension of the payment of retirement pension, one on the pension of a widow of a Portuguese worker and three on medical treatment issues)

45 http://www.skm.dk/presse/pressemeddelelser/skatteministeriets/5328.html, accessed on 22 August 2007.

46 S.I. No. 292 of 2006.

47 Social Welfare Law Reform and Pensions Act 2006 (Part 3)(Commencement Order) 2006 S.I. 291 of 2006

48 7.3.2006, G 119/04

In *Sweden* attention has been paid in periodicals to Cases C-137/04 and C-185/04 concerning a European Commission Swedish official's right to draw a parent's allowance based on the year she had been working at the Commission.[49] The Swedish Social insurance office had refused to count in the period at the Commission when calculating the parent's allowance.

49 See for instance Lag & Avtal in March 16, 2006, p. 35.

CHAPTER XI. ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS

Establishment

Three reports (*Denmark, Estonia* and *Finland*) observe that to a large extent the domestic laws implementing the general EC rules on free movement of workers are also applicable to establishment, the provision of services and students, with the exception of a few differentiations regarding the validity of the resident permit, support requirements and family reunification.

The *Italian* report mentions the reform process Italy has undertaken regarding the access and exercise of professional and other economic activities. The draft legislation on professions, presented by the Ministry of Justice on December 2006, takes care of the rights of Union citizens and of professional diplomas awarded in other Member States. Law 4-8-2006 no. 248 on economic and social renewal aims at ensuring that the Articles 43, 49, 81, 82, and 86 of the EC Treaty are fully respected. With reference to the judgement of the ECJ in case C-506/04 *Commission v. Luxembourg* [2006] ECR I-8613 the report reveals that for the same reasons the relevant Italian law should be considered as a violation of EC law as well. The ECJ held that: "Article 9 of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as meaning that it precludes an appeal procedure in which the decision refusing registration, referred to in Article 3 of that directive, must be challenged at first instance before a body composed exclusively of lawyers practising under the professional title of the host Member State and on appeal before a body composed for the most part of such lawyers, where the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts". Also in Italy the decision refusing registration must be challenged at first instance before the Bar Council composed exclusively of lawyers. This decision can be appealed to the National Council of the Bar, composed exclusively of lawyers appointed by the Ministry of Justice. Against the decision of the National Council of the Bar an appeal can be lodged to the Supreme Court, on grounds of lack of competence, abuse of power or infringement of the law only.

The *Latvian* report mentions the discussions during 2005 on the need to make it easier to register as a self-employed person or company. The relevant amendments to the Commercial Code were adopted on 16 March 2006. The Commission has initiated an infringement procedure (no. 2006/233) in relation to the requirement that only Latvian citizens can work as notaries. The Latvian government did not accept the arguments of the Commission. According to the government notaries play a special role in Latvia, belong to the court system and exercise public authority in performing their duties. Theirs acts have special legal force. Therefore, the government is of the opinion that notaries in Latvia are covered by the exception clause of Article 39, paragraph 4, and Article 45 of the EC Treaty.

In *Luxembourg* and *Slovakia* too Luxembourg, respectively Slovak nationality is a requirement to become a public notary. With regard to Luxembourg the Commission has asked a reasoned opinion why the access to the profession of public notary is reserved to Luxembourg nationals only. In its opinion of 31 October 2006 the Luxembourg government supports the view of the Chamber of Notaries that notaries are public officers and not submitted to the rules of free establishment but are covered by Article 45 of the EC Treaty, as they are part of the exercise of public authority.

Luxembourg was under scrutiny as well while knowledge of the Luxembourgish language was required for foreign lawyers practicing under their home title. Two judgements of the Court of Justice of 19 September 2006 have condemned Luxembourg for failing to observe Directive 98/5 EC: Case C-506/04 (*Wilson v Ordre des avocats du barreau de Luxembourg*) and Case C-193/05 (*Commission v Luxembourg*). As a consequence the Bar Association of Luxembourg has decided not to pose anymore this language test to foreign lawyers wishing to practice in Luxembourg under the Home Title Directive.

The *Lithuanian* Aliens' Law was amended in November 2006. Before the Aliens' Law granted temporary residence permits to those EU nationals who are intending to engage in a lawful activity in Lithuania or to provide or to receive services. The situations which were considered as a lawful activity were enumerated in the law. Since November 2006 the law simply mentions workers and self-employed persons as categories to obtain a residence permit in Lithuania. Nevertheless, there is still a clear differentiation between the treatment of Lithuanian nationals and foreigners (including EU nationals) concerning the registration for tax purposes. Whereas Lithuanian nationals are granted an exemption from registering as VAT payers if they are able to demonstrate they earned less than 100,000 Litas (approximately 29,000 Euros) in the past year, foreigners, including EU nationals, are required to register. This requirement may pose some additional bureaucracy on the right of establishment exercised by EU nationals.

In the *United Kingdom* too the new Immigration (European Economic Area) Regulations 2006 defines as qualified persons the self-employed. The definition of self-employed is strictly by reference to the EC Treaty. There is no further clarification as to what documents need to be submitted to show that the individual is self-employed. This lack of guidance is in particular of some concern for nationals of the 2007 Member States while this is their only free movement right available yet. At the moment, there appears to be substantial discrimination in practice in the treatment of requests for registration certificates from pre and 2004 Member States nationals which are dealt with very lightly, and 2007 Member States nationals who are subject to a more intensive investigation (business plans, evidence of potential and existing clients and other documentation).

Finally, as in previous years the issue of the compatibility of a long stay visa requirement with the right of establishment in the Association Agreements with the CEEC States played an important role in the case law of the *Netherlands*. The Minister of Immigration was of the opinion that in the framework of the Association Agreement Bulgaria/EC a long stay visa for a self established person may be denied according to the national public order clause. According to the Minister the community public order clause applies only in cases of withdrawal of a residence permit. The District Court The Hague 10 January 2006 disagreed. With reference to C-63/99 (*Jany*) the district court decided that the community public order clause applies not only in withdrawal situations but also with regard to first admittance decisions.

Provision of services

The *French* report discusses in some length Décret 2006-1229 of 6 October 2006 with regard to the Code du tourisme. The Code specifies the conditions which a community citizen has to fulfil in order to exercise activities as a travel agent. A whole section of the Code concerns the free provision of services of travels agents. If the travel agent is not established in France he needs a licence of the Minister of Tourism after consultation of the National Board for Tourism. In absence of a response for four months the licence is regarded as granted.

The report of *Hungary* notes explicitly that during 2006 the reciprocal restrictions in respect of the provision of services by Austrian and German companies continued in accordance with the transitional arrangements in the Accession Treaty.

A recent report *Services Innovation in Ireland – Options for Innovation Policy*, states that employment in the services sector in *Ireland* grew by 58.1% between 1995 and 2004. This can be contrasted with manufacturing employment growth of 5.6%.These statistics provides a context for Ireland's pro-Directive position in the negotiations toward the recently adopted Services Directive. Nevertheless, the Irish government would have preferred a more ambitious proposal, for example, the inclusion of temporary employment agencies in the scope of the Directive. In the initial Commission proposal for a Directive, Ireland was in favour of the introduction of the 'country of origin' principle, though like all Member States it wanted certain safeguards in relation to its application built in to address domestic concerns. In parliamentary debates the government highlighted that, even without the Directive, workers posted in Ireland from other EU Member States have the protection of all Irish

employment legislation in the same way as employees who have an Irish contract of employment. Attention was also drawn to the Industrial Relations Act 1946, which provides for collective agreements negotiated between trade unions and employers in individual sectors, called Registered Employment Agreements. Once registered, these agreements are binding not only on the signatory parties but also upon all employers not party to the agreement. Therefore, employees posted to Ireland are entitled to the minimum pay and other terms and conditions of employment specified in the Registered agreement.

Lithuania has undertaken an impact assessment of the EU Services' Directive. The assessment concluded that the implementation of the Directive will require a huge administrative work to be undertaken in order to review approximately 150 licences.

The *Italian* report mentions a judgement of the Supreme Court of 18 May 2006 in which the Supreme Court holds that the judgement of the Court of Justice in case C-180/89 *Commission v. Italy* [1991] ECR I-709, prevents a Regional law that reserved to a tourist guide qualified in Italy any guided tour of the town of Venice, to be applied to a German tourist guide, properly qualified in his Member State, who is accompanying a German group. In the case, the German tourist guide was fined by the police because he was considered to practice without the prescribed authorization, no relevance being given to his German qualification.

After an informal discussion fall 2004 the European Commission has sent a letter of formal notice on 21 March 2006 concerning the alleged infringement of Article 49 EC Treaty on the provision of services, while the *Netherlands* required companies established in the eight new Member States in Central and Eastern Europe that provide services in the Netherlands to apply for work permits for their employees, both nationals of the new Member States and third country nationals, involved in the provision of those services. A settlement was not reached and the Commission started the second stage of the infringed procedure with a reasoned opinion on 27 July 2005. Obviously, the introduction of the obligation to notify did not satisfy the Commission either. The Commission continued the infringement procedure with a letter of formal notice. On 19 July 2006 the Commission sent a supplementary letter of formal notice and issued a press release. In the meantime the government announced its willingness to implement the free movement of workers from the eight new Member States in Central and Eastern Europe step by step, originally foreseen for 1 January 2007 but later postponed to 1 March 2007, and finally materialised 1 May 2007.

EEA nationals and their family members who come to the *United Kingdom* to provide services are completely ignored by the new Immigration (European Economic Area) Regulations 2006. Service and service provision is not mentioned in the Regulations at all. These EEA nationals are not defined as 'qualified persons' and so do not acquire rights under the Regulations. There are continuing problems with the posting to the UK of third country national employees by EEA based businesses. While under the *Vander Elst* and subsequent judgments of the Court of Justice, such employees should be able to enter and under take service provision for their employer anywhere in the EU without undue administrative obstacles, in practice in the UK there are many obstacles. The first and most problematic is the prior visa requirement. The individual and business must obtain a prior visa for the third country national to come to the UK before he or she will be admitted. This causes delay and the loss of business opportunities. The jurisprudence of the Court in particular in *Commission v Germany* (C-244/04) has not been correctly applied (or indeed not applied at all).

Students

Contrary to previous years, free movement of students has been discussed (in length) in almost all of the reports, although the format differs from report to report which makes a comprehensive analytic overview rather difficult. Foreign students' quota are introduced in Austria and the French-speaking part of Belgium and are under discussion in Denmark. The issue of private institutions' diplomas which have to be recognised by universities played in particular a role in Italy. In Finland it is up to the universities to assess the diplomas of pri-

vate institutions. In most Member States diplomas issued by private educational institutions are generally recognized if the institution is officially accredited. Often the same applies to branches of foreign universities. Below the rather lengthy sections on students in the reports are summarized.

In 2005 the Court of Justice (C-147/03, *Commission vs Austria*) ruled that a different treatment for *Austrian* secondary diplomas and similar diplomas from abroad is a breach of Articles 12, 149 and 150 EC Treaty. Consequently the Austrian law was amended; the new Section 124a University Act declares that secondary diplomas were to be regarded as equal to Austrian diplomas. This caused an influx of German students: studying in their language without the limitations of the German *numerus clausus*. As a result of the influx of German students to Austrian universities (especially medicine), parliament amended the University Act. A new § 5 was inserted which introduces a quota system: 95% of the places at university will be allotted to EU citizens; 75% of these places have to be given to persons with an Austrian secondary diploma.

A comparable development took place in the French-speaking part of *Belgium*. The authorities are confronted with more and more French students, representing more than 30% to 50 % of the students in some studies, mainly paramedical. In fact, France is applying a *numerus clausus* in those studies and Belgium is not. On 26 January 2006, the French Community of Belgium adopted a Decree blocking the registration of students in studies leading to the professions of obstetrician, occupational therapist, speech therapist, chiropodist, physical therapist and veterinarian. Subsequently on 16 June 2006 a Decree came into force for the academic year 2006, which limits to 30 % in the sectors of studies mentioned above, the number of non-Belgian students who are not resident for at least 3 years. The suspension of the new Decree was requested from the Constitutional Court (*Cour d'Arbitrage*). It ruled that conditions of highly difficult damages could not be found amongst the applicants, as the action was dismissed on procedural grounds. The next case concerned a French student who wanted to study physical therapy in the High School of Charleroi. He was refused in this section as the number of students already registered was reached. He began to study in Belgium in September 2005 in the occupational therapy section with the clear intention to register again for the next academic year. In September 2006, the same French student was refused by application of the new Decree of 16 June 2006 regulating the number of students. He decided to challenge the new refusal decision before an internal Appeal Commission which rejected the appeal. Then, he lodged an action to the State Council to suspend the decision of the Appeal Commission. In its judgement given on 17 October 2006, the State Council decided to suspend the refusal decision. On 26 April 2006, the Labour Court of Liège confirmed a judgement given by the Labour Tribunal which refused social benefits to a French student, taking into consideration the fact that he did not prove his "situation of need" as he has the possibility to live with his parents. The Court applied the social benefits Act with reference to the *Grzelczyk* case.

In *Denmark* too there has been an intensive debate about the high amount of especially Swedish students at the medical studies in particular, but also the dental studies, the veterinarian studies and the architecture studies. To reduce the amount of foreign students and increase the amount of Danish students at the higher educations, the government has now launched an action combined with initiatives, and a more basic reform of the admission system, which should be fully implemented in 2010. The new 2006 EU Order states that students from EU Member States have the right to reside in Denmark provided he/she disposes of sufficient means for the support of himself/herself. The right to reside is conditioned by a health insurance. This condition has been made mandatory with the 2006 Order, whereas it was discretionary in the 2005 Order. The EU Order states that the registration certificate is not issued for a certain time period, but lapses when the conditions for the right to reside are no longer present. In the older Orders the residence certificate was issued for a period corresponding to the length of the studies, but not for more than 1 year at a time. EU Order section 8 contains the rules on family members. Family members of an EU student have the right of residence in Denmark, if they accompany or join the EU citizen and already have permanent lawful residence in an EU Member State. According to section 8(2) the resi-

dence right is, unless exceptional reasons make it inappropriate, conditioned on the EU citizen's ability to dispose of such income or other means of support that the family member(s) cannot be assumed to become a burden to the public welfare system. Formerly the family concept was not as broad for this group as for the other groups, since only the EU citizen's spouse and their dependent descendents were included in the concept. This has now been changed with the issuance of the 2006 EU Order and the adoption of the common definition of family members for all EU privileged groups. The Executive Order issued on the basis of the Act on Evaluation of Alien Educational Qualifications regulates the evaluation of foreign qualifications. The Order does not distinguish between private and public institute diplomas. According to the Order, one of the elements of the evaluation is the recognition of the education in the alien's country.

At the end of 2006, the legal position in *Cyprus* was the same as described in the 2005 report. The Bill, still pending in Parliament at the end of 2006 and enacted into law in February 2007, introduced some changes, including extending the right of residence over three months to those who are enrolled in courses of study in state or private educational institutions approved or funded by the Republic, including professional courses, have comprehensive insurance cover in the Republic of Cyprus and are in a position to assure the appropriate authority by means of a statement or by some other equivalent manner that they have sufficient financial means so as not to be a burden on the welfare system of the Republic. Originally the Bill provided for educational grants on the same footing as Cypriot nationals, but this inconsistency is to be abolished by the law which transposes Directive 38/2004 in its totality.

Czech citizens and EU Member States citizens have equal access to education; the elementary and secondary education for Czech citizens and EU Member States citizens on the governmental schools is declared as free of charge. There might be a tuition fee required for the study e.g. on the non-governmental schools. If a foreigner takes up studies for which fees are charged (private schools etc.), s/he pays the same fee as a Czech student. Individuals having a nationality of another EU Member State and their family members have access to education and education services upon the same conditions as the Czech citizens. All students have equal access to study grants and have the right to scholarships granted to students for their outstanding scholastic achievements, for outstanding study results, in case of student's strenuous social situation and in other cases worth special consideration. No quotas for foreign students were introduced.

The *Finnish* Aliens Act requires in addition to the general requirements that a student has been admitted to an educational institution in Finland as a student. According to the Aliens Act in force in 2006, students could not be issued with a permanent residence card. The Government Proposal 205/2006 proposes, however a change to this and under the amended Aliens Act students too, would be entitled to permanent residence. No foreign student's quotas are applied in Finnish universities. A university may admit a person who does not have formal qualifications, if the university considers that she has otherwise acquired sufficient knowledge and facilities. This makes it possible to admit a person who has obtained a diploma from a private institution.

In a judgement of 10 July 2006 the *German* Administrative Appeal Court of Baden-Württemberg discusses the question whether a Union citizen living permanently in another EU Member State and attending university there, who in the framework of the ERASMUS-programme is studying for two semesters temporarily in Germany, is entitled to social benefits according to the federal law on social assistance to students. The Court comes to the conclusion that the temporary attendance of a German university as a student within the ERASMUS-programme does not constitute an education in the meaning of the federal law on social assistance to students since social benefits are only granted for a study if the respective university or professional training institution is located within Germany regardless of the domicile of the student. The attendance of a university abroad is only financed under the special conditions which have not been fulfilled in this particular case. The Court also extensively discusses whether this interpretation is in accordance with community law. The Court comes to the conclusion that community law does not grant an entitlement to access

to social benefits for the attendance as a temporary student at a university in another EU Member State.

In *Hungary* a new Act on high-level education entered into force on 1 March 2006, however, the rights of migrants are regulated in the same spirit as before. High-level education encompasses universities and colleges founded or recognised by the State in the territory of the Republic of Hungary. With effect from 1 September 2006 a new Government Decree entered into force concerning the benefits of students in high-level education. According to the Decree EEA nationals (and nationals qualifying as EEA nationals) and their family members shall be treated on an equal footing with Hungarian nationals as regards rights and obligations in terms of fees and benefits. However, Government Decree No. 86 of 12 April 2006 on study loans limits the possibility to apply for study loans to Hungarian nationals, refugees, persons with permanent residence permit, and nationals of EEA countries if they possess a residence permit issued for employment or self-employment. It inherently means that only Community workers and self-employed are entitled to apply for the study loan, EEA nationals who study in Hungary without exercising an economic activity are not expressly allowed to apply. The family members of EEA nationals are generally not allowed to apply for a study loan. The Hungarian rules meet the provisions of the Directive 2004/38/EC as regards workers and self-employed but seems to be contrary to it with respect to family members. Moreover, the Directive obliges Member States to provide for the possibility of study loans to EEA nationals other than workers and self-employed after obtaining the right of permanent residence. It seems that Decree 86 tends to sort out this issue by referring to persons with permanent residence permit. However, hence the document issued on the basis of EC law does not have the same name the implementation of this provision is questionable.

In *Ireland* EU students are entitled to access to education and training in the like manner and the like extent as Irish citizens. The Free Fees Scheme, under which the Exchequer meets the tuition fees of students attending approved third-level courses, applies to first-time graduates who hold EU nationality or have official refugee status and who have been ordinarily resident in a EU Member State for at least three of the five years preceding their entry to the course. Under the Higher Education Grants Scheme, which is administered by local authorities, means-tested grants are provided to eligible students who are pursuing approved full-time courses. In order to be eligible for a grant under this scheme for the 2006/2007 academic year, a student must inter alia have been ordinarily resident in the administrative area of the Local Authority from 1 October 2005 and in addition hold EU nationality; or have permission to remain by virtue of marriage to a resident Irish national (or be a child of such a person, not having EU nationality); or have permission to remain in the State by virtue of marriage to a national of another EU Member State who is residing in the State and who is/has been employed or self-employed (or be the child of such a person, not having EU nationality); or be a national of a member country of the EEA or Switzerland. There appear to be no quota, or numerus clausus arrangements applying to limit the number of students coming from outside Ireland.

The enrolment in *Italian* university courses is open to EU and Italian students on an equal footing. A foreign secondary school qualification is considered as equivalent to an Italian one, if it allows access to the university in the State that awarded it. Italy operates a *numerus clausus* system for regulating access to a limited number of university courses, but in that case again, equality of treatment is granted. The quotas annually assessed by Ministerial Decrees are reserved to Community citizens (which encompass both Italian and EU citizens), and to third countries nationals resident in Italy. Non discrimination is also assured when it comes to grants and other benefits for students. Article 20 of Law 1991 no. 390 states in general terms that the benefits regulated by this law and by other Regional laws are given to foreign students in the same ways and under the same conditions as Italian students. In transposing Directive no. 2004/38/EC, Italy does not reproduce Article 24 (2) of the Directive which allows the Member States to deny the entitlement to maintenance aid for students. Private institutions that organize courses of studies in Italy which prepare students for a degree to be granted by foreign universities give raise to two groups of case-law. The

first group relates to the fact if a student, enrolled in a course organized by these private institutions, can postpone his military service. Administrative courts of first and last instance keep on taking a different approach. The second group of cases related to the legal value of the degree these private institutions award while the Ministry for Education had instructed Italian universities not to recognize degrees awarded by foreign universities to students who had attended courses given in Italy. In 2006 the judge of second instance of Naples adjudicated one of these cases in which the facts of the case were similar to those which the ECJ examined in the case *Neri* (C-153/02). The court uphold the claim. In the meantime the Ministry for Education has modified its practice and let the Italian universities recognize these degrees.

In *Latvia* amendments to the Law on Institutions of Higher Education were adopted on 2 March 2006. The amendments provide inter alia that foreign students can be admitted to universities and other institutions of higher education without having permanent residence permit. There is no quota set for foreign students to be admitted. Study fees are set for EU citizens and their children who acquire education in Latvia and are covered under the same conditions as for Latvian citizens, but Article 83 of the Law on Institutions of Higher Education does not contain a reference to family members who are third country nationals. Private educational institutions have to get accreditation for both the institution and the program. In order to run a program, the institution shall apply first, for a licence for the program, and second, for accreditation. If the program is accredited the diploma is recognized in Latvia as a diploma of higher education and no further recognition is needed. The same procedure is applicable also in relation to branches of foreign universities. The number of foreign students in Latvia remains very low since he language of instruction is Latvian in all institutions of higher education, with a very few exceptions.

The status of EU-students in *Lithuania* is regulated by the Aliens' Law of 2004. The provisions applicable to students are generally in compliance with the Directive 2004/38/EC. The Law provides that students who intend to stay for a period longer than 3 months in Lithuania, need to obtain the EC residence permit. For issuance of the residence permit, health insurance, sufficient living means and accommodation in Lithuania is required. The later requirement to prove the availability of accommodation might create certain obstacles for students who are not provided with accommodation at educational establishments where they are enrolled. For issuance of the residence permit sufficient living means for students are counted on the basis of a rate of one minimal monthly wage. This is not fully in line with the Directive 2004/38/EEC that requires only declaration of income and the judgement on each individual case rather than fixing a commonly applicable amount of sufficient resources. Residence permits to students are issued for one year.

In order for post-secondary, vocational and university students to be eligible for a maintenance grant in *Malta*, they must be full-time students who are registered and who have been accepted as regular students in a day course of studies and be Maltese citizens, or students with at least one parent being a Maltese citizen, or have resided in Malta for a period of not less than five years from the commencement of the relative course of studies. The Maltese authorities are currently analyzing the implications which the *Bidar* decision may have on the Maltese Regulations on Maintenance Grants. The five years' residence provision in Malta would appear to be potentially at odds with the findings of the Court of Justice in case 209/03 (*Bidar*).

At the occasion of the transposition of Directive 2004/38/EC and in order to implement *Bidar* amendments were introduced in the *Netherlands* to the social assistance and study grants legislation. The amended legislation entered into force 11 October 2006. According to the amended Social Assistance Act EU-citizens who reside less than three months in the Netherlands or who are seeking for employment or reside in the country as students are excluded form social assistance. According to the amended Study Grants Act 2000 students from EU, EEA Member State and Switzerland are in principle equally treated as Dutch citizens, irrespective whether they reside in the Netherlands or not, but by a Royal Decree groups of students may be designated who are only entitled to a reimbursement of the enrolment fees (the so-called *Raulin*-compensation). According to this Decree an

EU/EEA/Swiss student, who is not (a family member of) an (ex-)worker or (ex-)self-employed and who has not (yet) acquired permanent residence as mentioned in Article 16 of the Directive (legal residence for a continuous period of five years), is entitled to the reimbursement of the enrolment fees only.

The law on higher education was amended by the Act of 14 July 2006 on the entry into, residence in and exit from the Republic of *Poland* of nationals of the European Union Member States and their family members. According to the amended law foreigners having the right to settle down in Poland, who are recognized as refugees or who have obtained temporary protection, migrant workers and nationals of EU (or EEA) Member States and their family members in the meaning of the Act of 2006 and long–term EU residents (this is new), if they live in, and are currently or have been previously employed in, the territory of Poland (and members of their families), may take up and continue their education at university under the same rules as Polish citizens. If EU (or EEA) nationals and members of their families possess the financial resources which are sufficient to cover their cost of living during their studies they are allowed to take up (if their language capacity is sufficient) and continue their university education in Poland and have the same rights as Polish citizens except for the right to grants which depend on their social status. However, they may obtain the right to these grants through international agreements, a decision by the Minister of Education (it is not a complicated procedure and many ministerial grants are given) or a decision by a head of a particular school. All the students are entitled to grants received for their learning achievements

In *Portugal* Law 37/2006 recognizes the right of residence to any student who is a national of a Member State and who does not enjoy this right under other provisions of Community law, provided that the student fulfils three conditions: he/she must be enrolled at a officially accredited educational establishment, public or private; he/she must assure, by means of a declaration, that he/she has sufficient resources (at least equivalent to the minimum national wages); and he/she must have a health insurance provided that this is required in the Member State of his/her nationality to Portuguese citizens. The right of residence of these students is extended to their family members who are third-country nationals and who are accompanying or joining them. In Portugal there are no foreign students' quotas. The private diplomas issued by private educational institutions officially accredited are generally recognized.

The main issue in the *United Kingdom* regarding students from other EU Member States has been the application of the ECJ's judgment in *Bidar* regarding access to maintenance grants. On higher education fees, there are differential fees applicable to all students depending on whether they have lived in the EEA during the pervious three years or not. If they have not they pay overseas student fees, if they have they pay the much lower home student fees. For Bulgarian and Romanian nationals who begin a course of study on or after 1 January 2007, and have lived in the European Economic Area (including Bulgaria and Romania) or Switzerland for three years before the first day of the first academic year of the course and meet any other requirements of the fees regulations, they will be treated as a 'home' fee payers. For Student Support (maintenance grant and loans) the student must be both settled in national law and ordinarily resident in national law for the preceding three years at the beginning of the course and the main purpose for residence in the UK and Islands must not have been to receive full time education during any part of the three-year period. If during any part of the three year period, the main purpose for residence was to receive full time education the student must have been 'ordinarily resident' in the UK or elsewhere in the EEA and/or Switzerland immediately prior to the 3-year period of 'ordinary residence' in the UK and Islands. A student will also be entitled to Student Support if he or she has the right to permanent residence in the UK, was ordinarily resident in England at the start of the course and had been 'ordinarily resident' in the UK for three years before the 'first day of the first academic year' of the course.

CHAPTER XII. MISCELLANEOUS

Introduction

This chapter includes the general information on activities related to free movement of workers.

Studies, Seminars, Reports

Austria: there has been a study on Turkey's possible accession to the EU.

Belgium: there have been a number of important articles on free movement of workers and EU migration law in general.

Czech Republic: there have been a number of seminars to widen public knowledge in the field; there has also been a substantial amount of literature published. The European Commission organized a legal seminar (Legal Conference on Free Movement of Workers, Prague, 10-11 November) in the context of the European Year of Mobility of Workers.

Germany: there is a lively legal debate in the literature on the German transposition of Directive 2004/38 and EU immigration and asylum law.

Greece: an important seminar was held on the subject.

Hungary: a network of academic experts has been established to review the impact of accession. The authorities have commissioned a study into the needs of the next 5 – 10 years. A study on the role of women in migratory movements is underway.

Latvia: there have been eight conferences where movement of persons has been discussed; eight publications on the subject have come out.

Lithuania: a conference at the Parliament considered the issue of emigration of Lithuanians.

Luxembourg: the relevant websites are included, lists of cases and two new journal articles.

Malta: free movement of workers is taught at the university.

The Netherlands: there is a specific course of the judges on implementing Directive 2004/38.

Poland: there are now many electronic sites for information on the area.

Portugal: the electronic sites have been updated and included.

Slovakia: there are electronic sites listed.

Slovenia: again this includes the key electronic sites available.

United Kingdom: the main websites are listed. There have been five main courses for lawyers on free movement of persons in EU law. An important new text book has been published.

Legal Information

Austria: has withdrawn its reservation to Article 11 CEDAW regarding night work.

Cyprus: the problem of the divided island also causes problems for the coherence of EU free movement rules. The physical existence of a non-existent border which effectively includes a visa requirement is highly anomalous.

Estonia: citizenship continues to be a concern here. The strict rule against dual nationality applies.

Italy: the new laws are included.

Malta: there is the latest information on citizenship.

The Netherlands: a study has been carried out on the effects of the new formalized integration test which indicates it fails both candidates at the high and low educational levels.