# EUROPEAN REPORT
## on the Free Movement of Workers in Europe in 2007

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# Executive Summary

Free movement of workers is a cornerstone right of all nationals of the Member States. In examining how the Member States have implemented this right in 2007, the following key issues arise:

- Access to the territory, residence and protection from expulsion: workers and job seekers are able to access the territory of other Member States and to remain their under the provisions of Directive 2004/38. A number of Member States appear to have taken the opportunity of a new directive to introduce new restrictions which did not apply before. This phenomenon deserves close attention as it does not appear to be consistent with the intention of the directive.

- Transitional arrangements regarding EU-8 workers are gradually being lifted across all the Member States. There are very few member States which are still applying significant restrictions. In light of this it seems unlikely that many Member States will seek to justify a further extension of the transitional arrangements for the EU-8. As regards the EU-2, the situation is much less positive. Many Member States apply transitional restrictions, even one EU-8 Member State. The protection of job seekers seems particularly weak as regards expulsion.

- Equal treatment in access to procedures is a substantial problem in a number of Member States. Delays in administrative procedures which result in the inability of a worker to enjoy his or her rights are widespread. Respect for the obligation to issue a residence certificate immediately is widely flaunted and access to remedies not always available. These weaknesses hinder the exercise of the right of free movement with particularly severe consequences for job seekers and their family members.

- Language requirements are still applied in many Member States although they constitute an important obstacle to free movement of workers. While in many cases these requirements are stated to be applied according to the principle of proportionality, the area is one deserving careful attention.

- A number of Member States are denying the right of family reunification with third country national family members of EU migrant workers where those family members seek to enter from outside the EU. This is causing substantial hardship for workers in a number of Member States and a distortion of the use of free movement rights as workers, in some cases in desperation, excise free movement rights to move to yet another Member State primarily in order to enjoy family reunification. This is counterproductive to the good functioning of the internal market.

In general, 2007 has seen some progress towards the realisation of the free movement rights of workers across the EU though there is still much room for improvement.

# General Introduction

## 1. TRANSPOSITION OF DIRECTIVE 2004/38

In most Member States the transposition of Directive 2004/38 started in 2006 and was completed during 2007. Only Luxembourg did not succeed in transposing the Directive in its national legislation in 2007. In the majority of Member States the transposition of Directive 2004/38 resulted in a reinforcement of the status of EU migrants and their family members in comparison with their status under the previous law. In some Member States rules formerly in administrative instructions or case-law of national courts have been codified in legislative acts. In some Member States transposition resulted in national rules that are more favourable than the Directive. In Belgium the national law provides for acquisition of the permanent residence status after three years of lawful residence rather than the five years provided for in the Directive.

On the other hand, several national reports mention that the transposition of Directive 2004/38 was used as an occasion to introduce more strict rules. In Denmark, Finland, Ireland and the UK with reference to the *Akrich* judgment a rule was introduced requiring third-country national family members to prove previous lawful residence in another Member State. Italy limited the admission of those family members to the ones who had regularly entered the country (see chapter 1). In Lithuania the acquisition of the permanent residence status was made conditional on passing a language test. Germany reduced the access to social benefits for jobseekers not qualifying as a worker. Most of these retrograde measures are problematic considering the text of the Directive and the recent judgment of the Court in *Metock*, either because the Court held that requiring previous lawful residence in another Member State or regular entry is incompatible with the Directive, or because of the Court's general observation "that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals" (par. 59).

## 2. ENLARGEMENT

At the beginning of 2007 Bulgaria and Romania acceded to the Union. The number of nationals of other EU Member States having registered residence in those two states is still relatively small (approximately 5,000 in Bulgaria and 9,000 in Romania). Most EU-15 Member States decided to make use of the transitional provisions on workers from the two new Member States. All EU-8 Member States, except Hungary granted full freedom of movement to citizens of Bulgaria and Romania. In reports on some EU-8 Member States disagreement with the continued application of the transitional regime to their workers in some of the EU-15 is mentioned as a major reason for allowing full freedom of movement to Bulgarian and Romanian nationals. Several EU-15 states decided in 2007 to no longer apply the transitional rules to EU-8 workers (see chapter 8). Several reports mention problems with substandard employment conditions (Ireland and Finland) or substandard housing conditions (Netherlands) of (posted) EU-8 workers. According to some of those reports, the legislative measures against those practices are rather ineffective.

## 3. APPLICATION OF SCHENGEN ACQUIS IN EU-10

A major event in 2007 was the full application of the Schengen acquis in the EU-10. The lifting of controls on persons at the internal borders with the EU-10 Member States is of great practical and symbolic importance. It removes practical obstacles to the free movement of persons between Member States. In several EU-10 Member States the importance of this event was compared with the accession to the EU in 2004. Application of the Schengen acquis was considered as the final acquisition of full membership of the EU.

## 4. RECOGNITION OF QUALIFICATIONS AND ACCESS TO PUBLIC SERVICE

In the majority of Member States the transposition of Directive 2005/36 of the recognition of qualification was completed in 2007 (see chapter 2).

The reports on Estonia, France, Hungary, Spain and the UK mention improvements in the access of Union citizens to employment in public service during 2007 (see chapter 4).

## 5. DEPORTATION AND DETENTION

The reports on Ireland, Italy and the Netherlands refer to the introduction of national legislation or administrative practices on deportation and detention of Union citizens on public order grounds or because Union citizens are held to be an unreasonable burden on the public purse. The Irish report refers to “multiple deportation” of Romanian nationals. The new national rules or measures either are an explicit effort to establish which actions of national immigration authorities are still in conformity with Community free movement law or they appear to have been adopted without proper regard to the applicable Community law.

## 6. EQUAL TREATMENT IN IMMIGRATION PROCEDURES?

In some reports (a.o. on Belgium and Sweden) the question is raised whether the more strict national procedural rules in immigration cases generally, adopted in 2007, can be applied to Union citizens and their family members. Where those national rules provide for special immigration tribunals or for a more limited judicial review than afforded to nationals of the Member State concerned in their disputes with national authorities, the application of more strict immigration procedures may be problematic as to their compatibility with Directive 2004/38, with the equal treatment provisions and with the general principle of Community law that national procedural rules should at least provide equivalent protection of rights granted to individuals under Community law.

In some Member States the Ombudsman appears to play an important role in protecting free movement rights of EU nationals in cases where access to national courts may be difficult or not possible (e.g. in the Czech Republic, Hungary and Luxembourg).

## 7. BUREAUCRATIC OBSTACLES AND LANGUAGE REQUIREMENTS

Several reports mention bureaucratic or other obstacles to free movement: long delays in the actual registration (Cyprus), or in issuing documents to EU nationals (UK) or the application of an additional income tax requiring nationals to pay the difference between the income tax in the host Member State and the own Member State (Latvia). This tax may well be an ob-

stacle to return to the latter Member State. Long delays in registration and issuing of documents may well result in unequal treatment of (undocumented) EU nationals by employers during this waiting period. The report on Portugal mentions efforts to remove of an obstacle affecting the movement of cross-border worker across the Portuguese-Spanish border as one of the major events in 2007.

The increased relevance of language requirements as an obstacle to the exercise of free movement rights is mentioned in the reports on Cyprus, Hungary and Lithuania (see chapter 2).

## 8. THIRD-COUNTRY NATIONAL FAMILY MEMBERS

Finally, the treatment of third-country national family members continues to raise serious problems in several Member States. This relates not only to the additional conditions for admission such as the one that gave rise to the *Metock* judgment, but also to the (non-)admission of same sex partners or registered partners and the access to employment of those family members (see chapter 5). Positive developments in 2007 in this respect are the abolition of the income requirement and fees for visa in Slovakia, the introduction of a judicial remedy against a refusal of a visa for third-country national family members, and the application of the Courts judgment in *Eind* on the admission of family members of a national who returns to Denmark after having used his freedom of movement.

# Chapter I
# Entry, Residence, Departure and Remedies

## INTRODUCTION: TRANSPOSITION OF DIRECTIVE 2004/38/EC

The year 2007 finally saw the transposition in all European Union Member States of the EU Citizens Directive (hereafter "the Directive"),[1] which should have been transposed by 30 April 2006. The exception is *Luxembourg*, which, by the end of the year, had only partially transposed the Directive in response to the proceedings brought against it by the European Commission (Case C-294/07). In *Belgium*, the law transposing the Directive, which was adopted on 25 April 2007 and published shortly thereafter, only entered into force on 1 June 2008, which raises questions about the direct effect of some of the Directive's provisions between transposition and the law's entry into force. The two newest Member States, *Bulgaria* and *Romania*, which joined the EU in January 2007, also have legislation in place transposing the Directive, although a number of its provisions have not been transposed. In *Romania*, transposition occurred by way of an Emergency Ordinance which entered into force with that country's accession to the EU on 1 January 2007. The following Member States transposed the Directive in 2007: *Belgium* (but see above), *Cyprus* (national law adopted in February 2007 and implemented in November 2007), *Finland* (May 2007), *Greece*, *Hungary* (July 2007), *Italy* (April 2007), *Malta* (July 2007) and *Spain* (April 2007). *France* finalized the transposition, which started in 2003, in March 2007. While in *Latvia* the Directive was transposed by means of a Regulation in 2006, a draft law on the free movement of EU citizens, EEA citizens and Swiss citizens has since been formulated, which, if adopted, will place the Directive on a higher normative footing within the national legal system.

During 2007, several amendments were adopted (or were pending) in the ten Member States which joined the EU in May 2004 with a view to improving the national rules transposing the Directive. For example, in *Poland*, the amendments have aligned the national legislation more closely with the Directive in the area of the expulsion of EU citizens with regard to the application of the public health exception and the proportionality principle in the context of expulsion on grounds of public policy. However, given the continuing small number of EU citizens from other Member States employed and resident in the new Member States and the limited practice, including in terms of national court rulings, it continues to be difficult to assess the real impact of Community free movement law in those countries.

In the following Member States, it was expressly noted that the transposition of the Directive has, on the whole, resulted in more favourable national provisions on free movement than was the case previously: *Belgium*, *Finland*, *Italy*, *Latvia*, *Netherlands*, *Slovakia* and *Spain*. Moreover, in *Belgium*, some national provisions are now more liberal than those found in the Directive. The right to permanent residence in Article 16 of the Directive is afforded to EU citizens and their family members after three years of continuous residence rather than the five years specified in the Directive,[2] and the notion of family also includes

[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] However, despite the overall improvements noted in *Finland* after transposition, there has also been some regression in that the qualifying period for permanent residence for EU citizens and their family members has

same-sex marriages and a broader definition of partnership than that found in the definition of family in Article 2 of the Directive. In the *Czech Republic*, the concept of the registered partnership, which has been given equivalent status to marriage in immigration legislation, was introduced into national migration legislation in 2007.

This chapter discusses the application in the 27 Member States of the Community rules on the entry, residence and departure of EU citizens and members of their families in 2007, as well as of the remedies available to them if refused entry or residence or subjected to expulsion. The chapter also contains a separate section addressing the treatment of job-seekers in national law and practice, which the rapporteurs were once again requested to draw attention to in drafting their reports. A notable concern identified relating to some Member States is the temptation to circumvent the more stringent Community rules on entry and expulsion by applying national rules relating to aliens generally and particularly in respect of new EU citizens from *Bulgaria* and *Romania*.

## ENTRY

As observed in previous Reports, 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 now permit the entry of EU citizens or EEA nationals on the basis of a travel document or national identity card. What appears less clear, however, is 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 (see Article 5(4) of the Directive which relates to the Court of Justice's judgment in Case C-459/99, *MRAX*). This problem is observed explicitly in the reports of *Bulgaria* and the *Netherlands*. In *Italy*, the EU citizen entrant or his or her family member is given 24 hours to present this evidence, which is considered by the national legislator to be a reasonable period of time in the light of Article 5(4) of the Directive.

Moreover, there continued to be difficulties in 2007 in law and in practice surrounding the admission of family members and particularly third-country national family members of EU citizens in some Member States. In the *Czech Republic*, for example, the time-limit of 14 days set down in the law for issuing visas at the border, which would be applicable to third-country national family members of EU citizens who require a visa to enter the territory, would not appear to conform to the requirement in Article 5(2) of the Directive that such visas are to be issued "as soon as possible and on the basis of an accelerated procedure". However, no information is available on the application of this provision in practice. In *Finland*, the May 2007 legislation transposing the Directive lays down the requirement that third-country national family members must previously have been lawfully resident with their EU citizen family member in another Member State as a condition for enjoying free movement rights in *Finland*. The position in *Ireland* and *Italy* was similar. This restrictive approach relying on the *Akrich* (C-109/01) judgment is no longer justified in the light of the Court of Justice's recent judgment in *Metock* (Case C-127/08). In *Spain*, some doubts have been raised about the correct transposition of Article 5(4) of the Directive by the 2007 Royal Decree in respect of third-country national family members subject to the visa requirement in

been increased from four to five years. Similarly, and as observed in the 2006 Report, the qualifying period for permanent residence of four years residence in *Lithuania* has been abolished in favour of the five-year period.

Regulation 539/2001/EC and whether the absence of such a visa will automatically result in a refusal of entry.

In a few Member States, the grounds upon which entry may be refused to EU citizens, and in particular to their third-country national family members, appear to go beyond the scope of the public policy, public security and public health exceptions stipulated in the Directive. In the *Czech Republic*, third-country national family members are subject to additional refusal criteria as compared with EU citizens. In *Finland*, the position of EU citizens who have entered and registered their residence is stronger in the case of removal on these grounds than those who have "merely entered", and this is discussed in the section on "Departure" below. In *Slovakia*, as noted in previous Reports, the denial of entry to foreigners, including EU citizens, who are deemed to be undesirable persons, i.e. foreigners who were administratively expelled or on whom the punishment of expulsion in criminal proceedings was imposed, might be problematic if the person concerned was expelled in the past for reasons which are not compatible with the permissible grounds for the refusal of entry outlined in Article 27 of the Directive. In *Slovenia*, the national legislation transposing the Directive continues to permit refusal of entry on the basis of "international relations". Moreover, the public policy exception in connection with entry can be applied more strictly in respect of EU citizens from the new Member States, although there is no case law to verify what actually occurs in practice. Finally, in the *United Kingdom*, there is anecdotal evidence that Bulgarian and Romanian nationals (hereafter "A2 nationals") are routinely asked whether they are working in the country and requested to produce evidence of this. Even though unauthorized work by A2 nationals constitutes a criminal offence under the UK Accession Regulations 2006, it does not fall within the public policy exception under Community law and thus refusal of entry for this reason is not justified.

## RESIDENCE

With regard to residence of up to three months, the Directive, in Article 5(5), permits Member States to require EU citizens to report their presence within their territory within a reasonable and non-discriminatory period of time after entry. However, few Member States exercise this option (i.e. *Malta* – one month; *Poland* – four days; *Romania* – 15 days). It is questionable whether the four-day period in *Poland* amounts to a "reasonable" period of time as stipulated in the Directive. In *Ireland*, as also observed in the 2006 Report, the right of residence for up to three months in the implementing regulations is subject to the condition that the person concerned "does not become an unreasonable burden on the social welfare system of the State", which is not in conformity with Article 6(1) of the Directive stipulating 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".

With regard to residence for a duration longer than three months, a significant majority of Member States have exercised the option in Article 8(1) of the Directive to require EU citizens to register with the relevant national authorities within three months (or longer)[3] of their arrival upon which a registration certificate is issued (*Austria*, *Belgium*, *Bulgaria*, *Cyprus*, *Denmark*, *Estonia*, *Finland*, *Germany*, *Greece*, *Hungary*, *Italy*, *Latvia*, *Lithuania*, *Luxembourg*, *Malta*, *Netherlands*, *Poland*, *Portugal*, *Romania*, *Slovenia*, *Spain*, *Sweden*). As observed in the 2006 Report, a residence permit was still being issued to EU citizens in *Lithuania* as amending legislation to replace this permit with a registration certificate was

[3] E.g. in *Portugal*, the obligation to register falls within 30 days after a period of three months.

pending by the end of 2007. In *France*, the 2007 measures transposing the Directive oblige EU citizens to register with the mayor of the locality in which they wish to establish their habitual residence, although they are not required to hold any document to this effect. While Article 8(1) stipulates that sanctions for the failure to register are permissible provided they are proportionate and non-discriminatory, the maximum penalty of approximately EUR 2,250 in *Cyprus* would appear to be disproportionate. In the *Netherlands*, the maximum sanction includes imprisonment for up to one month or a fine of the second category (which is not defined). In contrast, the maximum fine in *France* for a failure to register is EUR 90.

In the *Czech Republic*, *Ireland*, *Slovakia* and the *United Kingdom*, EU citizens are under no obligation to register, although they are entitled to apply for a registration certificate if they so wish. As noted in the 2005 and 2006 Reports, such documentation may still be necessary to prove length of residence in the country for other reasons, such as naturalization, although this is no longer the case in *Ireland*, where the Department of Justice, Equality and Law Reform advised that other evidence can be put forward to prove length of residence, such as the existence of a mortgage, bank accounts or taxes paid.

The application of EU free movement law with regard to registration of residence was hampered in some Member States by lengthy delays in the issue of registration certificates, which is not in conformity with Article 8(2) of the Directive stipulating that such certificates are to be issued immediately. This problem was also identified in the 2005 and 2006 Reports. In *Cyprus*, there was a waiting list of up to one year and more for appointments to obtain the registration certificate, which would appear to be mainly the result of staff shortages in the regional office in Nicosia, which receives more than half of the applications from EU citizens. In *Finland*, the registration process continued to take up to two 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. Attention was also drawn to similar delays in the 2005 and 2006 Reports, which raises the question why more resources have not been put into place to process applications. In the *United Kingdom*, while the administrative instructions stipulate that such certificates should be issued "immediately" on application and that the UK Home Office's published aim is to issue them within 20 days, disclosure of information obtained under the Freedom of Information Act indicates that, in practice, it can take more than six months for residence certificates to be issued. Indeed, in the first three-quarters of 2006, over 1,700 applications for residence certificates had not been completed within six months. Similar delays also apply to the issue of residence cards for third-country national family members and documents certifying permanent residence.

Discriminatory national provisions relating to residence are identified in some reports that impact adversely on third-country national family members. In *France*, the requirement that third-country national family members apply for a residence card within two months of arrival if the planned period of residence is for more than three months was recently found by the *Conseil d'Etat* to be in clear violation of Article 9(2) of the Directive, which stipulates a minimum period of three months. In the *United Kingdom*, a specific legal regime operates only in respect of the entry of third-country national family members whereby UK Immigration Officers have the power at the border to revoke their documents, including residence documents, if they are not satisfied that they are the family members of a qualified EU citizen.

The rules in Member States transposing the residence conditions in Articles 7 and 8 of the Directive are generally unproblematic, although there are some irregularities and regression from the position prior to transposition in some Member States. For example, in *Italy*,

applicants for a registration certificate have to prove that they enjoy comprehensive sickness insurance cover and, in the case of a private insurance policy, need to attach a copy of an Italian translation of the policy to the application. Previously, however, a voluntary registration with the Italian health care office, which was granted on payment of a fee, was considered valid sickness insurance for the purpose of residence. In *Latvia*, the meaning of the "sufficient resources" condition for students was defined as 50 per cent of the minimum wage, which is an amount higher than the threshold below which Latvian nationals become eligible for social assistance. Therefore, by tying this condition to a fixed amount without taking into account the personal situation of the person concerned and to a higher level than the social assistance threshold is not in conformity with Article 8(4) of the Directive. A similar issue arises in *Lithuania*, where the "sufficient resources" condition was fixed at one minimum monthly salary for foreigners (including EU citizens) and at 50 per cent of this salary for students. Moreover, as also noted in the 2006 Report, the condition of proof of accommodation remained in place. A positive development in the *Netherlands* was the amendment to the Aliens Circular in April 2007 clarifying that the "sufficient resources" condition in relation to economically non-active EU citizens can be satisfied by the existence of resources abroad so long as the EU citizen is able to rely on them unconditionally. In *Spain*, the residence conditions were not transposed at all by the Royal Decree, which came into force in April 2007, and this omission raises the concern that the conditions might therefore be interpreted restrictively by the authorities.

With regard to the right of permanent residence, the administrative courts in *Germany* ruled, in accordance with Article 16 of the Directive, that this right arises after five years continuous and lawful residence and cannot be subject to further conditions, such as non-dependence on social assistance or that the previous five years on the territory have to be connected with the exercise of free movement rights under Community law. This position appears to be more favourable than the rulings of Asylum and Immigration tribunals in the *United Kingdom*, which have adopted a narrow interpretation of this provision (erroneously in the view of the UK rapporteurs), namely that lawful residence of EU citizens from new Member States prior to their accession cannot be taken into account in the calculation of the five-year period. In *Latvia*, the Immigration Law stipulates that foreigners must pass an official language test before they can be granted permanent residence. Given that the definition of foreigner also encompasses EU citizens and their family members, this means that the legislation is potentially applicable to them, although in practice no language test is applied according to information provided by the Office of Citizenship and Migration Affairs. Similarly, in *Lithuania*, foreigners are now required to pass a state language and Constitution exam before permanent residence can be granted and it remains unclear whether this provision also applies to EU citizens and their family members, although it would appear that it does not since the adoption in October 2007 of an Order relating to the issuance of the permanent residence certificate.

There are still provisions in Member States concerning the issue or non-issue of residence permits that appear to conflict with Community law. In *Hungary*, and as also observed in the 2005 and 2006 Reports, the conditions for rejecting the application for or withdrawing the residence certificate on account of the EU/EEA national suffering legally defined diseases endangering public health occurring within three months of his or her arrival is not in conformity with Article 29 of the Directive, especially as HIV/Aids appears to still be included in the national list of diseases endangering public health.

Concerning retention of the right of residence, as outlined in Article 14 of the Directive, it is notable that the legislation adopted in *Italy* transposing this provision does not mention paragraph 3 prohibiting automatic expulsion of the EU citizen or his or her family member if they have recourse to the social assistance system of the host Member State. Furthermore, Article 15(2) stipulating that expiry of the identity card or passport on the basis of which the person entered the Member State and was issued with a registration certificate or residence card cannot constitute a ground for expulsion is not transposed.

## TREATMENT OF JOB-SEEKERS

There are explicit national rules in a number of Member States (*Denmark*, *Finland*, *France*, *Hungary*, *Malta*, *Netherlands*, *Sweden*) on the right of job-seekers from other Member States to enter and reside in their territory for more than three months. In the *Netherlands*, job-seekers have a right to residence for more than three months if they can demonstrate that they are still looking for work and have a real opportunity of obtaining it. But they also have to register their residence after three months like all other EU citizens. However, in *Sweden*, job-seekers are expressly precluded from the obligation to register their residence after three months and the condition in Article 14(1) of the Directive of not becoming an unreasonable burden on the social assistance system within the initial three-month residence period is not applicable to them. In *Denmark* and *Malta*, express legal provisions stipulate that EU job-seekers may reside in the country for up to six months, although they will not be asked to leave on expiration of the six-month time limit if they can demonstrate that they continue to look for work and have a real chance of obtaining employment. In *Hungary*, the new law transposing the Directive that entered into force on 1 July 2007 is more favourable and flexible than former provisions because it does not specify a six-month time limit for the residence of EU citizens who are job-seekers. However, no practice has been recorded.

In other Member States, however, it is only implicit under the national rules that job-seekers enjoy a right of residence. Consequently, this means that in those Member States where registration of residence is required under national rules, job-seekers are in practice under an obligation to register their residence if they intend to stay for a longer period than three months (e.g. *Estonia*, *Lithuania*).[4] Similarly, in *Poland*, the obligation of EU citizens to report their presence to the authorities within four days (see above) also applies to job-seekers. In *Latvia*, EU citizens do not need to obtain a registration certificate if they reside in the country for up to six months within a one-year period for the purpose of employment. In the view of the national rapporteur, this means that job-seekers who have not been employed in the country previously may apply for a registration certificate if they meet the general conditions for EU citizens who wish to reside in Latvia without the status of an employee or as self-employed persons. In *Italy*, the lack of explicit provisions means that it is unclear whether a job-seeker would be treated as a worker or non-worker and therefore required to have sufficient economic resources. However, in *Poland*, the understanding of the rapporteur is that the job-seeker would need to possess sufficient financial resources to continue looking for work for a period exceeding three months. In the *United Kingdom*, job-seekers do not usually encounter difficulties with regard to their residence unless they apply for social benefits

[4] This constitutes a regression in *Lithuania* as previously the law stated expressly that EU job-seekers were not required to register for six months.

In the newest Member States, Article 14(4)(b) of the Directive, which provides 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", has been transposed in *Romania* but not in *Bulgaria*.

**DEPARTURE**

The "sliding scale" of rules in Article 28 of the Directive relating to the expulsion of EU citizens has, on the whole, been transposed faithfully in Member States. However, gaps exist in a number of Member States. For example, in *Bulgaria*, the strengthened safeguards in Article 28(2) of the Directive regarding the expulsion of EU citizens who are permanent residents have not been transposed. Moreover, there is no explicit reference to the "best interests of the child" and the 1989 UN Convention on the Rights of the Child in the transposition of Article 28(3)(b). The UN Convention is also not expressly mentioned in the regulation transposing this provision of the Directive in *Ireland*. In the *Netherlands*, the obligation to take account of the general considerations listed in Article 28(1) of the Directive before an expulsion decision is taken is not transposed in the Aliens Circular with the result that the more general weighing of interests found in the General Administrative law is applicable. Neither has this obligation been transposed in *Slovakia*, while in *Finland* it is only activated in the case of deportation (i.e. applicable to those EU citizens and their family members who have registered their residence or have obtained a residence card) and not refusal of entry, which is problematic because EU citizens and their family members may already have entered the country and resided there de facto for some time even though they have not registered their residence or been issued with a residence card. In *Spain*, the Royal Decree transposing the Directive appears to limit the application of the Article 28(1) considerations in the case of the expulsion of EU citizens or EEA nationals who are permanently resident whereas no such qualification appears in the provision itself.

As noted in the 2005 and 2006 Reports, in some Member States there is little or no indication in the domestic implementation of Community rules of what is actually meant by public health, public policy and public security. This is the case in *Bulgaria*, the *Czech Republic*, *Estonia* and *Slovakia* where these grounds are reiterated in the national legislation but where no definition is available. Consequently, the rapporteur for *Slovakia* concludes that the provisions in the national legislation are vague and leave a lot of room for police discretion, a situation that is compounded by the lack of administrative or judicial practice. In *Italy*, only "imperative grounds of public security" in Article 28(3) of the Directive are defined in the transposing legislation. In *Lithuania*, there continue to be no specific provisions in the foreigners' legislation regarding the departure of EU citizens, which means that they remain vulnerable to expulsion on broader grounds than those stipulated in the Directive. Moreover, no specific rules exist regarding the detention of EU citizens, although there is still no practice substantiating possible inconsistencies with Community law.

It would appear that in some Member States criminal convictions alone may, at least on the face of the law, constitute a reason for the expulsion of EU citizens without considering the personal conduct of the individual concerned to determine whether s/he constitutes an actual and serious threat to the fundamental interests of society (i.e. on grounds of public policy and public security). Indeed, this is the position in administrative practice in *Bulgaria* where previous criminal convictions are considered as a threat to public order and constitute sufficient grounds to deport a foreigner. Given that Article 33(1) of the Directive has not

been transposed, this practice could potentially be applied in respect of EU citizens. In *Finland*, on the other hand, the rapporteur notes a distinct improvement in the conformity of judicial decisions with Community law on the expulsion of EU citizens. Similarly, in the *United Kingdom*, there have been a number of positive adjustments to the rules applicable to the deportation of EU/EEA citizens, namely deletion of the list of criminal offences justifying deportation without the need to demonstrate personal conduct or evidence of propensity to offend and abandonment of the policy on deportation of EU/EEA citizens sentenced to imprisonment for two years or more. However, the UK Borders Act, which came into force in October 2007, contains a provision on the automatic deportation of foreign criminals (including EU/EEA citizens). This provision has not yet been brought into force but may be contrary to Community law.

In *Romania*, while the principal of proportionality is adhered to in the letter of the law, EU citizens may also be removed (or refused entry) if they have been declared as "undesirable", a concept which is not elaborated and which could raise questions in the context of its compatibility with Community law particularly if the declaration was issued before freedom of movement principles began to apply. A similar potential problem has been identified in *Slovakia* regarding the refusal of entry to foreigners who are deemed to be "undesirable persons" (see also the section on "Entry" above). In *Slovenia*, as with entry, deportation can be ordered when the registration of residence (or permanent residence) has been refused to EU citizens or their family members on the grounds that they pose a threat to inter alia "international relations".

There are recorded instances in Member States where authorities continue to use national rules on foreigners to expel EU citizens and their family members to circumvent the more stringent provisions of Community law despite the fact these rules require that prevalence is given to the latter. EU citizens from the new Member States, particularly Bulgaria and Romania, and third-country national family members are most affected. The practice in *Italy* gives rise to particular concerns given also that the law was amended in November 2007, both procedurally and substantively, to facilitate the expulsion of EU citizens for serious reasons (i.e. on grounds of State security and imperative grounds of public security). No official data is available, but reports in the Italian press indicate that 510 EU citizens were expelled in 2007 and that 181 orders were based on imperative reasons of public security, which means that the order has immediate effect. The only published judgment concerned a challenge by a Romanian national who was facing expulsion on this ground because she was a prostitute. The judge held that the fact that the person in question was a prostitute was insufficient basis for the expulsion decision. In the *Netherlands*, the practice of immigration authorities to apply national rules of expulsion on public order grounds continued in 2007 despite the judgment of the Court of Justice in the infringement procedure against the Netherlands in June of that year (Case C-50/06). Moreover, the Dutch rapporteurs also refer to pilot projects undertaken by local police in Rotterdam and The Hague that explore the limits of Court of Justice case law regarding possibilities for the expulsion of EU citizens who have committed a series of minor offences and caused major nuisance to the public.

In *France*, the measure of "taking a foreigner back to the frontier" (*reconduites à la frontière*) is not to be used in the case of EU citizens because the criteria for its activation do not conform to Community law. However, administrative practice indicates that this measure was used during 2007 in respect of Bulgarian and Romanian nationals. Furthermore, the public policy exception was interpreted broadly in respect of these nationals, although the administrative courts have since confirmed that unauthorized work by Bulgarian and Romanian

citizens (in respect of which the transitional provisions on their freedom of movement are still operable) does not amount to an infraction on the basis of which an expulsion measure can be taken. In *Greece*, a first instance decision (adopted in accordance with the directly effective provisions of the Directive and before its actual transposition and implementation at the national level) ruled that the permanent expulsion of a Bulgarian national pursuant to a custodial penalty could not take place if it did not conform to the conditions in Articles 27-33 of the Directive (but see also below on the compatibility of measures of permanent expulsion with Community law). In *Ireland*, there were a series of deportations in July 2007 against Romanian nationals without visible means of support on the basis that they had become an unreasonable burden on the social welfare system, a response that was in sharp contrast to the previously liberal regime operating in this area.[5] While the 2007 law in *Cyprus* transposing the Directive faithfully reflects its provisions concerning the permissible restrictions that can be imposed on the right of free movement on grounds of public policy, public security or public health, the rapporteur observes that throughout 2007 concerns were expressed by human rights NGOs about the continuing practice of immigration authorities to deport EU citizens.

With regard to third-country national family members, in *Austria*, a number of Administrative Court procedures have been postponed (i.e. unlimited residence ban against a Nigerian national married to an Italian and the expulsion of a Serbian national who is the son of a German) pending the judgment of the Court of Justice in response to a request for a preliminary ruling by the Administrative Court (Case C-551/07, *Sahin*).

In *Denmark*, the judicial practice of permanent expulsion or life-long exclusion of EU citizens who have been convicted of serious criminal offences has been questioned from the point of view of the principle of proportionality in Article 27(2) of the Directive and the case law of the Court of Justice (Case C-115-116/81, *Adoui and Cornuaille* and Case C-348/96, *Calfa*).

As noted in previous Reports, the courts in a number of Member States have confirmed that EU citizens cannot be presented with the option of expulsion in lieu of serving a term of imprisonment (where this possibility exists for foreign offenders under national law) because this would not conform to Community law (*Italy* with reference to a Supreme Court judgment in 2004), or they cannot receive an additional penalty of expulsion except in connection with public policy or public security grounds (*Portugal* with reference to a Supreme Court of Justice judgment in 1991) as indeed is also foreseen in Article 33(1) of the Directive. In *Spain*, however, this provision has not been transposed on account of the July 2006 Government Memorandum, which refers to the likelihood that such a measure will be ineffective in the light of the abolition of internal borders.

The public policy exception has also given rise to the interesting question of the validity of restrictions on freedom of movement imposed on EU citizens in their own countries. In *Romania*, the general practice of limiting the free movement of Romanian nationals returned from other Member States under a readmission agreement for a period of up to three years, was found by national courts to be a disproportionate response and not in conformity with the strict Community interpretation of the public policy exception (see also the recent judgment of the Court of Justice in Case C-33/07, *Jipa*). On the other hand, in *Germany*, the re-

[5] Moreover, in 2007, 520 nationals from the EU-10 and EU-2 Member States (with Polish nationals being in the majority), who fail the habitual residence condition attached to social assistance payments, were repatriated from Ireland on a voluntary basis by the Reception and Integration Agency.

fusal to grant a passport to a German national with substantial tax arrears was considered to be a valid measure under Community law.

**REMEDIES**

There are a number of issues identified in the national reports relating to new developments in Member States, as well as ongoing concerns, that impact on the transposition or otherwise of the provisions on remedies in Directive 2004/38/EC.

The new foreigners' jurisdiction established in *Belgium* (*Conseil du Contentieux des étrangers*), and operational since 1 June 2007, is applicable to all foreigners, including EU citizens. However, it gives rise to concerns in respect of its compatibility with Article 31(3) of the Directive given that it is unclear whether the new body will be able to fully review the facts and circumstances on which the decision is based and not merely the legality of the decision. The law establishing this jurisdiction appears to indicate only the latter possibility despite the contrary assertions of the Belgian authorities. A similar procedural problem of incomplete review was identified in the *Netherlands* where a judge asked to decide on the lawfulness of the detention of a Belgian national was precluded by the Judicial Division of the Council of State from also considering the legality of the decision declaring the EU citizen to be undesirable at the end of her period of imprisonment, which, according to the rapporteurs, means that there is a real risk of continued detention in breach of Community law.

In *Luxembourg*, the draft law introduced in November 2007 that will complete transposition of the Directive constitutes a significant improvement to the appeal mechanisms currently in place in respect of decisions on refusal of entry and residence and expulsion in that it provides for detailed provisions. As at the end of 2007, remedies for these decisions were provided by the general procedural rules of administrative tribunals and actions sought under these rules did not have suspensive effect. In *Spain*, transposition of the provisions in the Directive concerning notification of decisions (Article 30) and procedural safeguards (Article 31) is only partial. With regard to Articles 30(1) and (2), the transposition is indirect referring to provisions in the general legislation on aliens and the common administrative procedure, while Article 31(3) stipulating that the "redress procedures shall allow for an examination of the legality of the expulsion decision, as well as on the facts and circumstances on which the proposed measure is based", is not expressly referred to in the Spanish legislation.

In *Austria*, as observed in the 2005 and 2006 Reports, both Supreme Courts (i.e. the Constitutional Court and the Administrative Court) interpret 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 2004/38/EC), as applying to Turkish workers. But the dispute between the courts concerning whether the national provisions are applicable to third-country national family members of Austrians who have not exercised their free movement rights has not been resolved.

# Chapter II
# Access to Employment

The issue of equality in access to employment for citizens of the Union outside their state of nationality engages a very wide number of different issues and fields of law and practice. As access to employment in this chapter excludes the public service, the subject matter is founded in civil law and the relations of individuals and enterprises in the private sector. As this field includes so many different areas of economic enterprise, it is not always straight forward determining what the applicable law is. In some cases there are exceptions for certain types of economic activity. In addition, because this question is one within the business field, transparency is not always evident as regards the practices.

It is apparent from the national reports that EU-10 and EU-2 Member States have made progress in reducing and eliminating nationality exclusions in access to employment but there are still problems. Tribunals in a number of Member States appear to perceive their role as that to uphold national law rather than to ensure EU law is properly applied. This creates problems for individuals seeking remedies against provisions of national law which are of dubious consistency with EU requirements. Language requirements in the private sector appear to be problematic only in some Member States. Generally they are applied in the regulated professions but in some Member States there are legal provisions regarding language requirements which apply to the private sector as well though these are more limited. Mainly in these cases a proportionality test limits the deterrence effect of such language obligations to an acceptable level. But in some states, as for instance Luxembourg, language requirements represent a substantial obstacle for EU migrant workers. Finally, a very mixed picture emerges regarding the transposition of the directive on recognition of diplomas. While some Member States seem to have successfully achieved the goal, others are only partially there or even have yet to start the process.

The following themes are dealt with specifically in this chapter:

- equal treatment in access to employment;
- language requirements;
- recognition of diplomas.

Of the three, the third has been the subject of substantial legislative activity as the transposition deadline for the new directive on recognition of diplomas (2005/36) passed during this reporting period. In this chapter we will consider each of the three areas in turn drawing together the key features of 2007.

## EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

*Austria:* the law on employment agencies has no specific provision on non-discrimination though the general law on non-discrimination applies, it does not exclude discrimination on the basis of nationality.

*Belgium*: there has been no legislative activity on this subject in 2007 nor have any cases come before the courts.

*Bulgaria*: while the law prohibits discrimination on the basis of nationality there appears to be a gap in legislation where by EU nationals who reside for less than three months

can get the assistance of employment agencies but after three months they can only do so if they have registered and no provision is made to issue registration certificates to job seekers.

*Cyprus*: there is a general prohibition on discrimination on the basis of nationality as regards EU nationals.

*Czech Republic*: the relevant labour legislation requires that EU nationals (and their family members) be assisted in their search for work in the same way as Czech nationals.

*Denmark:* the main law which prohibited discrimination on the labour market does not specifically mention nationality though this might be considered indirect discrimination under the existing Danish legislation. EEA nationals are entitled to register with job centres, to use the facilities and to receive guidance though the EURES centres which established at the beginning of 2007 are to be closed in 2008. Their tasks will be moved to 3 international centers which will include one with a special Polish speaking hotline. A new responsibility has been given to the Danish Institute of Human Rights to receive complaints on prohibited discrimination not only on the grounds of race or ethnic origin, but also on grounds of religion or belief, political opinion, sexual orientation, age, handicap and national or social origin. So far no case of an EU national has come before it on differential treatment in the labour market. Two cases of EU nationals have come before it regarding discrimination on the basis of ethnic origin – a Dutch national of Indian origin who was asked for further evidence of Dutch nationality beyond his passport – in principle the complaint was upheld but on the specifics it failed on the basis that there are too many forged Dutch passports in circulation thus making it reasonable for the potential employer to ask for more evidence; secondly, a German national was offered a holiday house at a higher rate because of his German address than would have been the case if he had a Danish address. The Committee held that the difference was objectively justified because the company had a wide discretion in its commercial activities.

*Estonia*: according to the legislation on wages and employment contracts discrimination on the basis of nationality is prohibited.

*Finland*: the law on employment contracts prohibits discrimination on the basis of nationality. A considerable number of EU nationals, however, arrive with existing job offers so few need the services of employment agencies.

*France*: as France has applied throughout 2007 the restrictions on workers permitted under the accession agreements 2004 and 2007, Member State workers are discriminated against as regards access to employment. The exact provisions of the transitional restrictions have given rise to jurisprudence.

*Germany*: the Social Code does not distinguish between German and EU nationals thereby providing a level playing field.

*Greece*: a ministerial decision requires non discrimination between Greek and other EU nationals as regards new job opportunities.

*Hungary*: there are general provisions of law which require non discrimination in recruitment in the private sector and in wages and working conditions. A system of temporary work book employment permits a high level of labour market flexibility while the individual retains social security rights – it is open to both Hungarian and EU nationals. There is equal access to job placement services for EU nationals in accordance with the law.

*Ireland*: EU nationals are entitled to access to training and employment services on the same conditions as Irish nationals.

*Italy*: national law prohibits discrimination on the basis of nationality and national origin in respect of employment.

*Latvia*: according to national law, employers may not discriminate on the basis of nationality against nationals of other Member States. There has never been any provision allowing discrimination on the grounds of nationality regarding employment.

*Lithuania*: there is a general obligation of non-discrimination in employment. In light of labour shortages, Lithuanian employers have been advertising for workers across the EU but mainly in 2004 and 2007 Member States.

*Luxembourg*: one important improvement has been the withdrawal of obligations that third country national spouses of migrant EU nationals obtain work permits.

*Malta*: while there is legislation which prohibits discrimination in employment, nationality is not a prohibited ground. However, the definition provided by the Employment and Industrial Relations Act is not an exhaustive one.

*Netherlands*: there is general legislation which prohibits discrimination on the basis of nationality in employment.

*Poland*: EU nationals are entitled to take employment on the same basis as Polish nationals. Previous restrictions have now been removed. In principle employment agencies are under a duty not to discriminate against EU nationals.

*Portugal*: EU nationals are entitled to equal treatment with Portuguese nationals as regards access to jobs. However, some sectors are protected such as lawyers (including notaries).

*Romania*: there is a general requirement of non discrimination in employment including on the ground of national origin. This applies to EU nationals.

*Slovakia*: there is a general prohibition on discrimination against EU nationals as regards employment. There is a right to access to employment services which is also open to EU nationals on a non discriminatory basis.

*Slovenia:* there is a general non-discrimination requirement regarding employment which includes discrimination on the basis of national origin. The principle of equality applies to the unemployed EU, EEA and Swiss federation citizens, too. The inconsistency can be traced between the provisions of different acts relating to the kind of permit which is provided for as a condition on the basis of which the unemployed EU, EEA and Swiss federation citizens may register in the evidence of unemployed persons in Slovenia.

*Spain*: employers are under a non-discrimination obligation as regards EU workers. Employment agencies are required to treat EU workers and their family members in the same way as Spanish nationals.

*Sweden*: nationality requirements in the private sector apply only if the post is regulated by the Security Protection Act which relates to protection against espionage, sabotage and other crimes against state security. Employment agencies are under no restrictions beyond these.

*UK*: the existing legislation prohibits employment agencies from discriminating on the grounds of nationality. New legislation provides a wider definition of indirect discrimination and harassment but does not apply to the grounds of colour or nationality.

## LANGUAGE REQUIREMENTS

*Austria*: as regards the private sector there are no provisions on language requirements.

*Belgium*: no problems were recorded as regards language requirements in the private sector.

*Bulgaria*: there are no language requirements applicable to the private sector.

*Cyprus*: in the private sector there is no language requirement. However, there are language barriers to registration in regulated professions – real estate agents licences being a particularly contentious one. Legislation to remedy the problem was adopted. There are still problems as regards language requirements for building contractors and tourist guides.

*Czech Republic*: a language requirement can be made mandatory in the private sector depending on the profession to be exercised, but this is not regulated by law.

*Denmark:* a National Labour Market Authority circular states that language is a formally neutral requirement. However, a language requirement may constitute indirect discrimination when this requirement is not objectively justifiable. There is assistance for all foreigners, including EEA nationals, to learn Danish though they must pay a fee which depends on the length of stay in Denmark – the shorter the higher the fee.

*Estonia*: in the public sector there are strict requirements on language ability.

*Finland*: while there are no formal requirements for the private sector it is common for employers to require a knowledge of either Finnish or Swedish. However, in some sectors where English is the working language (for instance at IT firms such as Nokia) neither language is required. A state agency monitors job advertisements to check whether businesses are requiring too high language skills or nationality conditions.

*France*: there is a legal requirement that foreigners who plan to live in France have sufficient knowledge of French (article L.341-2 Code du travail). This can be important in the regulated professions and specifically medical ones. The mechanisms for proving language knowledge are set out in circulars.

*Germany*: there is no general information available on language requirements in the private sector – this is a matter of contractual freedom.

*Greece*: while language requirements are permitted by law they must be justified by genuine and determining occupational requirement.

*Hungary*: language requirements are permitted so long as they are proportionate and fulfil a genuine job requirement. Employers are free to set their own levels within this legal framework.

*Ireland*: in the private sector there is no legal requirement regarding language knowledge. This is a matter for employers. Exceptionally, all persons seeking to exercise a profession of law must have knowledge of Irish, and in the medical professions a knowledge of English. For teachers only those teaching Irish must be proficient.

*Italy*: while Italian is the official language of the country, special status is accorded in some regions to French, German and Slovenian. School teachers must prove their knowledge of Italian by submission of a certificate CELI 5 Doc but this is not required of teachers who attended primary or secondary school in Italy or at an Italian school abroad or graduated from an Italian university.

*Latvia*: there are high levels of language knowledge required for the regulated professions. There are different levels of language knowledge specified in the legislation and employers are required to ensure that employees have the necessary level commensurate to the job level. Where the job is not one regulated by legislation it is up to the employer to fulfil a legal requirement that the knowledge of staff is sufficient for the purpose of the job (consumer protection). The means by which the individual can satisfy a language requirement are inflexible: primary or secondary school certificates or a diploma issued by the state language proficiency examination commission.

*Lithuania*: there is a legal obligation for employees in some sectors to have sufficient knowledge of Lithuanian. This applies in the fields of communications, transport, health care

and service provision to residents. Temporary service providers have some exemptions, even in health care.

*Luxembourg*: knowledge of three languages is a condition required by private sector employers. This results in problems for nationals of other Member States who may speak German and French but lack Luxembourgish. Only 48% of salaried workers state they use Luxembourgish on the labour market. Family members of EU civil servants often encounter problems.

*Malta*: there are no language requirements applicable to the private sector.

*Netherlands*: there are no language requirements applicable to the private sector but there have been complaints about jobs requiring 'native speakers'.

*Poland*: private sector employers are not required to check the language knowledge of employees unless the employee is in a regulated profession.

*Portugal*: there are no specific language requirements applicable in the private sector.

*Romania*: the private sector is not regulated as regards language requirements. However, in some areas such as regards credit institutions if none of the directors holds Romanian nationality at least one of them must speak Romanian as assessed by the Romanian National Bank.

*Slovakia*: the private sector is not covered by language knowledge requirements. However, in some regulated professions there is a language requirement such as in health care services and law.

*Slovenia*: language requirements are not applicable to the private sector unless the employee is in a regulated profession.

*Spain*: private sector employers are not under obligations as regards language facilities. In fact, many job advertisements require employees to be able to speak English!

*Sweden:* In the private sector language requirements are permitted, provided that they are in accordance with the principles of non-discrimination and proportionality.

*UK*: the private sector is not subject to any language knowledge requirements.

## RECOGNITION OF DIPLOMAS

*Austria*: In December 2007 the transposition of Directive 2005/36 was enacted as regards lawyers and notaries. In the other professions covered by the directive a law was adopted in 2007. So far one administrative court decision (23.10.2007, 2006/06/0173) has considered the problem of recognition of diplomas outside the scope of the directives and found that other aspects of EU law were engaged.

*Belgium*: a mixed method of transposition was adopted regarding the directive – horizontal transposition through a basic law and vertical transposition as soon as the authorities are entitled to take enforcement measures for regulated professions. Between August and December the necessary legislation was adopted.

*Bulgaria*: there are two strands of recognition: academic and professional. Each strand is subdivided into numerous parts all with separate requirements. The new directive has been transposed. There is a substantial number of regulated professions in the country so the Ministry of Education and Science has a website to provide assistance and links to the competent authorities for each.

*Cyprus*: legislation was before parliament to transpose the new directive though the administration was already seeking to apply the new requirements.

*Czech Republic*: legislation has been introduced to implement the new directive which includes both provisions on general recognition and the specific professions. Problems have arisen before the courts regarding recognition of professional diplomas for service providers (as opposed to persons exercising establishment) and the attempt to make them register in the Republic (notwithstanding their existing registration in their country of origin). The Republic was condemned by the ECJ for failure to comply with EU law on recognition of diplomas and has now remedied the situation.[6]

*Denmark*: where the profession is regulated, the recognition of foreign diplomas under the directive includes registration with the relevant ministry or an agency, CIRIUS. Unregulated professions do not require any authorisation. The transposition of the directive permits the temporary or occasional practice of a profession without registration.

*Estonia*: the legislation requires all non Estonians to register if they plan to engage in regulated professions and for the state agency to assess the equivalence of the qualifications. There is no initiative to transpose Directive 2005/36.

*Finland*: recognition of qualifications applies almost exclusively as regards post secondary education. In the private sector, employers assess competence except as regards the regulated professions. Directive 2005/36 has been transposed for regulated professions.

*France*: a substantial number of regulated professions are included in this system. The new directive has been transposed. Romanian nurses, for instance, appear to be subject to heavy equivalence criteria in particular but in general the complexity of the system does not assist the individual in determining whether a specific decision is justified or not regarding his or her qualifications. A decree adopted in February 2007 provides that nationals of other Member States are entitled to take jobs in the management and direction of medical services establishments (clearly related to the substance of the *Burbaud* decision of the European Court of Justice) where they qualify on the basis of their diplomas and professional qualifications as set out elsewhere in legislation.

*Germany*: one key issue for the implementation of the directive is that this is a Länder responsibility. For some sectors and in some Lander the transposition is complete, in others less so. Where there is Federal competence the necessary measures have been adopted.

*Greece*: transposition of the directive is not yet complete in all areas. Problems continue to exist as regards the recognition of diplomas granted by foreign institutions in Greece.

*Hungary*: The transposition of the directive was not yet completed in 2007 though it had begun. Particular problems were encountered with the automatic recognition of Romanian health care diplomas as regards a so-called conformity date for which in 2007 none had been established for Romania.

*Ireland*: there is a variety of legislative acts which transpose the EU directives applicable before the new directive. A national agency seeks to facilitate the recognition of foreign diplomas which agency carries out it work free of charge for job seekers, employers and students. Work on transposition of the new directive was still under active consideration at the end of 2007.

*Italy*: there is some complexity to the situation in Italy. The act transposing Directive 2005/36 states that a document issued by a national authority of another Member State that recognizes an Italian diploma is not a professional qualification for the purposes of recognition in Italy. It is not clear what level of knowledge of Italian language is required by practicing various professions. There is, however, a procedure for recognition of qualifications

[6] See decisions No 3 As 12/2006-52, Supreme Administrative Court and no 419/2006 Coll of the Constitutional Court.

where part of the study has taken place in Italy and part in another country but the diploma is issued by an EU based institution. For a substantial number of professions, this recognition is subject to an aptitude test or adaptation period, the cost of which the applicant must bear. The legal position on foreign (non-professional or academic) diplomas is that they are valueless unless otherwise provided by law. Responsibility is shared between universities, which are entitled to decide on recognition for the purposes of studies and the state for other purposes. Elementary and secondary school diplomas from other EEA states are recognised subject to an Italian language and culture test. The equivalent of Italian upper secondary school diplomas are recognised only on the basis of an exam.

*Latvia*: the new directive has not been transposed by the end of the reporting period. The previous legislation has been transposed in the sectors covered.

*Lithuania*: recognition of diplomas is spread among a number of different legislative acts. Directive 2005/36 has been transposed into these acts. The Ministry of Social Security and Labour is responsible for the regulated professions under which there are a number of bodies responsible for different sectors and parts of the process. The majority of applications relate to qualifications from Russia, Belarus and Ukraine.

*Luxembourg*: sectoral amendments to legislation have brought into force the new directive. There is new legislation in particular on lawyers. Already there have been issues brought before the national courts.

*Malta*: it appears that the new directive has been transposed. A specialised centre has been established which is responsible for evaluating diplomas and assisting interested parties (among other duties). The system is divided into regulated and non-regulated professions which are dealt with separately.

*Netherlands*: most of the new directive has been transposed during the reporting period. There are two organisations responsible for evaluating foreign diplomas which are coordinated.

*Poland*: the new directive has not yet been transposed. Poland exercises the system of probationary periods in a number of the regulated professions.

*Portugal*: the law was amended in 2007 though it is not clear whether there has been full transposition of the directive as a result. In general, however, the system of recognition of diplomas seems to be straight forward and user friendly.

*Romania*: it is not apparent that the new directive has been transposed. The system of recognition appears fairly streamlined with deadlines in the region of 60 and 30 days for institutions to reach decisions.

*Slovakia*: the new directive has been transposed. The new legislation respects the procedural requirements of articles 23 – 20 of the directive.

*Slovenia*: the national legislation was amended in 2005 and establishes a system of recognition of diplomas which is free but cumbersome. The 2005 directive was transposed at the beginning of 2008.

*Spain*: legislation regarding recognition of diplomas was amended in 2006 establishing a new system which applies both to EU and foreign diplomas. The adequacy of the diploma is assessed and if deemed necessary complementary training is required of the individual. Further measures have been adopted in the field of private security to satisfy the European Court of Justice decision which found the Spanish system not in conformity with EU law. A further ECJ judgment on the failure of Spain to regulate recognition of hospital pharmacists diplomas has not yet been rectified. The national courts have been active with cases by indi-

viduals whose claims to recognition of diplomas have been rejected but the results seem quite varied.

*Sweden*: the new directive has been transposed in all sectors except real estate agents and security guards which were still under consideration at the end of the reporting period.

*UK*: the new directive has been transposed. The Department of Education and Skills (now Department of Children, Schools and Families) provides advise on its website and links for further information from the regulatory bodies for the professions covered.

# Chapter III
# Equality of Treatment on the Basis of Nationality

## 1. WORKING CONDITIONS, SOCIAL AND TAX ADVANTAGES

### *Working conditions*

In all EU Member States there exist legal obligations requiring formal equality of treatment between the nationals of the Member State and those of other Member States regarding working conditions. This equal treatment is mostly regulated in the constitution, general non-discrimination legislation or general labour legislation. In some countries equal treatment of EU citizens is also directly based on Regulation 1612/68. In *Spain* the principle of equality of treatment is in 2007 directly linked to Directive 2004/38.[7] It also guarantees non-discrimination in Spain for reasons other than nationality.

The *Belgian* report pays under this chapter attention to case C-212/06 on the relationship between Regulation 1408/71 and article 39 EC, in which the question of social rights given by autonomous Communities in a Federal State has been answered by the ECJ. According to this report the question of equality of treatment between citizens within the State will become more and more important. A Flemish Code of Public Housing, containing the condition that access to social housing is dependent on the willingness to learn the Flemish language appears to be indirect discriminatory.

*Greek* citizens or people of Greek origin older than 68 years and not having sufficient resources are granted a special pension and free medical care.[8] This pension and medical care are not granted to other EU citizens who reside in Greece, which can be seen as discrimination.

In the *UK* a number of problems as regards discrimination against EU nationals relate to EU 8 and EU 2 nationals. First, the application of the right to reside test has had a substantial impact on their ability to access social benefits. Secondly, some trade unions have expressed concerns about their exploitation in the labour market, mainly via employment agencies. Thirdly, the Worker Registration Scheme's application appears to be resulting in a number of troubling cases where employees appear to be having difficulties convincing their employers to sign forms to regulate the change of employment. According to information from the Trade Union Congress (TUC) a common problem for EU workers is being charged a fee by employment agencies simply for finding individuals a job or putting them on their books. Similarly there are problems of agencies withholding pay where the agency fails to receive payment from the end contractor or where the end contractor has failed to sign the employees' time sheets. The TUC has also received complaints about the failure of agencies and employers to provide written particulars of the contract.

In *Denmark* there have been examples of exploitation of underpayment and poor working conditions for EU-8 workers, particularly in the construction sector. The *Finnish* authorities also discovered discrimination against employees from the new Member States, either directly employed by Finnish employers or working as posted workers.

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7 Royal Decree 240/2007.

8 Art. 1 of Law 1296/1982.

In *The Netherlands* there was media attention on the fact that there is still a huge gap between formal equality and practical reality, especially for Portuguese and Polish workers who were characterised as the new slaves of Europe. In the *Czech* report reference is made to an inquiry of the Czech Public Defender of Rights (Ombudsman), which indicates that there is in some areas distinction between the working and salary conditions of temporary (Polish) employees and permanent (Czech) employees.

Trade unions and others attempt to improve the awareness of employment rights of workers from (a.o.) Poland and the Baltic States through the publication of handbooks in various languages and conferences in *Ireland* and the *UK*. Trade unions on *Cyprus* see serious problems as regard the procedures of considering applications, causing many daily problems for workers who are EU citizens: in most cases this procedure takes as long as a year and more, and as a consequence it creates various discrepancies, discrimination and disruption in labour relations, as this allows the employers not to comply with collective agreements and standard practices in Cyprus. The leeway provided by the law and the actual practice of one year delay in registering workers from EU countries "is causing problems for their smooth enjoyment of working life" in Cyprus.

An important legislative innovation in *Spain* is the establishment of a Statute of the Self-Employed Worker.[9] This is the first example of a systematic and unitary regulation of self-employed work in the European Union.

***Social advantages***

Access to job-seekers' allowances for Union citizens have frequently been the subject of court decisions in *Germany* in 2007. Taking into account Directive 2004/38 and the case law of the ECJ in cases as *Grzelczyk* and *Collins*, a Union citizen cannot be excluded from access to job-seekers' allowances when he qualifies under the general provisions for entitlement.

The *French* report describes extensively the new 2007 legislation which limits the access of job-seekers from other EU Member States to single parent benefit, income support and universal health coverage.[10]

In *Ireland* the application of the 'habitual residence' test, introduced in 2004 for access to social welfare payments has raised questions in relation to the equality principle. A published guideline on the Habitual Residence Condition[11] makes it clear that persons entitled to payments under EU law do not have to satisfy the habitual residence condition where this would conflict with EU rules. This guideline states that people who move in search of employment, only benefit 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.

In *Italy*, Union citizens who enter Italy in search for a job are not entitled to social assistance for the first six months of their stay, unless these allowances are granted explicitly by the law. Inactive EU citizens are apparently denied free health care, because it is not clear whether they have the right to register with the health care system

9 Official State Gazette, July 11, 2007.

10 Couverture Maladie Universelle (CMU).

11 See http://www.welfare.ie/foi/habres.html.

In *Portugal* in the field of social security, a new 2007 law establishes the principle of non-discrimination on the grounds of nationality of the beneficiaries of the systems of social protection, subject to residence and reciprocity requirements.[12]

According to the *Latvian* report pregnancy, natal and maternity care is provided only to the spouses of Latvian citizens and non-citizens of Latvia who have a residence permit. Therefore this kind of social advantages is not provided on an equal basis to Union citizens and their family members.

In *Spain* 2007 regulation on loans to university graduates requires that, in order to be a beneficiary of these loans the applicant has to be resident in Spain during the two years immediately previous to the date of application.

***Tax advantages***

In general EU citizens who reside or work in another EU country are treated the same as the citizens of that country as far as the tax system concerned. Tax residents are taxed in respect of their worldwide income, while non-tax residents are taxed on the basis of the income earned in that specific EU country only. Regarding tax issues, see also section 3 of this Chapter, dealing with specific categories as frontier workers and others.

In *Denmark* as a consequence of the judgments in *Commission v. Denmark* and *van Lent*,[13] the Danish Act on Registration Tax on Motor Vehicles[14] has been amended in order to comply with these ECJ judgments.[15]

The *Swedish* Government has advised in 2007 new rules in order to adapt Swedish tax legislation to the ECJ judgments in Cases C-150/04 *Commission v. Denmark* and C-522/04 *Commission v. Belgium*. The Government is expected to give a final proposal on the subject at the beginning of 2008. From the judgments it follows that 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 one Member State, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States contravene Articles 39, 43, 49 and 50 EC.

In *Greece* the exemption for tax on transport of real estate for permanent living is dependent on the continuous work or residence in Greece for at least 12 months.[16]

## 2. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

This section contains a variety of obstacles.

In *Belgium* a case has been lodged by the Centre for Equal Opportunities and Combating Racism in front of the Industrial tribunal of Brussels against a firm that publicly alleged to refuse recruiting of Moroccan citizens as workers. If the case does not concern directly free movement of EU workers, it could affect EU workers who could be discriminated on a

12 The Law 4/2007 (Framework Law of Social Security)

13 ECJ judgments of 2 October 2003 *Hans van Lent* (C-232/01) and 15 September 2005 *Commission v. Denmark* (C-464/02).

14 Consolidation Act No. 977 of 2 December 2002, cf. the most recent Consolidation Act No. 804 of 29 June 2007 Section 1(4)-(7).

15 Bill No. L 225/2005-06. See also below Chapter VI.

16 This provision could give rise to questions as to its compatibility with Article 24 Directive 2004/38, although EU citizens do not lose there advantage definitively, but only have a 'waiting period' of a year.

racial basis. It does also concern the agreements with the Maghreb countries. On 6 February 2007, the Industrial tribunal requested in this case a preliminary ruling from the ECJ (case C-54/07).

In the *Czech Republic* the preliminary ruling procedure in case *Sahin* C-551/2007 has been watched carefully by institutions involved. The ruling will be essential for further development of parallel existence of free movement of persons and migration/asylum policies in general which is not regulated by the Directive 2004/38/EC.

A number of EU citizens residing in *Cyprus* complained to the Anti-discrimination Authority that when they applied for a driving license, they were requested to present documents from the immigration authorities showing that they reside in Cyprus for at least six months.

The *Finnish* report raises the problems of posted workers, particularly from Estonia whose wages are below the wages paid for Finnish employees or even below the minimum wages. Supplementary payments, such as overtime pay, are not performed, and employers neglect their obligation to insure the employee and to arrange occupational health care.

Based on the provisions of the Hungarian Labour Code a manpower agency (employer) located in another Member State appears to be barred from the possibility to send workers to *Hungary* without having been legally established in the country. 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 and the lack of harmonisation of EC law in this area.

The *Italian* 2006 Law exempting vendors born in Sardinia and their spouses, irrespective of the place of residence from taxation on the profit from the sale of residential buildings used as second homes, was repealed in 2007 after a judgment of the Constitutional Court.

For some professions a permanent domicile in *Romania* is mandatory. For example, this is the case for criminal experts.

The *UK* report emphasizes that migrant workers moving to the UK face the general problems of finding housing, particularly in the South East. This difficulty is exacerbated when workers new to the labour force have more difficulty accessing banking facilities and credit than domestic workers.

## 3. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

### *Frontier workers*

Various reports mention tax problems for different categories of frontier workers.

The Administrative Court in *Austria* had to deal with the problem whether or not a Liechtenstein benefit for an Austrian frontier worker was tax exempted. In Austria there is a tax exemption for ‘Wochengeld’ (benefit on the occasion of giving birth). According to the court taxation of the similar Liechtenstein benefit in Austria would be a restriction of free movement of workers and therefore it has to be tax exempted according to Art. 28 EEA-Agreement.

In *Latvia* frontier workers and their children are not guaranteed equal rights to education.

In *Luxembourg* the biggest frontier workers discrimination issue is considered to be the lower wages they get paid in comparison to residents and the administrative practice of the employment administration to keep two separate lists of unemployed persons; one for Luxembourg residents, and one for frontier workers.

Joining the Schengen area and abolishing regular controls on *Poland*'s border with other Member States may positively influence the development of cross-border-employment. There seems to be a growing tendency for Polish citizens to buy or rent flats or houses in German (close to the border) while keeping employment in Poland.

In *Portugal* in the course of 2007 several Spanish frontier workers, especially doctors and nurses working in Portuguese hospitals, were fined for using vehicles with Spanish registration plates in their daily travel to their working place. These workers can not benefit from the regime of temporary admission because they are exercising a professional activity in Portugal. In order to remove this obstacle to free movement of Spanish workers, an exemption was made by law for those Spanish cross-border workers, working within a distance of 60 kilometres from the border. As this did not solve the problem, the Portuguese Government has announced its intention to allow cross-border workers residing in Spain to circulate in the national territory, in order to reach their working place, without any distance limit.

In *Slovakia* tax bonuses on children are applicable only to citizens, who have permanent residence, which seems not to be in line with EU legislation.

In *Slovenia* still some problems appear regarding personal income tax of frontier workers, especially Slovenians (e.g. performing work in Austria on a daily basis).

The *Danish* and *Swedish* Governments have established in 2007 a working group analysing the possibilities to increased co-operation on matters concerning cross border commuting.[17]

*UK* benefits regulations have not permitted persons who live in Ireland but work in Northern Ireland to claim Working Families Tax Credit. The *UK* report also mentions some tax problems for the frontier workers who live in Spain and work in Gibraltar.

According to a *Dutch* commission on frontier workers the main problems are related to tax interest, premium for health care insurances based on double pensions and difference in qualifying period for disability benefit between Germany and The Netherlands.

### *Sportsmen/sportswomen*

*General*

At an informal Council summit of Ministers of Sport on 25 October 2007, *The Netherlands* and *France* have presented a memorandum in which they plea for a better protection of sport and sportspersons within the EU. They invite the Commission to clarify the status of sport in Community law on a number of points, most notably: the composition of teams, the training of young talent, the status of players' agents, secure funding for sport and audiovisual rights.[18]

The *Dutch* and *Danish* governments want to make an exception for football (but other sports as well) in relation to the free movement principle. It wants to protect the national sports leagues.

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[17] A declaration from the Swedish Ministers in charge of labour market and social security, May 9, 2007. Information is available on the Government's website: http://www.regeringen.se/sb/d/8566/a/82192.

[18] See http://www.minvws.nl/images/s-2808263b_tcm19-154391.pdf.

In *Hungary* the sport federations' home-grown rules on consensual fee and compensation, agent, transmission consent and undertakings can be considered as indirect obstacles for free movement. Although there are no quotas for EU nationals the influence of sport federations – as important civil organisations – on internal sport rules can hinder the free movement of non-national sport experts and athletes' movements: these codes are not controlled by the government whether those are in harmony with EC law and ECJ case law.

In *Italy* a decree states that starting from the 2006/2007 season more than 50% of team players competing at national level, have to be home grown. The regulations of the Italian Sport Federations of (amateur) football, basketball, cycling, volleyball, water polo and ice-hockey are complex and discriminate on the basis of nationality.

*Latvian* football clubs and ice-hockey clubs must pay a registration fee for each foreign player, which may create an obstacle for free movement. According to the *Lithuanian* report, the restrictions applied in the basketball and football competitions (quotas and registration fees) concerning foreign players are not compatible with the Community law and the judgments of the European Court of Justice in *Bosman* and *Simutenkov*.

*Luxembourg* adopted in 2007 an Act creating specific residence permit categories for among others third country national sportspersons.

The *Austrian* report mentions a violation of EC law regards basketball, fistball and tennis.

In *Slovenia* regarding ice-hockey and basketball, the number of the registered foreign players may be unlimited, but the rules fix a minimal number of Slovenians that have to take part in a match.

*Football*

In *Austria* any club applying for subsidies from the Austrian Football Association is forced to restrict the number of non-Austrian EEA-citizens. Only very rich clubs are able to have a team with a majority of non-Austrians.

*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 *Sweden* a football team with 16 players should have at least 7 players being "home grown", i.e. registered in a Swedish football club for at least three years, during the period when the individual player was between the age of 15 and 21 years. The consequence of the home-grown players rules on *Malta* is that no more than three "foreign" players (including EU citizens) can play during a football match.

In *Slovenia* a football player, not having reached the age of 18 years of age, is only allowed to be transferred to a club abroad if his family has moved abroad for reasons not connected with football.

The *Spanish* rules of the football association have no quota restrictions on EU citizens any more for male footballers, but there are still in force for female footballers. For Romanian and Bulgarian footballers it appears that the possibility is opened not to have an employment contract but a contract to provide services.

*Ice-hockey*

According to the rules of the *Danish* authorities on ice-hockey tournaments, a maximum of 10 players without Danish citizenship may be added to the match report's player list in a tournament match or cup match.[19]

In *Finland* the teams playing in the National Ice-Hockey League, Basket Ball League and Volleyball league applied in season 2007-2008 'gentlemen's agreements' that limited the number of foreign players in the playing line-up. In Ice-Hockey and Volley Ball the quota for foreign players (including EU citizens) is two players, and in Basket Ball three players. In each of these three cases players from the other EU states are included in the quota.

The *Latvia* Ice Hockey Federation has adopted the Regulations of the Samsung Supreme League for season 2007/2008,[20] which provide that each club can register five foreign players and an unlimited number of foreign players who are EU citizens.

The *Dutch* ice-hockey association is trying to diminish the amount of foreign players in the highest division. At this moment half of the 150 players have a non-Dutch nationality.

In *Poland* in the 2007/2008 season nationality quotas for ice-hockey players were abolished. In *Slovakia* there are also no formal quotas anymore, but the governing body can limit the participation to two foreign players in a championship game.

*Basket-ball*

For the season 2007/2008 a basket-ball team in the highest division in *The Netherlands* must contain at least four Dutch players. In *Spain* a team has to consist of 5 Spanish players at least as well. In *Bulgaria* the team list for each game within the National Championship or Bulgaria Cup for men and women has a limit of a maximum of six foreigners, only three could have a nationality outside Europe. In *Latvia* the number of non Baltic foreign players is limited to four per game.

*Volleyball*

In *Bulgaria* a volleyball club from the prime league should not have more than three players with foreign nationality, and only two of them can play in a game at the same time. There are no exceptions provided for EU citizens. In *Slovakia* there are no restrictions in the prime league but clubs have to pay a progressive registration fee for foreign players. In the second league there is a limit to one player with foreign nationality.

***The Maritime sector***

According to 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 Bundesrepublik Deutschland*) a Member State may restrict the posts of master and chief mate of ships flying

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19 *Danmarks Ishockey Union, love og turneringsbestemmelser, juli 2007, Turneringsbestemmelser,* Part III: *Kampe,* Section 8, available at www.ishockey.dk/website/pdf/DIUs_love_og_turneringsbestemmelser_JULI_2007.pdf.

20 Homepage of Latvia Ice-Hockey Federation www.lhf.lv, http://www.lhf.lv/public/?id=142&ln=lv&std_id=686.

that Member State's flag to its nationals only if the rights under the 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. The legislation of some Member States is still not in line with this case-law. *France* adopted early 2008 legislation to incorporate the case-law of the ECJ.

In reaction to an infringement procedure by the Commission brought before the European Court of Justice in November 2007, the Czech Ministry of Transport presented a draft law which will change the current Law on Sea Navigation probably in 2008. The change stipulates that the captain of the ships must be either a Czech citizen or a citizen of another EU Member State and at the same time must prove certain knowledge of the Czech language so that he/she can exercise the relevant powers.

The Commission also started an infringement procedure against *Italy* on this issue in 2007 (case C-447/07).

During 2007 the *Greek* Government made proposals in order to bring the national rules into conformity with Community law. However it is not certain that these proposals are in conformity with the community rules as interpreted by the Court.

In *Spain* there are also still doubts whether the practical application of the relevant provisions cannot give rise to obstacles for citizens of the EU or the EEA.

In *Denmark* the problem regarding Polish seafarers who have not the same rights as Danish seafarers with regard to membership of labour unions, wages and other working conditions has still not been solved.

In 2007 the captain of a *Finnish* commercial ship still has to be a Finnish national.[21] The Government Proposal amending the Act to abolish this condition was not given by the end of 2007. For crew members there is a requirement concerning language proficiency, which may in practice impede the access of citizens of the other Member States to the Finnish maritime sector.

Seafarers on *Irish*-flagged ships are entitled to equal treatment in terms of pay and other terms and conditions of employment irrespective of nationality. Irish Ferries decided to re-flag its vessels to be able to reduce the wages. A number of vessels are currently flagged in Cyprus and its most recently acquired vessel is flagged in the Bahamas.

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

The *Bulgarian* Merchant Shipping Code was amended in 2007 to adapt national legislation to the EC law on free movement of workers in the maritime sector. In spite of the amendments, however, Art. 88 (4) of the Merchant Shipping Code stipulates that "in all cases, the captain and the chief engineer officer of the ship shall be Bulgarian nationals".

In 2007 the President of *Lithuania* has vetoed amendments concerning reduction of social insurance contributions for sailors working on ships with Lithuanian flags as being in conflict with the principle of equality under the Constitution.

*Luxembourg* and *Denmark* transposed Directive 2005/45/EC on the mutual recognition of seafarers' certificates issued by the Member States.[22]

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[21] Merilaki 674/1994, 6 luku 1 §, Sea Act, http://www.finlex.fi/fi/laki/ajantasa/1994/19940674).

[22] Règlement grand-ducal du 5 mars 2007 transposant la directive 2005/45/CE du Parlement européen et du Conseil du 7 septembre 2005 concernant la reconnaissance mutuelle des brevets de gens de mer délivrés par les États membres et modifiant la directive 2001/25/CE, et modifiant le règlement grand-ducal du 16 novembre 2001 transposant la directive 94/58/CE du Conseil du 22 novembre 1994 concernant le niveau minimal de

In the *UK* the question of discrimination against EU nationals in wages on UK registered ships has been the subject of controversy.

***Researchers/Artists***

EU nationals exercising professional activities as researchers and artists are considered to have the same legal status as national researchers and artists. Although there is almost no specific legislation, problems occur mainly regarding tax and social security issues.

The British organisation "On The Move" has published in 2007 a revised version of its basic guide about tax and social security for performing artists. The aim of the basic guide is to help artists and arts professionals understand better the main issues that affect how and what they are paid when they work abroad in Europe. The basic guide can be found on www.on-the-move.org/documents/TaxandSocialSecurity.pdf.

In *Germany* the tax authorities have repeatedly been challenged before the ECJ on the practice to impose withholding tax on both the fee and expenses of non-resident artists. In the *Scorpio*-judgment,[23] the Court decided that Germany must allow the deduction of direct expenses before the performance so that withholding tax is only levied on the net profit. In response to the Scorpio-decision of the European Court, the Federal Office for Finances in a circular letter to the tax authorities of the Länder[24] has enacted provisional guidelines to be observed by the tax authorities until the German legislator has passed new regulations.

Withholding tax on non-resident performing artists was also abolished in the *Netherlands* in 2007 for artists who are resident in a country with which the Netherlands has a bilateral tax treaty.

Alien artists are not liable to taxation in *Denmark* under the Act on Pay-as-you-earn Taxation [25] unless the length of the stay in Denmark exceeds 6 months.

In *Hungary* there are special rules on taxation and social security for artists. Access to the Hungarian labour market is complicated. Income earned by artists, writers, composers and sculptors from the sale of their works is in certain cases exempt from tax in *Ireland*.[26]

## 4. RELATIONSHIP BETWEEN REGULATION 1408/71 AND ARTICLE 39 AND REGULATION 1612/68

Most reports give a short overview of the main aspects of their social security system, in relation to Regulation 1408/71. There is not very much specific information on the relation between this Regulation and article 39 EC and Regulation 1612/68.

In *Cyprus* a 2007 law replaced all previous legislation regarding social security, incorporating (a.o.) Regulations 1612/68.[27]

In *Portugal* also in 2007 a new Basic Law on Social Security was adopted, establishing the principle of equality.

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formation des gens de mer telle que modifiée par la directive 98/35/CE du Conseil du 25 mai 1998, Memorial A- N° 43 du 28 mars 2007, p. 789. See http://www.legilux.public.lu/leg/a/archives/2007/0432803/index.html.

23 Judgment of 3 October 2006, Rs. C-290/04, *Scorpio/Finanzamt Hamburg-Eimsbüttel*.

24 IV.C 8-S 2411/07/002.

25 Consolidation Act No. 1086 of 14 November 2005 and amendments.

26 http://www.revenue.ie/index.htm?/leaflets/artinfo.htm.

27 These include EEC Directives 64/221; 68/360; 72/194; 73/148; 75/34; 75/35; 90/364; 90/365; 93/96 and regulations 1251/70; 312/76; and 2434/92.

The *Dutch* social security system includes foreign pensions for the calculation of the height of premiums, which is not in line with the ECJ judgment in the *Nikula* case (C-50/05, 18 July 2006). For a follow up on the Hendrix case (C-287/05) see Chapter VI.

The most important question in *Estonia* that arises in social security is the question about guaranteeing parental benefit for EU citizens, who have no permanent resident.

*Lithuania* has finally signed in 2007 the agreement with the Government of Estonia concerning calculation of the insurance periods acquired in the territory of former Soviet Union in order to avoid duplication of insurance periods.

# Chapter IV
# Employment in the Public Sector

## 1. ACCESS TO PUBLIC SECTOR

### *1.1. Nationality conditions 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.[28]

According to some rapporteurs, it is almost impossible to give a good picture of the employment situation for EU citizens in the public sector. There are no figures available.

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 (*Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Romania, Slovakia, Slovenia, Sweden*). 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. Civil servants have better working conditions. The situation in *Latvia* and *Romania* is very much the same as in Lithuania.

In 2007 the list in *Hungary* was reduced deleting the nationality requirement for members of the National Accreditation Board and Accreditation Body,[29] workers in administration of justice, such as (candidate) experts in judicial/forensic sciences, typist or physical worker,[30] typist or physical worker at Public Prosecutor Offices,[31] administrator as public officials,[32] if s/he has a necessary knowledge in Hungarian to his/her task.

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[33] that have been decided by the European Court of Justice to be open to other EU citizens and only for rather minor positions. It appears that in practice Luxembourg citizenship is still required for posts, most notably in the areas of teaching, ground transport and water, gas and electricity distribution, as well as generally for the posts referred to as local government. In the *Italian* legal system it is impossible to distinguish posts implying concretely the exercise of public authority and responsibility of safeguarding the general

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

29 Amending the Act LXXVIII of 2005 on National Accreditation Body.

30 Amending the Act LXVIII of 1997 on legal standing of workers in administration of justice.

31 Amending the Act LXXX of 1994 on public prosecutors' legal status and data protection in Public Prosecutor Office.

32 Amending the Act XXIII of 1992 on legal status of public officials.

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

interests of the State from those posts involving administrative tasks, technical consultation or maintenance, which have to be opened to EU citizens. The Italian public administrations' practice does not appear always in line with Community law.

In *Poland* an extensive list of legislation for posts in the public and uniformed service contains a nationality condition. Since 2007 nationals of EU Member States, EFTA States which are party to the EEA agreement and nationals of the Suisse Confederation can be employed as teachers on equal footing with Polish nationals. But to become a state labour inspector Polish citizenship is required. On *Malta* there is 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.

Also in *Spain* in 2007 new legislation, applying in general as well as in the Autonomous Communities concerning the access to the public sector came into force. This legislation require firemen to be Spanish.

The *Belgian* rules applying to the working conditions of civil servants in the Belgian Institute for telecommunication and postal services were modified in 2007, requiring Belgian nationality only when the position occupied by the civil servant involves a direct or indirect participation in the exercise of powers conferred by the public law.

In *Bulgaria* 'state servants' have to be Bulgarian. Bulgarian nationality is also required for occupying any post under the responsibility of the Ministry of the Interior (including policemen and firemen). This is valid not only for civil servants (employed according to an administrative act), but also to labour contract employees.

*Notary*

In many Member States notaries are self-employed persons and therefore do not fall under Article 39 EC. However in some Member States notaries are working as employed in the public sector. The judgments of the ECJ on notaries will most likely be of interest for the application of Article 39(4) EC.

The European Commission decided in 2007 to bring *Luxembourg* (and *Austria, Belgium, France, Germany, Greece* and *Portugal*) before the Court of Justice on the grounds that these Member States permit only their own nationals to practise as notaries.[34] The *Luxembourg* Minister of Justice declared that Luxembourg does not share the view of the European Commission and that the tasks delegated to notaries by the State are related to the exercise of Luxembourg's sovereignty. According to the Portuguese rapporteur there is no nationality requirement for notaries in *Portugal*.

In *Slovenia* notaries also have to have Slovenian nationality.

In *the Netherlands* in 2007 a Bill was introduced to abolish the nationality requirement for the appointment of a notary completely.[35] This Bill also introduced an explicit statutory requirement as to the knowledge of the Dutch language for appointment as a notary.

[34] Action brought on by the Commissions early 2008. See C-47/08, C-50, 51, 52, 53 and 54/08.

[35] In the Netherlands a notary is a civil servant, who has public authority.

### *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 (*Latvia, Malta*) even promote the use of the national language.

If a EU citizen wishes to apply on *Cyprus* for a job in the Public Service for which knowledge of Greek is required, he/she has to provide the necessary documentary evidence that they possess the knowledge required in the same way as a Cypriot national.

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 *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 *Finland* the requirements concerning language proficiency are rather rigid and they may constitute an impediment for the access of citizens of the other EU States to the Finnish public sector. Often proficiency of both national languages, Finnish and Swedish, is required. The requirements concerning linguistic competence are bound to the qualification requirement (for example university degree) and not, for example, to the post and tasks in question, which would be a more flexible approach.

In *Germany* as a general requirement for appointment as a civil servant the respective laws and regulations of the federation and the Länder require full command of the German language.[36] In Bavaria new legislation provides for the possibilities to prove the required German language skills for teaching professions by a specific diploma of a Goethe-Institut.[37] Generally speaking, good German language knowledge is required for employment in the

[36] See Sec. 20a of the Federal Law on Civil Servants: "Die Beherrschung der deutschen Sprache in Wort und Schrift ist Voraussetzung für die Zulassung zur Laufbahn"; see also Sec. 28a of the Law on Civil Servants of the State of Baden-Württemberg: "Die Beherrschung der deutschen Sprache in Wort und Schrift ist Voraussetzung für die Zulassung zur Laufbahn."

[37] Para. 14: "Nachweis der deutschen Sprachkenntnisse".
(1) Bestehen Zweifel hinsichtlich des Vorliegens der für die Berufsausübung erforderlichen deutschen Sprachkenntnisse, können entsprechende Nachweise gefordert werden.
(2) Der Nachweis der erforderlichen deutschen Sprachkenntnisse wird durch das "Große Deutsche Sprachdiplom" eines Goethe-Instituts erbracht. Bewerber mit einer Fächerverbindung, die Deutsch enthält, müssen das erwähnte Sprachdiplom mit dem Prädikat "sehr gut" erworben haben. Bewerber mit einer Fächerverbindung, die eine (oder zwei) Fremdsprachen enthält, mit dem Prädikat "gut"; Gleiches gilt für Bewerber, die auf Grund der Organisationsstruktur der betreffenden Schulart im Fach Deutsch oder in einer Fremdsprache eingesetzt werden können.
(3) Das Staatsministerium für Unterricht und Kultus oder die von ihm bestimmte Stelle können die Anerkennung eines bestimmten Nachweises der deutschen Sprachkenntnisse davon abhängig machen, dass durch Fertigung eines Aufsatzes (Klausur, Dauer: drei Stunden) über ein Thema, das keine spezielle Vorbereitung erfordert und durch Ablegung einer mündlichen Prüfung (Dauer: bis zu 60 Minuten) entsprechende Deutschkenntnisse nachgewiesen werden.

public service[38] or within the framework of the recruitment procedure.[39] According to the special profile of the employment in the public service (police, universities) additional language requirements may be considered as desirable or necessary according to the practice or regulations. In some Länder the existing rules on language requirements for access to the public sector are in the process of amendment.

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.

The *Spanish* report extensively describes the requirement of Castilian Spanish but also of the language of the Autonomous Communities (Catalan, Galician, Valencian) for several posts. A 2007 high court decision prohibited this requirement for specific posts which do not require a direct relation with citizens.

Also 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).

With respect to the profession of notary public, the *Dutch* government is of the opinion that the language requirement is in conformity with the *Groener* judgment (Case 379/87).

### *1.3. Recruitment procedures*

In *Germany* employment in the public sector is a matter of competence of the Länder with regard to their civil servants and employees, and of the federation with regard to the federal civil servants and employees. Even with regard to the federation, there is no uniform administrative code or guideline concerning the recruitment procedures

The Hungarian report emphasises at the outset, that *Hungary* will introduce a similar entry exam as used in the *Burbaud* case for applicants of public officials in 2009.

In *Luxembourg* admission to a post as civil servant depends on an examination, a *concours*.

In *Portugal* EU citizens who are already fully qualified in the field of activity concerned do not have to participate in a competition procedure which gives access to a training and afterwards to a post in the public sector open for EU citizens.

In *Sweden* a 2007 public investigation presented a proposal introducing a kind of "trainee" system for the education for a position as a judge.[40]

In *France* new 2007 legislation concerning the recognition of diplomas includes the right to enter competitions leading to recruitment into the French public sector. The recognition of diplomas represents a precondition for entry to these competitions.

*Dutch* legislation does not provide for a system of recruitment of civil servants or employees in public service, comparable to the system of the *concours* applied in France.

In the case of the *UK*, the system of public service recruitment is open to criticism for the lack of published requirements as regards the recognition of qualifications and experi-

[38] For teachers see for instance in Bavaria Dritte Verordnung zur Änderung der EG-Richtlinienverordnung für Lehrer of 10 January 2008, *Bayerisches Gesetz- und Verordnungsblatt* of 10 January 2008, p. 17 at section 14.

[39] Information by the Ministry of Interior, Sport and Integration of Lower Saxony of 29 May 2008.

[40] Official report Ds 2007:11 En mer öppen domarutbildning.

ence. If it is thought that a refusal of recognition amounts to unjustified indirect nationality discrimination, there is the possibility of legal action under the Race Relations Act.

### *1.4. Recognition of diplomas*

In most Member States there are no special statutory rules on the recognition of diplomas in relation to posts in the public sector in comparison to posts in the private sector. See for a general overview on recognition of diplomas, the paragraph on implementing Directive 2005/36 in Chapter II. In general, the same professional qualification requirements and the same rules of recognition apply in both cases.

In *Austria* the provision regarding the recognition of foreign diplomas for access to employment in the public sector refers since 2007 to Art. 3 of Directive 2005/36/EC.

The Greek National Academic Recognition and Information Center (DOATAP) does not recognize the diplomas granted by foreign universities collaborating with private Institutes operating under licence on a franchise basis in *Greece*.

In *France* in 2007 detailed legislation entered into force regarding the conditions for access to three branches of the public sector (State public sector, territorial public sector and hospital public, enabling the inclusion of professional experience both by French candidates and by nationals of the other Member States.

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

Although most Member States have rules on the recognition of professional experience 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, France, Germany, 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.

In *Cyprus* seniority is a prerequisite for someone to apply for a promotion position within the public service.

In *Denmark* previous employment in other Member States shall be taken into account to the same extent as had it been employment in Denmark.[41]

According to the more recent regulations or laws in the *German* Länder in implementing the Directive 2005/36/EG the competent authorities make an assessment whether a certificate or diploma on a professional training is comparable to a German certificate on professional experience.

In *France* a 2007 Decree enables explicitly to take into consideration professional experience for both French candidates and EU nationals.

On *Malta* in cases where the Public Service post concerned requires candidates to possess specific qualifications or to have carried out specific training programmes, recruitment to virtually all posts allows for the recognition of comparable qualifications. In *Italy* the issue of taking into account teaching experience acquired in another Member State still leads to court cases.

[41] Guidance on Personnel Administration, 2004, Chapter 18.

## 2. EQUAL TREATMENT

### *2.1. Recognition of professional experience for the purpose of determining the professional advantages*

According to the information of the Commission services many Member States (10 of the EU-15 and at least 6 of the EU 10+2) have statutory rules on the issue of recognition of professional experience for the purpose of determining working conditions (e.g. salary, grade etc.). The national reports, however, do not give much information on these rules and on their application in practice. Equal treatment legalisation forms usually an obligation to take into account the professional experience and seniority acquired in another Member State.

Regarding salary, the *Danish* Guidance on Personnel Administration, 2007 and 2008 explicitly states that professional experience obtained in another EU/EEA country has to be accounted for in the same manner as had the occupation been in Denmark.[42]

The Administrative Court of *Austria* asked in 2007 for a preliminary ruling regarding the recognition of Swiss working periods under the Austrian Salary (see ECJ C-332/07, recently removed because the disputed decision was withdrawn).

The *Bulgarian* legislation contains no provisions on the recognition of professional experience in another EU Member State.

In *Slovakia* the salary level 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 his/her superior officer.

In *Slovenia:* there is no explicit legal provision on the recognition of professional experience in another EU Member State, but according to the call of the Ministry of Public Administration, addressed to all ministries, Government's services, local administration, in practice the length of service accomplished in an EU Member State must always be taken into account for determining certain professional advantages (supplement for the years of service, the calculation of the length of annual leave).

In *Sweden* this issue is mainly regulated through individual employment agreements, normally concluded within the framework of collective agreements.

The *French* report mentions in detail a court case regarding not taking into account the professional experience in the salary of a Belgian deputy railways station manager.

[42] Circular No. 6633 of 16 July 1987 on Salary Seniority contains the detailed rules on determination of advantages.

# Chapter V
# Members of the Family

## INTRODUCTION

The reports show interesting differences in Member States' approaches. These issues are discussed under six headings: "Scope of the family", "Applying *Akrich*", "Reverse discrimination", "Visa requirements", "Character of the card proving the residence right for longer than three months, duration of legal residence" and "Miscellaneous".

## SCOPE OF THE FAMILY

The system of Directive 2004/38 of two provisions defining the scope of the family, one being mandatory (Article 2(2)) and the other optional as to the way in which entry and residence are facilitated (Article 3(2)), led to a variety of transpositions. Apart from this twofold definition, differences in family law conceptions among the Member States played a role.

All Member States transposed Article 2(2), but some did not include the registered partner, apparently because of problems recognising such partnerships under national law. Seven Member States (*Latvia, Estonia, Slovenia, Poland, Hungary, France* and *Slovakia*) did not include the registered partner as member of the family. *Italy* did include the registered partner in the definition, but it is reported that *Italy* neither regulates registered partnerships nor equates them to marriage, which means that the scope of the provision is unclear.

*Bulgaria* does include the registered partner but excludes direct descendants and direct relatives in the ascending line of registered partners. In contrast, with regard to spouses, their grand children and grandparents are included in the definition.

Though all Member States include spouses in the definition of family members, problems may rise recognising same sex marriages. *Italy* reports that such weddings are devoid of effects in this Member State as being contrary to public order.

Further, many varieties show up in the way Member States dealt with Article 3(2) requiring the Member States to facilitate entry and residence of other family members and of the non-registered partner.

Six Member States (*Latvia, Slovenia, France, Hungary, Poland* and *Spain*) did not transpose Article 3(2). *Hungary* however did introduce a general extra category of family members: those whose entry and residence as a family member is permitted by the competent authority.

Ten Member States (*Netherlands, Portugal, Sweden, Ireland,*[43] *Lithuania,*[44] *Cyprus, Czech Republic, Finland, Bulgaria, Romania, Slovakia*) appear to have included the non-registered partner in the circle of family members as eligible for the same rights of entry and residence as family members meant in Article 2(2) of the Directive.

[43] The Irish Regulations refer to family members defined in Article 2(2) of the Directive as "qualifying family members" and to those covered in Article 3(2) of the Directive as "permitted family members".

[44] A proposal amending the Lithuanian Aliens' Law in 2006 to expand the definition of EU family member was not yet adopted in 2007.

Eight Member States (*Netherlands, Czech Republic, Denmark, Estonia, Finland, Bulgaria, Romania and Portugal*) also include other family members as mentioned in Article 3(2).

From the reports of *Germany, Greece, Luxembourg* and *Malta* on the year 2007 it is not clear how Articles 2(2) and 3(2) are implemented. *Malta* reports a distinction between 'family members' and 'other family members'.[45]

In some Member States additional qualifying requirements, not mentioned in Directive 2004/38, are added.

In *Latvia*, for members of the core family, dependence and a common household in the country of previous residence are required.

In *Slovenia*, children are only included in the definition of family member as long as they are unmarried. Further, for all third country family members to receive a residence permit they must have more resources for maintenance than the threshold provided for the entitlement to social assistance, they must have a suitable health insurance, an they must have legally entered the territory of Slovenia.

With respect to the national legislation implementing Article 3(2) on the unmarried partner some Member States report restrictions.

*Italy* added to the words "the partner with whom the Union citizen has a durable relationship duly attested", the specification that the attestation should be done "by the Union citizen's State".

The *UK* reports that the Home Office position remains unchanged in relation to durable relationships. It is required that the couple have to have resided together for two years before their relationship can be said to be durable.

Under *Bulgarian* law there is a problem of proving partnership. The law does not elaborate on the issue *how* the factual partnership should be proven or certified or under what circumstances it is recognised as such.

**APPLYING *"AKRICH"***

Even in the "pre-*Metock* era" most Member States appear to have abstained of introducing any condition of previous lawful residence in another Member State in their legislation. From the reports on *Austria, Italy, Latvia, Portugal, Sweden, Belgium, Estonia, France, Bulgaria, Poland, Spain, the Netherlands* and *Romania* it can be learned that no "*Akrich*-provisions" were drafted or applied. *Spain* is reported not to apply "*MRAX*" either. The *Netherlands*, while not having any inserted "*Akrich*" provision in its legislation, pleaded a "pro-*Akrich*" position in procedures before the Court of Justice.

*Ireland, Denmark, Lithuania*[46] and *Finland* did apply an "*Akrich*" approach.

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45 With regard to other family members, section 3 (5) of the Maltese Immigration Act provides that the Director for Citizenship and Expatriate Affairs shall give due and proper consideration in relation to the admission and residence of an other family member, by undertaking an extensive examination of the personal circumstances. Any denial of entry or residence to such other family member shall subsequently be justified to the said family member.

46 According to the Lithuania report, Article 101(2) of the Aliens Law requires that a third country national family member of Lithuanian citizen (the rule does not apply to other EU nationals) who applies for EU residence permit has exercised the right to freedom of movement in the EU or has arrived from another EU Member State's territory .

Further, the *UK* reports that the distinction between third country family members applying to join an EEA national in the UK who are inside the EEA and those who are outside and therefore have to comply with the UK national immigration rules remains problematic. This is particularly so, for those categories of third country nationals who have rights under the Citizens Directive but who are unable to bring themselves within a category under UK immigration law (e.g. children over 18, grandchildren etc).

In *Cyprus*, the *Akrich* principle is used in favour of the family members: Under the new legislation, family members who are not citizens of an EU Member State can enter Cyprus upon producing a valid passport. However, the passport requirement does not apply if the family members are in possession of a residence permit issued in another EU country.

## REVERSE DISCRIMINATION

The *Akrich* and *Metock* discourse is not only pertinent to questions of former lawful residence of a family member in another Member State. Its roots are to be found in the phenomenon of reverse discrimination. From the reports, it becomes clear that there are remarkable differences between the Member States as to how they treat their own nationals with respect to family life.

The *Netherlands* report that difficulties for Dutch nationals to meet conditions under Netherlands immigration law for family reunification with third country nationals led to the phenomenon of the "Belgium route", according to which Dutch nationals settle in a neighbouring Member State as a worker or a self-employed person. Likewise, *Denmark* reports that a number of Danish citizens who were unable to fulfil the requirements under Danish law for being reunited with family members, in particular spouses, were hoping to rely on the EU rules on free movement as these rules allow for persons exercising the right to free movement to bring with them their family. In *Slovakia*[47] family members of own citizens have to meet more strict conditions than family members of EU citizens using their right to free movement.

On the other hand in *Belgium*, the position of the family members is reported to be strengthened in Belgium by the refusal of reverse discrimination for family members of Belgian citizens. In *Finland*, family members of Finnish citizens, according to the main rule are registered under the rules on freedom of movement. The family member is thus treated as a Union citizen entitled to freedom of movement.[48] *Hungary*[49] also applies criteria derived from Directive 2004/38 to family members of Hungarian citizens

In *Belgium* it proved difficult to apply the *Chen*-approach to parents of a Belgian child. A Belgian Court decided on 10 October 2007, not to cancel a decision which refuses to recognise the right of residence to a Belgian child's mother. Basing its decision on the applica-

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47 The conditions for granting of the permit are still harder for family members of Slovak citizens, than for family members of EEA citizens. Apart from the conditions for the family members of EEA citizens mentioned above, the family member of Slovak citizen has to prove that he/she has no criminal record, and needs to have his/her stay financially secured, which has to be proved by the sum of at least approximately 3.000 EUR.

48 However, if the Union citizen family member does not meet the requirements laid down for practicing the freedom of movement, (s)he can be issued with a Finnish citizens' family member's residence permit under the general rules of the Aliens Act.

49 A family member of a Hungarian national in paid employment shall be entitled to residence for more than three months, if s/he or the Hungarian national has sufficient resources for said family member not to become an unreasonable burden on the social assistance system, and has adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law.

tion of the *Baumbast* and *Chen* cases, the Court considered that the refusal of residence permit did not concern the Belgian child. Additionally, the Court reminded that the right of residence of the Belgian child is a consequence of his Belgian nationality but not a consequence of any EC provision. Moreover, the situation of the Belgian child is different from the *Chen* case as the child never used his free movement right since he has always be resident in Belgium. Consequently, he is not entitled to allege the EU rights protection as beneficiary of the EU citizenship.

## VISA REQUIREMENTS

From the reports it appears that most Member States facilitate the issuing of visas, but some do not.

*Portugal* reports that visas are given free of charge, under a special accelerated procedure. *Sweden* also reports that, if there should be a demand for visa for family members of an EU citizen, the administrative procedure should be speeded up. According to the reports on *Hungary*, *Slovakia* and *Malta*, visas are issued free of charge. In *Lithuania*, draft amendments to the Lithuanian Aliens Law were pending by the end of 2007, providing that the family member of an EU national who is a third country national, but is in possession of EC residence permit, will be entitled to arrive to Lithuania and stay there up to three months within half a year without a visa. In *Cyprus*, "every effort" is made to facilitate the obtaining of a visa free of charge by such persons and no fee is required.

*Finland* reports that an appeal to an administrative Court is offered against refusal of a visa.[50]

Complications are reported from *Italy*: Apart from a visa, an entry clearance must be issued no more than 6 months earlier. Unmarried partners cannot apply for a visa for family reasons and must apply for a visa for 'elective residence', requiring amongst others documented and detailed guarantee of substantial and steady private income private income (pensions or annuities) from property, stable economic and commercial activities or from other sources and availability of adequate lodgings in Italy.

The most extensive report on requirements for providing visas is from *Ireland*:

The Irish Department of Justice, Equality and Law Reform issued lengthy guidelines on documentation required for applying for a visa. In relation to visa applications generally, it is provided, amongst other matters, that:

- the fully completed form must be signed by the applicant, save where he/she is under 18 where the parent's may sign on the applicant's behalf;
- all documents submitted must be in English, or where in another language, a notarised translation must accompany the original document;
- at the time of the application, the passport must be valid for 6 months after the date on which it is proposed to leave Ireland. For long-term stays, it is advised that the passport be valid for at least 12 months;
- all visa applicants must be able to show evidence that they can support themselves during their stay in Ireland without recourse to public funds or resources. A detailed bank statement showing sufficient funds – and covering the immediate 6-month period prior

[50] Third-country national family members of EU citizens, who are required to have a visa to enter Finland are exempted from the fee for the visa and from the requirement concerning travel insurance. In contrast with visa decisions regarding other third country nationals, a decision concerning a visa of a Union citizen's or Finnish citizen's family member, may be appealed to an administrative court.

to submitting the application should be submitted. Lump-sum lodgements made in the run-up to the application are not taken into account; and
- details should be included of any other family members presently in Ireland, or any other EU State.

In relation to the "Spouse of Irish/EU Visa", which covers spouses of Irish nationals and nationals of other EU Member States, the additional requirements are as follows:
- a fully completed and signed application form;
- a passport valid for at least 12 months;
- a clear copy of the other spouse's passport;
- a marriage certificate;
- for recent marriages, and marriages where the couple have not yet resided together, the applicant is asked to give a full account of the relationship history – when and where the couple met and evidence of this such a visas, entry/exit stamps on passport of Irish/EU national;
- evidence of Irish/EU national's employment in Ireland (P60 form, payslips);
- if other spouse is not in employment, details of how the applicant intends to support himself /herself; and
- accommodation details.

## CHARACTER OF THE CARD PROVING A RESIDENCE RIGHT FOR LONGER THAN THREE MONTHS, DURATION OF LEGAL RESIDENCE

Most Member States appear to grant one type of residence card to all family members regardless of whether they are referred to in Article 2(2) or in Article 3(2) of Directive 2004/38. However some Member States make distinctions between the categories. *Austria* and *Denmark* give a specific right under national law to residence to unmarried non-registered partners and Austria gives specific rights under national law to other dependent family members. *Austria* gives a residence card to family members under Article 2, a quota free settlement permit for partners and a quota space within the quota system for other family members. In *Italy*, Article 10 of the Legislative Decree 2007 no. 30 establishes the residence card for non-EU family members *stricto sensu*. Other family members and unmarried partners may be granted an 'elective right to stay'.

Further, there are some differences reported in the duration of the residence card. Many Member States grant a residence card for five years or for the envisaged period of residence of the Union citizen, if this period is less than five years. *Austria* gives family members under Article 2(2) a residence card for ten years. Some Member States make mention of a "temporary residence permit".

## MISCELLANEOUS

In *Estonia*, the use of freedom of movement maybe considered abuse. A temporary residence permit will be refused if the family member or the citizen of the European Union with whom the family member wishes to reside has abused the rights prescribed by this Act or used deceit in order to achieve the aim of the family member obtaining temporary right of residence in Estonia. Among other things, the following will be considered as the abuse of rights, or deceit: obtainment by the citizen of the European Union of temporary right of residence in

Estonia in order to achieve the aim of the family member obtaining temporary right of residence in Estonia.

Article 48 of the *Latvian* Regulation No. 310 provides that if one of the parents is a foreigner, the child can leave Latvia only with a document of assent of the parent who is a citizen of Latvia. Article 50 of the regulation provides that a parent who is a foreigner may leave Latvia with his/her child only with the authorisation of the other parent who is a citizen of Latvia.

# Chapter VI
# Relevance/Influence/Follow-up of Recent Court of Justice Judgments

## INTRODUCTION

The national experts were requested to give an in-depth analysis and interpretation of the importance and potential impact of the Court's recent judgments. For the 2007 edition the Commission considered the following judgments of special interest:

- C-212/05 *Hartmann*
- C-213/05 *Geven*
- C-287/05 *Hendrix*
- C-291/05 *Eind*
- C-208/05 *ITC*
- C-1/05 *Jia*
- C-97/05 *Gattoussi*

In the *Estonian, Greek, Maltese, Slovenian and Spanish* reports any reference to, let alone an in-depth analysis of the above mentioned (or other) cases is lacking.

### *Follow up to: Hartmann (C-212/05) and Geven (C-213/05)*

Both judgments concern the German child-raising allowance ("Erziehungsgeld") to a cross-border worker. In the *Hartmann* case the ECJ declared that a full-time employment is a valid factor of integration into the society of Germany and thereby Mr Hartmann's children are entitled to be granted child-raising allowance. However, in the *Geven* case the ECJ accepted the reasoning of Germany that a minor employment does not constitute a sufficiently close link with Germany, the refusal is proportionate and thereby justified. Consequently, Ms Geven's children could not receive the benefits.

As to the consequences of the Court's decision in *Hartmann* no legislative action has been taken in *Germany*. The competent social authorities in Bavaria have simply been requested to apply the judgment. In the *Belgian* report both decisions are not mentioned. According to the *Austrian* rapporteur these decisions did not ask for any amendments. While both cases involved the category of 'frontier workers' this as such is – according to the *Cypriot* rapporteur – unlikely to have any bearing on Cyprus. According to the *Finnish* Social Insurance Institution, the *Hartmann* and *Geven* judgments have not had and are not likely to have any impact on the domestic system in Finland because it is already regarded to be in line with it. In *Denmark* too no follow-up actions of the *Hartmann* and *Geven* judgments were identified. Also in *Romania* both decisions did not play a role (yet). According to the *Portuguese* rapporteur *Hartmann* should have a particular impact in Portugal or vis-à-vis Portuguese citizens who exercise their rights of free movement. As a matter of fact, there is already a significant number not only of Portuguese nationals who maintain their employment in Portugal and have transferred their residence to Spain, but also of EU citizens who maintain their residence in Spain and obtained an employment in Portugal. In this context,

questions concerning the allocation of social advantages similar to those in Hartmann may arise.

More in-depth analyses are provided in the other reports.

According to the *Czech* rapporteur the problem of whether a cross-border worker and/or his/her spouse fall within the scope of the Regulation 1612/68 appears in the *Czech* legal context as unlikely. One of the reasons is the non-existence of a social benefit comparable to the German "Erziehungsgeld" in the Czech social system. Furthermore under Czech law governing social benefits, EU citizens are entitled to social benefits pursuant to Regulations 1612/68 and 1408/71. Thus the issue of frontier workers is regulated in the Czech Republic by direct application of Regulations 1408/71 and 1612/68. Therefore as regards to the classification of a person as a migrant worker it can be assumed, that under legislation applicable in the Czech Republic, a national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can also claim the status of migrant worker for the purposes of Regulation No. 1612/68. Taking into account this conclusion, also family members of a migrating worker would be entitled to social benefits under the Regulations stated above. From this it follows, that also the question of granting a social benefit to the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, would be in the Czech legal context most probably resolved in conformity with the *Hartmann* and *Geven* judgments.

The same applies to *Hungary*. According to Hungarian labour law every person who is in legal employment qualifies as a worker. Every EEA national who exercises economic activity on the basis of a legal employment relationship falls within the ambit of Reg. 1408/71/EEC. In addition, Article 2(d) of the Family Act explicitly lays down that the residence condition is waived for frontier workers. In sum, if a union citizen works in Hungary in a legal employment relationship (irrespective of the duration of the work), s/he will fall within the ambit of Reg. 1408/71/EEC and if s/he resides in another Member State will be exempted from evidencing his/her Hungarian residence. The person will be entitled to claim family benefits as a Community worker for himself and for his family. In this regard, Hungarian law is more favourable than the ECJ in *Geven* because it grants benefits for the workers even if they have no real and sufficiently close links to Hungary.

There has been no explicit recognition in *Irish* practice that a frontier worker who does not fall within the regime of Regulation 1408/71 is able to claim the benefits of Article 7(2) of Regulation 1612/68 in the circumstances that obtained in the *Hartmann* case. There is a general recognition in relation to Supplementary Welfare Allowance, which is affected by Article 7(2) of Regulation 1612/68, that workers within the meaning of Article 39 EC do not have to establish habitual residence. This approach should extend to cover the *Hartmann* and *Geven* scenarios. However, in discussions with an official in the Department of Social and Family Affairs, it appears that the issues in *Hartmann* and *Geven* have not arisen in the Irish context, but that if they did, those cases would be applied in deciding whether to dispense with any residence condition.

The same applies to *Lithuani*a. Family benefits may be paid to a person on the basis of the work place and not residence. The responsible country is the country of the workplace even if one of the parents is unemployed. If the allowance is higher in the country of residence, then the later pays the difference.

Less clear is the situation in *Latvia*. Article 4 of the Law on State Social Allowances provides that the right to the social allowances is enjoyed by persons residing in Latvia per-

manently. Union Citizens and their family member who have not obtained the status of permanent residents are entitled to the child-raising allowance only if this follows from Regulation 1408/71. As explained by the State Social Insurance Agency, if the child-raising allowance is claimed by a frontier worker employed in Latvia but living with his/her family in another EU Member State, Latvia will provide child-raising allowance to the frontier worker as an individual right. If, however, his/her spouse living in another EU Member State is also employed there, then the state responsible for the provision of child-care allowance is the Member State where the child lives. In addition, both Member States are under the obligation to compare the amount of child-care allowances, and in case the amount of allowances differs they must compensate the difference. It follows that the Social Insurance Agency takes into account Regulation 1408/71 only. It is clear that under Latvian law the unemployed wife of a frontier worker residing outside of Latvia would be denied the right to Latvian child-care allowance, because the right to child-care allowance in Latvia is an individual right. However taking into account the *Hartmann* decision, especially paragraphs 25-26, where in substance the ECJ gave the interpretation of the scope of an individual right to social advantages for a frontier worker by extending it to the spouse as an indirect beneficiary, the understanding of an individual right to child-care allowance under Latvian law in the light of Article 7(2) of the Regulation 1612/68 also has to be extended.

In *Sweden* there is a proposal to introduce a certain child-care allowance. According to the proposal the benefit should come within Regulations 1612/68 and 1408/71. In principle this should mean that a Swedish child-care allowance will be co-ordinated with the corresponding benefit in other Member States. Referring to the *Hartmann* and *Geven* cases the public investigation presenting the proposal for a future Swedish child-allowance has dealt with the matter and the committee has noted that it is important to provide for an exception to a strict application of settlement requirements.

The relationships between *Luxembourg* and the neighboring states in the social security field are mainly provided by the Regulation 1408/71. Nevertheless, due to its specific geographical location Luxembourg is one of the European countries that welcomes an large number of cross-border workers from France, Belgium and Germany, Luxembourg's legislators have decided to go beyond the European text and offer the members of a cross-border worker's family the same choices as the worker would receive. With its far-reaching legislation, Luxembourg anticipated a right that will be recognized for all European cross-border workers once the amended European coordinating Regulation 883/2004 enters into force. Nevertheless, there are still examples of residence clauses in the Luxembourg's social security legislation that could be contrary to the jurisprudence of the Court of Justice in *Hartmann*, as they imply discrimination against cross-border workers. On the one hand, there is the maternity allowance ("allocation de maternité"), which was considered compatible with Community law (Case C-43-99). On the other hand, the "forfait education" established by the Law of 28 June 2002 on pensions for parents who do not work at all and who take care of a child under four years, with the condition that both the parent and the child reside in Luxembourg, thus excluding cross-border workers, was considered incompatible.

On the other hand, strict residency requirements are still applied by *France* (Article L 512-1 of the "Code de la sécurité sociale"), which could be considered as contrary to the *Hartmann* decision. In *Italy* too, comparable child-raising allowances as in *Hartmann* and *Geven* are subordinate to the condition of residence in Italy.

The same applies to *Poland*. The comparable benefit (child-raising allowances) is provided by the Act on family benefits, but the benefit is only provided for those migrants (EU

nationals included) who reside in Poland during the period of receiving the benefit, unless provided otherwise by rules on co-ordination. Thus, it can be stated that with regard to child-raising benefits the Act requires residence within the territory of Poland. The prerequisite of residence in Poland needs to be fulfilled. There are no other provisions concerning frontier workers and their families. It seems incompatible with Community law, while there are no provisions on evaluating potential connections of the beneficiary with the Polish society. Instead, residence in Poland is required.

In *Slovakia* too almost all social and tax advantages are conditioned with permanent residence in the country, or at least temporary residence. Therefore, individuals in a similar position as in the *Hartmann* case would not be entitled, according to Slovak legislation, to any social benefits contrary to the wording of Article 7 (2) of the Regulation 1612/68 in the light of abovementioned decision.

In the *United Kingdom* the main consequence of these judgments has been in Northern Ireland. In relation to child benefit and child tax credit the cross-border issue does not seem to have been problematic. However, in relation to Working Families Tax Credit (a means-tested benefit for families on lower incomes) UK benefits regulations have appeared not to permit persons who live in Ireland but work in Northern Ireland to claim.

Following the ECJ's decision in *Hartmann* the Cross-Border Mobility website (www.crossbordermobility.info) recognises that this requirement should be amended and advises individuals who are affected by the regulations (a) that they are entitled to the social benefits irrespective of the apparent residence requirement; (b) that many people resident in Ireland are in receipt of the benefit (i.e. that the UK authorities have accepted the principle that they are obliged to pay the benefit). The rapporteurs however are not aware that the requirement in Regulations has yet been changed formally. There is a requirement that the applicant or partner for the benefit should be working 16 hours a week (but there does not seem to be a minimum remuneration amount). This kind of requirement in principle seems to be compatible with the Court's judgment in *Geven*.

For the *Dutch* situation, *Geven* is of particular interest. Wendy Geven lives in the Netherlands but works after her pregnancy leave during the first year of her son's life between 3 and 14 hour a week in Germany. Before the Court could decide on the entitlement to a children's allowance it should be decided whether Geven is a worker in the meaning of Regulation 1612/68. The referring court had already "established that during the period in question Ms Geven was in a genuine employment relationship allowing her to claim the status of migrant worker for the purposes of Regulation No 1612/68." Obviously the Court agreed. Dutch policy and jurisprudence follow a rather different and much more restrictive approach. Since the nineties the Aliens Circular applies for genuine and effective employment the criteria of 40% of the fulltime equivalent. This criterion is leading for the jurisprudence as well, although recently District Court Amsterdam rejected the argument that employment is only effective and genuine when it is at least 40% of the full time equivalent. Nevertheless, another District Court (Haarlem) is still of the opinion that 6 hours where 38 is the full time equivalent does not constitute effective and genuine employment. This approach clearly contravenes the *Geven* judgment. *Geven* implies also that the wording of the Aliens Circular should be amended.

*Concluding*

As far as the *Hartmann* and *Geven* cases are mentioned in the national reports: in *Austria* the decisions did not ask for any amendments. The *Finnish* situation seems also in line with the judgments. No follow-up was noted in *Denmark*, while in *Romania* the decisions did not play a role yet. The Portuguese rapporteur considers both decisions extremely important for *Portugal*, while according to the Cypriot rapporteur the decisions have no bearing on *Cyprus*.

The *Czech*, *Hungarian*, *Irish* and *Lithuanian* rapporteurs argue with arguments that legislation and practise in their Member States are most probably in line with both decisions. Less clear is the situation in Latvia and Luxembourg.

Openly contrary to the judgments is the situation in *France*, *Italy*, *Poland* and *Slovakia*, while strict residency requirements are still applied.

The Regulations in the *UK* and *the Netherlands* need still to be amended. Future relevant legislation in Sweden will most probably make an exception to a strict application of settlement requirements in this respect. No legislative action has been taken in Germany itself.

***Follow up to: Hendrix (C-287/05)***

This case is about a Dutch frontier worker who worked and lived in the Netherlands. While continuing to work in the Netherlands, he transferred his residence to Belgium. Before his removal he was entitled under Dutch legislation to a benefit for handicapped people which is listed in Annex IIa of Regulation 1408/71 as a non-exportable special non-contributory benefit. Therefore, once Mr Hendrix had left the country, the Dutch competent institution stopped paying that benefit applying the said provisions of Regulation 1408/71. However, as Mr Hendrix continued to be active as a worker in the Netherlands, the ECJ was asked whether the withdrawal of the benefit is not contrary to Article 39 or Article 18 EC Treaty.

The ECJ stated that Article 39 EC and Article 7 of Regulation 1612/68 must be interpreted as not precluding national legislation, meaning that a special non-contributory benefit listed in Annex IIa to Regulation No 1408/71 may be granted only to persons who are resident in the national territory. However, implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings which goes beyond what is required to achieve the legitimate objective pursued by the national legislation.

According to the *Austrian* and *Romanian* rapporteur this decision has not been a topic in both countries. The decision is not mentioned in the *Belgian, French, German, Luxembourg's, Portuguese* and *United Kingdom's* reports. In *Denmark* too no follow-up action of the *Hendrix* judgments was identified**.** According to the Finnish Social Insurance Institution, the *Hendrix* judgment has not had and is not likely to have any impact on the domestic system either. In *Ireland* too there is no benefit which is strictly analogous to the benefit in the *Hendrix* case and the situation in that case has not apparently arisen in the Irish context. The same applies to *Italy*, *Latvia* and *Slovakia*.

According to the Czech rapporteur the *Czech Republic* listed/submitted social benefits which are granted on the basis of the State Social Support Act in Annex IIa of Regulation 1408/71. Benefits to disabled persons in general, however, are in the Czech legal system regulated by the Act on Social Security. Nevertheless, in the Czech Republic, a special non-

contributory benefit payable to young persons suffering from total or partial long-term incapacity for work before joining the labour market does not exist.

*Hendrix* may have some bearing on *Cypriot* courts. Moreover, the fact that the ECJ stated that the provisions of Regulation 1408/71 must be interpreted in the light of the objective of Article 42 EC, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers is significant for a potential case in Cyprus on the subject of freedom of movement. Moreover, the ruling that the residence condition can be applied only if it is objectively justified and proportionate to the objective pursued is again a significant authority for future court cases in Cyprus.

*Hungarian* social law contains three types of special non-contributory benefits in terms of Reg. 1408/71/EEC: non-contributory old-age allowance, invalidity annuity and benefit for motor-disabled persons. Pursuant to the Social Act persons being entitled to exercise the right to free movement can claim these benefits if they possess a Hungarian residence that is evidenced by an address card issued by the local authority. The address card (registry) is usually issued for indefinite period in case of Hungarian nationals and for one year in case of EEA nationals. Both Hungarian and EEA nationals are obliged to notify the authorities of their change in residence and they are legally liable for the damage caused by the omission of the notification. Reading these provisions together it must be stressed that Hungarian law sets the objective criteria of Hungarian residence for these special non-contributory benefits that must be evidenced by a valid address card. The lack of lawful residence results in the withdrawal of the benefit – just in the way as the law of the Netherlands provided for in the Hendrix case. The authorities are not allowed to exercise discretion in cases of persons who leave Hungary. The Act does not contain any general clause for persons in possible hardship who maintain their economic and social links to Hungary, which most probably contravenes the Hendrix judgment.

The *Lithuanian* legislation may be problematic too, because benefits for handicapped persons are related to the permanent residence in Lithuania.

Following the judgment of the ECJ, the Central Appeals Tribunal in *The Netherlands*, who asked for the preliminary ruling, came up with a decision on 7 February 2008. The Central Appeals Tribunal could not apply the 'unacceptable degree of unfairness'-clause as suggested by the ECJ in this case because this provision was only introduced in the relevant legislation in 2001, while the issue at stake was situated in 1999. However, the circumstances in this particular case do not fulfil the condition of paras 54-56 of the ECJ judgment that the legislation must not entail an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. The Central Appeals Tribunal referred to the fact that Mr. Hendrix stayed employed in the Netherlands after he moved to Belgium and the close relation between his working activities and receiving the benefit. So therefore the appeal was granted.

In *Poland* a benefit of the kind in Hendrix is provided by the Act of on social pension. A Social pension (renta socjalna) is a non-contributory benefit for persons who became incapable to work before reaching maturity or graduating studies. No prior employment is required. The characteristic of the Polish "renta socjalna" is in principle the same in The Netherlands. For Polish and EU/EEA nationals there is a requirement of residence in Poland to be eligible for the benefit. According to the point 38 of the *Hendrix* judgment the residence requirement to reside in Poland seems to be compatible with Community law. Nevertheless, it seems that the reasoning of the ECJ is relevant to Polish law as well (especially points 57 and 58 of the judgment). Thus, when deciding on the entitlement to a social pension in case

of residence in another country the economic and social links of beneficiary should be analysed. It should be noted, however, that the issue of "economic and social links with the state of origin" has not yet been analysed by Polish courts.

The corresponding benefit in *Swedish* law is the disablement allowance (handikappersättning), and this benefit is listed in the Social security Act as a benefit based on residence only. Hence, a preliminary conclusion is that in accordance with Swedish law the disablement allowance should not be paid if, for instance, a frontier worker living and working in Sweden was moving to Denmark for residence but continued to work in Sweden.

*Concluding*

As far as the Hendrix case is mentioned in the national reports: in *Austria* and *Romania* the decision hasn't been a topic. No follow-up was noted in Denmark and the decision is not likely to have any impact on the Finnish situation. Situations comparable to Hendrix have not yet arisen in the Czech, Irish, Italian, Latvian and Slovakian context. According to the national rapporteur the decision could have some bearing on *Cyprus*. Due to permanent residency clauses the relevant legislation in *Hungary, Lithuania, Poland* and *Sweden* most probably contravenes the Hendrix judgment.

***Follow up to: Eind (C-291/05)***

In February 2000, Mr Eind moved from the Netherlands, of which he is a national, to the United Kingdom, where he worked as an employee and where, in December of that year, he was joined by his daughter Miss Eind (born on 29 April 1989), she having come direct from Surinam, of which State she is a national. By letter of 4 June 2001, the United Kingdom authorities informed Mr Eind that he was entitled to reside in the United Kingdom by virtue of Regulation No 1612/68. By letter of the same date, Miss Eind was informed that she was entitled to reside in the United Kingdom in her capacity as a member of a Community worker's family. On 17 October 2001, Mr Eind and his daughter entered the Netherlands. On 9 November 2001, Miss Eind registered with the police authorities and asked them to issue a permit for a specified period to enable her to reside with her father in the Netherlands. The State Secretary for Justice rejected Miss Eind's application on the ground that she did not hold a temporary residence permit, adding that she could not be granted a residence permit on the basis of her status as a member of the family of a 'Community national'. On the latter point, it was stated in the decision that Mr Eind could no longer be regarded as a 'Community national' since, after residing in another Member State and returning to the Netherlands, he had not carried on any effective and genuine activities in the Netherlands and could not be considered to be economically non-employed within the meaning of Community law.

In its preliminary questions the Judicial Division of the Council of State asked, essentially, whether, when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Community law to reside in the Member State of which the worker is a national, even where that worker does not carry on effective and genuine economic activities. The Court ruled that, in circumstances such as those in the case before the referring court, Miss Eind has the right to install herself with her father, Mr Eind, in the Netherlands, even if the latter is not economically active. This finding is not affected by the

fact that, before residing in the United Kingdom where her father was gainfully employed, Miss Eind did not have a right of residence, under national law, in the Netherlands.

This decision is not mentioned in the *German, Lithuanian and Luxembourg's* reports According to the *Austrian* rapporteur the decision didn't ask for any amendments. In *Finland* and *Romania* no information on possible impact of this judgment was obtained. On the other hand, Eind is important for *Cyprus* in the way it deals with the right to family reunification, since Cyprus applies in general a very restrictive approach to family reunification which may be conceded to have a deterrent effect on the freedom of movement. *Eind* did not have any impact in *Latvia*, because a minor child of Latvian parents has a right to a permanent residence permit

The *Belgian* report did not mention *Eind*, but it addressed the related *Jia* case (C-1/05). The implementation of *Jia* into the judicial practice is not a problem in Belgium, as the Alien Act does not require any residence in another Member State to recognize free movement to EU citizens and their family members. This ruling was obvious in Belgium, as the Alien's Act contains an assimilation principle towards third country national family members of a Belgian citizen. While *Jia* did not prove to be a problem, it can be assumed that also the implementation of *Eind* will not be problematic in Belgium. According to the French rapporteur the same applies to France. The implementation of *Eind* will not be a problem in *France* as well.

Family members of EU citizens are under *Czech* law granted the right to entry and to obtain temporary residency permit on the grounds of the mere fact, that they enjoy the status of a family member of an EU citizen. Therefore it appears that Czech legislation is in the context of *Eind* in conformity with the conclusions of the Court.

In early 2008 an adjustment was made in the administrative practice concerning the right of residence for third country family members of *Danish* citizens returning from a stay in another Member State on the basis of the EU rules on free movement. As a result of the ECJ judgment in *Eind* the Ministry of Refugee, Immigration and Integration Affairs adopted new guidelines according to which the returning Danish citizen will be entitled to bring his or her family back to Denmark even if he or she is not employed or carrying out other economic activity at the time of the return from abroad.

According to *Hungarian* law, if a person proves his/her family ties (spouse, children, ancestor) with a Hungarian national and wishes to settle in Hungary, the same rules apply to his/her situation then those applicable to an EEA migrant's family member. It means that Hungarian law diminished reverse discrimination by placing EEA nationals and Hungarian nationals on the same footing. It also encompasses that it is not necessary to leave Hungary and to return in order to activate EC law and to become entitled to invoke the benefits contained in Dir. 2004/38/EC. The same legal effect can be generated by simply referring to the implementing Act and submitting the necessary documents.

Non-EU members of the family of *Italian* nationals are within the scope of the provisions of Legislative Decree 2007 no. 30, implementing Directive 2004/38/EC. Therefore, if Miss Eind had been the daughter of an Italian national coming back to Italy after staying in another Member State for working reasons, the right to stay would not have been refused to her, since she would have claimed the benefit of the Legislative Decree which entrusts a family member with the right to stay.

In *Slovakia* the legislation in this regard is considered fully in line with the *Eind* judgment.

It seems that under *Polish* law 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) would be applicable by analogy to a situation as considered in *Eind*. This Act refers to EU nationals moving to Poland and the rights of their relatives. However, since the rules on free movement of EU nationals should be interpreted broadly, it seems it would be possible to apply the Act of 14 July 2006 to establish rights as well of a Polish national who took advantage of free movement rules and enjoys the status of a "migrant worker" under art. 39 EC Treaty.

The situation considered in *Eind* – which was concerned with the application of Article 10 of Regulation 1612/68 – does not appear to have been considered in *Ireland* in respect of the period prior to the coming into force of the Free Movement Directive on 30 April 2006. In relation to the period since 30 April 2006, to which the principles in *Eind* would also appear to apply, it should be noted that the 2006 Regulations implementing the 2004 Free Movement Directive do not apply to Union citizens who are Irish nationals. This appears to exclude even free-moving Irish citizens, which appears to be contrary to what is envisaged in the Directive. At present, the right of a free-moving Irish citizen to be joined by third-country national family members on the former's return to Ireland appears to be dealt with by the Minister as part of his executive functions. It is not clear that any account would be taken of the position under *Eind* if the same factual circumstances arose in Ireland.

According to the *Portuguese* rapporteur *Eind* has a sure impact on Portugal. It is well known that a significant number of Portuguese citizens are gainfully employed in another Member State and frequently constitute here family with third-country nationals who did not have a right to reside in Portugal under national law. This judgment clarifies that when a Portuguese worker returns to Portugal after being employed in another Member State, a third-country national who is a member of his family has the right under Community law to reside with him in Portugal even where that worker does not carry on any effective and genuine economic activities and even where that third-country national did not have such a right of residence under Portuguese law.

In *Swedish* migration law no rules exist that prevent an effective application of the *Eind* case. However, a factual situation on which the Dutch authorities decided the case has yet not been tried before a Swedish migration court (or by the Migration Board).

The *UK* rapporteurs are concerned that the most recent judgments in *Eind* (and *Jia)* have left the law in a state of uncertainty that is unhelpful and open to divergent interpretation by National Courts. The rapporteurs have concerns that this situation is a potential source of inconsistent and divergent practice in different Member States and moreover that the practice currently prevailing in the UK is highly unsatisfactory.

Concerning The *Netherlands*, at the time of the writing of this report (October 2008) the Aliens Circular still contains the following wording: "Community national is also the Dutch national who had been established in another Member State to carry on economic activities and who has returned to the Netherlands to continue here his economic activities" (B10/1.5) This wording is in clear contradiction with the judgment of the Court in the *Eind* case.

*Concluding*

As far as the *Eind* case is mentioned in the national reports: in *Austria* and *Latvia* the decision did not ask for any amendments. In *Finland* and *Romania* no information on possible impact was obtained. The decision could be important for *Cyprus*. The legislation and prac-

tice in *Belgium, France, the Czech Republic, Denmark, Hungary, Italy,*and *Slovakia* seem in line with the *Eind* judgment, and most probably in *Poland* too. The situation in *Ireland, Sweden* and the *UK* is unclear. The regulations in *The Netherlands* still need to be amended.

***Follow up to: ITC (C-208/05)***

According to the ECJ judgment, the provisions of the EC-Treaty concerning free movement of workers "prohibit national legislation, which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that person's recruitment is subject to the condition that the job found by that agency be subject to compulsory social security contributions in that State".

The ruling concerned the refusal to pay by the German State Employment Agency a compensation to a private sector recruitment agency (ITC) in respect of a staff recruitment voucher. The refusal was justified by the fact that the job found by ITC for the person seeking employment (in another Member State) was not covered by compulsory social security contributions in Germany itself.

This decision is not mentioned in the *French, Luxembourg's, Portuguese* and *UK* reports. According to the *Austrian* rapporteur the decision didn't ask for any amendments. In *Belgium* the decision was published in a national law review only. The decision is one that is crucial for *Cypriot* courts dealing with the subject: so far Cypriot courts were reluctant to disapply any provision of domestic law which is contrary to provisions of the EU acquis.

The probability that a question of non-compliance of a national legislation such as the one at issue in the *ITC* case with the relevant EU law appears in the *Czech* legal context as low. As far as the possible relevance of the ITC judgment in *Denmark* concerned, no information was made publicly available. In *Finland* and *Romania* too no information on the possible impact of this judgment was obtained. There does not appear to be any legislation or other measure in *Ireland, Latvia, Lithuania, The Netherlands* and *Slovakia* corresponding to the German legislation considered in the *ITC* case. The same applies to Poland, the *ITC* ruling has no relevance for the Polish legal system. Contrary to German law, *Italian* law does not provide for a "recruitment voucher" in favour of an employee who is seeking work. On the contrary, under Italian legal system private-sector recruitment agencies are expressly not allowed to receive, directly or indirectly, any kind of payment from workers for their services.

In *Hungary*, the *ITC* case is of special interest in the field of active labour market measures. Albeit there is no equivalent instrument in Hungary like a recruitment voucher, there are other active labour market measures where similar issues might arise. The Unemployment Act contains several incentives. In these cases the Unemployment Act is silent on the place of employment meaning that in theory an employment in another Member State does not per se exclude the employed or the employer from the benefits. By now foreign elements did not occur. Therefore, it is not possible to tell what would happen in such a situation.

In response to the ITC judgment the Federal Labour Agency in *Germany* has reacted by changing the administrative orders to make lump sum payments for commissioning employment also with respect to jobs within other EU Member States provided that the employment is taken up by German citizens or Union citizens having their ordinary residence within Germany.

*Concluding*

The *ITC* judgment mainly concerns *Germany* itself.

***Follow up to: Jia (C-1/05)***

The *Jia* case concerned the interpretation of Article 43 of the Treaty and Directive 73/148/EEC. A Chinese mother to a Chinese national who lived in Sweden with his German wife (self-employed) applied for a residence permit, on the basis that she was related to a national of a Member State. The Swedish Migration Board rejected her application on the ground that there was insufficient proof of the situation of financial dependence. Ms Jia appealed against that decision at the then Utlänningsnämnden (Aliens Appeals Board). The Utlänningsnämnden referred several questions to the European Court of Justice, asking inter alia whether Community law, in the light of the judgment in *Akrich* (C-109/01), required Member States to make the grant of a residence permit to a national of a non-Member State, who was a member of the family of a Community national who had exercised his right of free movement, subject to the condition that that family member had previously been lawfully resident in another Member State.

The Court held that no such requirement followed from Community law in general or from the *Akrich* judgment, more specifically. The Court furthermore held that Directive 73/148 required that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they had come at the time when they applied to join that Community national.

The Court argued that Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support might be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.

The *Jia* decision is not mentioned in the *German* and *Luxembourg's* reports. According to the *Austrian* rapporteur the decision didn't ask for any amendments. The *Jia* decision hasn't been a topic in *Austria*. At the time of writing of the *Danish* report the Ministry's assessment of the impact of the *Jia* judgment, if any, was not known either. In *Romania* too the decision did not play a role yet.

The *Jia* case makes its clear that *Cyprus* is not entitled to implement a blanket requirement for previous lawful residence in another Member State as a condition precedent for the grant of a residence permit to a non- Member State dependent relative seeking to remain on the basis of their dependency on an EEA national exercising free-movement rights in the UK. This can have an important effect in the immigration law and practices in Cyprus.

The implementation of the *Jia* case into the judicial practice is not a problem in *Belgium*, as the Alien Act does not require any residence in another Member State to recognize free movement to EU citizens. The *Jia* ruling was obvious in Belgium, as the Alien's Act contains an assimilation principle towards third country national family members of a Belgian. In *France* too, the *JIA* decision in not supposed to have any impact on the French legislation and regulations.

The legal provisions in the *Czech Republic* do not make the grant of a residence permit to nationals of a non-member State subject to condition of previous legal stay in another member State. In this matter, Czech law is in conformity with the relevant EU law and ECJ judgments. The same applies to *Slovakia*.

A confrontation between the *Portuguese* legislation on free movement of workers and the case law of the European Court of Justice does not reveal any inconsistency of the former vis-à-vis the latter. From another perspective, the relevant Portuguese legislation can be interpreted according to inter alia the *Jia* judgment, without difficulties for the national administration and courts.

In the relevant *Polish* legislation there is no requirement of previous lawful residence in another Member State. There is also no definition of "dependency" of a family member. Thus, all appropriate means to prove the situation of being dependant can be invoked. Polish law seems to be compatible with the *Jia* ruling.

On the other hand, according to the *Finnish* rapporteur the Ministry of Interior is of the opinion that the *Jia* case does not preclude the application of the requirement of previous lawful residence in case of third country national family members. Therefore the national legislation and practice are not expected to be amended in this respect (yet).

According to the Lithuanian rapporteur, there should be no similar problems in *Lithuania* as those analysed in the *Jia* case, except that it may affect the family members of the Lithuanian national, because in case of a family member of a Lithuanian national the Aliens Law requires residence in another Member State before joining the family member in Lithuania.

While the *UK* Immigration (EEA) Regulations 2006 could be interpreted as requiring in this respect first lawful residence in another Member State, there is a great deal of uncertainty in the present position of the UK.

In Ireland too – based on *Akrich* – the 2006 Immigration Regulation 3 (2) "shall not apply to a family member unless the family member is lawfully resident in another Member State". According to the rapporteur it is clear that the *Jia* ruling of the European Court of Justice limiting the scope of the *Akrich* ruling means that Regulation 3(2) will need to be reviewed and, if necessary, deleted/amended. Nevertheless, the High Court in May 2007 still held that the 2006 Regulations correctly implemented the 2004 Directive, so that a third-country national who had lived unlawfully in the UK prior to coming to Ireland and getting married to an Estonian national in Ireland could be refused a residence card under Regulation 3(2). The Judge considered that *Jia* case was not intended to disturb the approach of the Court of Justice in *Akrich*.

In The *Netherlands* the government interpreted the *Akrich* judgment as allowing for the introduction of long term visa requirements and integration obligations, if the third country national family member of an EU migrant has not been admitted under the national immigration rules of another Member State. Nevertheless, the government decided to postpone the extension of the integration measures and long term visa requirements to third-country family members of EU nationals until the judgment of the ECJ in the *Jia* case. Due to the *Jia* ruling that "Community law does not require Member States to make the grant of a residence permit (to third country family members) of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another Member State", it may be expected that the government will not stick to its restrictive interpretation of *Akrich* and will refrain from extending long term visa requirements and integration obligations to third country national family

members of a Community national who has exercised his or her right of free movement, even when those family members have not previously been residing lawfully in another Member State.

It seems that the approach of Hungarian law to the question of dependence is rather different from the approach applied by Sweden and thereby probably the *Jia* case, and the implications contained therein are not of real significance for *Hungary*. Swedish law focuses on the fact of real dependence of the family member on the Community national as a precondition to judge an application. If dependence is appropriately proven, as a second step, the Community national is to evidence that none of the family members will be an unreasonable burden on the social security system of *Sweden*. However, in Hungary, dependence is rather treated as a guarantee towards the state that somebody – the Community national or the family member – will personally provide for the financial means necessary for covering the costs of stay. The whole concept of the supporting declaration sees as a primary target to appoint the person who is legally liable for the possible costs occurred in connection with the stay. In this sense it might be said that the real dependence of the family member on the Community national is not relevant. Consequently, the elements of dependence are not of practical relevance in Hungary either.

The *Italian* legislation requires that in order to be issued with a residence card, the non-EU family member shall submit a document certifying his/her being dependent on the EU citizen (see Article 10(3)(b) of the Legislative Decree 2007 no. 30). Neither the Legislative Decree nor the implementing circulars make it clear what means of proof of the status of 'dependent' family member are acceptable, or when a family member shall be considered dependent.

There is no administrative or judicial practice on application of the provisions of *Latvian* law in situations like the *Jia* case. Regulation No. 586 may be interpreted in a way that it requires actual dependency on an EU or EEA citizen when he/she moves to reside in Latvia.

The *Swedish* rapporteur concluded that the interpretation of the word "dependent" in the national legislation is within the boundaries of the Court's judgment in *Jia*.

*Concluding*

As far as the *Jia* case is mentioned in the national reports: in Austria the decision did not ask for any amendments. In *Denmark* and *Romania* no information on possible impact was obtained. The decision could be important for *Cyprus*.

The implementation of the *Jia* decision into the judicial practice is not a problem in *Belgium, France, the Czech Republic, Poland, Portugal* and *Slovakia*.

On the other hand the requirement of previous lawful residence is still an issue in *Finland, Ireland, Lithuania, United Kingdom* and (at the time) *The Netherlands*.

Only a few reports addressed the issue of dependency (*Hungary, Italy, Latvia, Poland* and *Sweden*). In these Member States no problems of implementation of the *Jia* decision in this respect are foreseen.

***Follow up to: Gattoussi (C-97/05)***

In *Gattoussi* the Court decided in line with *El Yassini* (C-416/96) that the non-discrimination clause of Article 64(1) of the Euro-Mediterranean Agreement EC-Tunisia may have effects

on the right of a Tunisian national to remain in the territory of a Member State in the case where that person has been duly permitted by that Member State to work there for a period extending beyond the period of validity of his permission to remain.

While Gattoussi had married a German citizen, he was granted on 24 September 2002 a residence permit valid for three years. On 22 October 2002 the Employment Office granted Gattoussi a work permit of indefinite duration. His contract of employment was still valid till 31 March 2005 when in April 2004 his relationship with his wife ended and the authorities withdraw his residence permit. According to the Court Gattoussi could claim a right of residence based on the non-discrimination clause of Article 64 while Germany had previously granted him specific rights in relation to employment which were more extensive than the rights of residence conferred on him. Therefore his residence permit should be extended for the entire period during which he has that employment, although the initial reason for the grant of his leave to stay no longer existed by the time at which his residence permit was withdrawn. The Court made it clear that the situation would be different only for reasons related to public policy, public security or public health. And the public policy exception presupposes – as for Community citizens in general – the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society.

The *Gattoussi* decision is not mentioned in the *Belgian, French, Luxembourg's, Portuguese, Slovak* and *UK* reports. According to the *Austrian* rapporteur this decision didn't ask for any amendments. The *Cypriot* rapporteur foresees serious effects on immigration law and routine practice of third country nationals in Cyprus. As far as the possible relevance of the *Gattoussi* judgment in *Denmark* concerned, no information was made publicly available. In *Finland*, the decision did not have any impact on the domestic law and practice either. In *Ireland* too Article 64(1) of the Euro-Mediterranean Agreement has not been considered in the Irish context yet. The same applies for Romania. The consequences of *Gattoussi* in *Latvia* and *Poland* are unclear. It is uncertain if the situation can arise at all when applying *Swedish* law. Therefore the Swedish rapporteur finds it difficult to give an opinion on the position of Swedish law on this point

The *Gattoussi* judgment has not had any effect in *Lithuania* so far. A third country national whose residence permit expired or was terminated is not able to extend his stay on the basis of a work permit, because the precondition for issuance/extension of a work permit is a valid residence permit. Work permits in Lithuania are being issued with a two-year validity only.

According to the Czech rapporteur the *Gattoussi* decision has no meaning for the *Czech Republic*. Under Czech law, the work permit is accessory to the residence permit. Pursuant to the Employment Act the validity of the work permit expires with the expiration of the residence permit. Therefore the validity of a work permit for a Tunisian national would be from the point of its issue limited by the validity of the residence permit. More or les the same applies in *Hungary*, but just the other way around. From the wording of the law it can be deducted that the residence permit is issued after the submission of the work permit, hence its duration shall be accorded to the validity of the work permit. Although it is common practice that the issuance of the work permit precedes the issuance of the residence permit, the end-validity of the both permits shall, however, be the same.

Contrary to German law, *Italian* law does not provide for "a work permit" issued by the public administration as an authorization different from a residence permit. On the contrary, under Italian law there are different kinds of residence permits depending on the purpose for which they are issued. A residence permit for working reasons usually lasts as long as the

employment contract which it is connected to, but in any case it cannot last more than two years (even if the employment contract is concluded for an unlimited period). Given the strong link between the residence permit for working reasons and the employment contract under Italian law, the residence permit is renewable almost automatically if there is an ongoing employment contract.

Had a situation like that involved in the *Gattoussi* case occurred in Italy, a regime totally different from the German one would have regulated the case. Italian citizen's family members who are not Italian nationals are treated as EU citizen's family members who are non-EU nationals.

The relevance of the *Gattoussi* judgment for *The Netherlands* can be illustrated by a 2006 District Court decision. The case concerned a Macedonian national who was granted a residence permit due to his marriage with a Dutch national. When the relationship ended he requested a residence permit for employment. It is not clear from the decision of the court whether the applicant was already employed at the time when his residence permit was withdrawn. If so, the *Gattoussi* judgment could have been relevant while the applicant due to his marriage was entitled to employment for an indefinite period. Actually his request was rejected and his appeal was considered unfounded. Any reference to the (non-discrimination clause in the) Association Agreement with Macedonia is lacking in the decision of the court.

In contrast to The Netherlands the *Gattoussi* decision played already an explicit role in several court decisions in *Germany*. In its decision of 29 June 2007 the Administrative Appeal Court had to deal with a Moroccan national who had received due to the marriage with a German national a residence permit until 31 December 2004. Her application for prolongation has been refused leading to a separation from her husband. The applicant argued since she was in possession of an unlimited residence permit and an unlimited labour contract she was entitled to prolongation of her residence permit under Art. 64 of the Europe Agreement with Morocco relying upon the *Gattoussi* judgment of the European Court. The Court argues that the *Gattoussi* judgment cannot be interpreted as an expansion of the residential status of Tunisian or Moroccan workers in comparison to the *El Yassini* decision. In this decision the European Court had stated that the prohibition of discrimination under Sec. 40 para. 1 of the Cooperation Agreement with Morocco could be exceptionally interpreted as an entitlement to a prolongation of a residence permit provided that the national court previously determined that the state of residence had granted the Moroccan worker with respect to the exercise of a profession more extensive right than with respect to residence. Therefore, the Court argues that the European Court's jurisprudence must still be interpreted as granting the national court the final decision of whether under national law a Moroccan national can be granted more extensive employment rights as his/her residence permit would indicate.

Following the *Gattoussi* judgment of the European Court the Administrative Appeal Court of Baden-Württemberg 27 September 2007 has decided that an unlimited work permit entitles an Algerian national due to the prohibition of discrimination in Art. 67 of the Europe Agreement EEC/Algeria to a residence right which may, however, by restricted in duration. Whether the entitlement to a residence permit exists also for nationals of other third states with which the European community has concluded Europe-agreements, containing, however, different interpretative common declarations, has been left open by the Court.

*Concluding*

From all the cases mentioned by the Commission *Gattoussi* is the great unknown. As far as the *Gattoussi* case is mentioned in the national reports its consequences are unclear in *Austria, Cyprus, Denmark, Finland, Latvia, Poland* and *Sweden*. The *Czech, Hungarian* and *Lithuanian* rapporteurs argue with arguments that the *Gattoussi* decision has no meaning for their Member States. Had a situation like that involved in *Gattoussi* occurred in *Italy*, a regime totally different from the German one would have regulated the case. Italian citizen's family members who are not Italian nationals are treated as EU citizen's family members who are non-EU nationals.

As an earlier District Court ruling illustrates *Gattoussi* could potentially be very relevant for *the Netherlands*. The decision played already an important role in German case law.

# Chapter VII
# Policies, Texts and Practices of a General Nature with Possible Repercussions on the Free Movement of Workers

## INTRODUCTION

The principal policies, texts and practices addressed by the national rapporteurs in this chapter cover, in large part, similar issues to those discussed in previous reports. The following topics are most likely to have repercussions on the free movement of workers.

- Reverse discrimination
- Application of the "Community preference principle" regarding access to the labour market;
- Association Agreement with Turkey;
- Economic/ labour migration of third-country nationals and their treatment after admission;
- Developments in integration policy;
- Nationals policy plans on migration;
- Measures to prevent irregular migration unauthorized employment;
- Transposition of Directives concerning third-country nationals.

Some miscellaneous issues pertaining to individual Member States are also listed at the end of the chapter.

## REVERSE DISCRIMINATION

Reverse discrimination whereby nationals are subject to less favourable rules than EU citizens resident in the Member State concerned is referred to in two reports in respect of family reunification. In *Austria*, the Constitutional Court ruled that the differentiation applied in family reunification rules between EU citizens residing in Austria with third-country national family members and Austrian nationals who have not exercised their free movement rights is not unconstitutional and is justified by the need to have a coherent law on foreigners and to preclude potential misuse of its provisions. In *Denmark*, the less favourable family reunion regime applicable to Danish citizens reuniting with or marrying third-country nationals, which has been described in previous reports (and which only underwent minor amendments in 2007), has meant that Danish nationals are resorting to Community law to circumvent the restrictive national rules.

## APPLICATION OF THE COMMUNITY PREFERENCE PRINCIPLE

The reports for the following Member States describe the application of the so called "Community preference principle" regarding access to the labour market[51]: *Czech Republic*,

[51] This is understood broadly as the principle whereby preference is to be provided to nationals, EU citizens and permanently resident third-country nationals over other third-country nationals with regard to access to the labour market of the Member State concerned. This principle finds a narrow legal basis in the 2003 and 2005 Accession treaties, which oblige Member States applying transitional arrangements to give preference to nationals of new Member States over third-country nationals, and in Decision 1/80 implementing the EEC-Turkey Association Agreement,

*Finland, Ireland, Poland, Portugal, Slovenia*. In the *Czech Republic*, explicit provision is made for the application of this principle in the Employment Act. Third-country nationals are required to hold a work permit, with the exception inter alia of family members of EU citizens, foreigners who have been issued a permanent residence permit, family members of officials of diplomatic missions and persons granted international protection. In *Finland*, the principle is applied by the employment office which examines whether suitable labour is available for the work in question in the labour market and ensures that issuing a work permit to a third-country national will not adversely affect a person already in the labour market from finding employment. Third-country nationals lawfully resident in Finland are considered as being already in the labour market together with Finnish nationals and EU citizens. In *Ireland*, the Employment Permits Act 2006, which entered into force on 1 February 2007, contains a number of provisions to ensure that the preference principle is applied. An employer who applies for an employment permit for a third-country national must provide evidence that the job vacancy was advertised with the FÁS/EURES employment network and in local and national newspapers for three days to ensure that an Irish, EU/EEA or Swiss national is unavailable to fill the vacancy. Moreover, the application must confirm that at the time of the application more than 50 per cent of employees in the company are Irish, EU/EEA or Swiss nationals. While transitional measures are in place in Ireland for Bulgarian and Romanian nationals, they are to be given preference over third-country nationals in the issue of employment permits. In *Poland*, the law on the Charter of a Polish National ("*Karta Polaka*") was adopted in September 2007. This legislation allows third-country nationals from countries to the east of Poland (including countries in the Caucuses and Central Asia), if they are able to demonstrate affiliation to the Polish nation, including the possession of a basic knowledge of the Polish language, to obtain a number of privileges in Poland, such as inter alia free access to salaried employment and self-employment. Therefore, the question arises whether this new legislation is in conformity with the preference principle as understood above. In *Slovenia*, the preference principle is addressed in the rules on permits for employment found in the Employment and Work of Aliens Act 2000 (as amended in 2005 and 2007), which, as a rule, are only issued to third-country nationals if there are no nationals seeking work in the sector concerned or third-country nationals who enjoy equal status to Slovenian nationals regarding access to employment and are registered in the records of the Employment Service. Finally, in *Portugal*, a new Immigration Act passed in 2007 also enshrines the Community preference principle.

## ASSOCIATION AGREEMENT WITH TURKEY

The position of Turkish nationals under the EU Association Agreement with Turkey is a subject of attention in both the reports of *Germany* and the *Netherland*s. In 2007, there were a number of cases in *Germany* decided in the favour of Turkish nationals, most notably that the enhanced protection against expulsion in Article 28 of Directive 2004/38/EC is also applicable to them, a position that is based on the judgments of the Court of Justice in C-467-

where Turkish workers lawfully employed in Member States for a period of four years are no longer subject to restrictions regarding access to the labour market and should therefore be granted preference over other third-country nationals. However, in the non-binding Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment (OJ 1996 C 274/3), Member States supported a broader preference principle, which is clearly reflected in labour market tests in Member States and which also finds expression in a number of Commission communications: e.g. see Commission Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (COM(2007) 637 final of 23 October 2007) at p. 10.

02, *Cetinkaya*. In the *Netherlands*, the European Commission's infringement proceedings are now before the Court of Justice (C-92/07, *Commission v. The Netherlands*) in which the Commission disputes the higher level of fees charged to Turkish nationals for issue of a residence permit as compared to the fees charged to EU citizens and EEA nationals. The Commission argues that the higher fees are incompatible with the standstill clause and non-discrimination clauses of the Association Agreement, the Additional Protocol and Decision 1/80.

## ECONOMIC MIGRATION OF THIRD-COUNTRY NATIONALS AND THEIR TREATMENT AFTER ADMISSION

There is an evident need in a number of Member States to fill labour shortages in both skilled and less-skilled sectors of the national economy and it appears that these shortages are not being adequately met by EU citizens from other Member States. With regard to skilled workers, a new system of "green cards" has been proposed in the *Czech Republic* that will facilitate access for third-country nationals who are qualified (i.e. those with university-level education and key personnel") and skilled workers (i.e. apprentice-level education) to fill shortages in the labour market. This system should come into effect in 2009 and aims to replace the pilot project on the "Selection of Qualified Foreign Labour", discussed in previous reports, which enables successful applicants to obtain permanent residence more quickly but which appears to have been not as successful as originally anticipated due to a low take-up rate and complexities in the administrative procedure. In *Ireland*, the new employment permit arrangements came into effect in January 2007. The new system is aimed at attracting third-country nationals with high-level skills which are strategically vital to the development of the economy and which cannot be found in the EEA. The arrangements aim to fill job vacancies in skills shortage areas and are based on a Green Card system. They also comprise an Intra-Company Transfer Scheme and a Work Permit Scheme. An Immigration, Residence and Protection Bill was also introduced in April 2007 with a view to replacing the current immigration legislation in a single measure, but it lapsed with the decision to call a General Election one month later and there was no attempt to revive the Bill during the remainder of 2007.[52] In the *Netherlands*, the regulation on knowledge migrants (described in the 2005 and 2006 Reports) was simplified in December 2007 and the admissions procedure applies to family members who do not enter the country with the migrant but who join him or her at a later date. Moreover, third-country national students who complete their studies are now able to seek employment for a period of one year (replacing the previous period of three months) and can also take up employment at a lower income threshold. In the *United Kingdom*, the details of Tier 1 of the new points-based system, which is aimed at highly skilled migrants from third countries, were announced at the end of 2007 and are being brought into effect during 2008. Tier 1 will cover four categories of migrants: a general category for the highly skilled to enable them to seek employment or establish themselves in self-employment in the UK; entrepreneurs; investors; and a post-study category permitting students who have completed their studies to work in the UK for up to two years. As a result of the reforms being introduced under the points-based system, knowledge of the English language has become central to admission.

With regard to other developments relating to the economic migration of third-country nationals, the Dutch Government published a policy paper, "Towards a Modern Migration

[52] However, the Bill was re-introduced in January 2008.

Policy" ("*Naar een Modern Migratiebeleid*"), which aims to orient policy more than ever before towards the need for migrants in Dutch society, but with an emphasis on temporary migration. In November 2007, the Advisory Committee on Aliens Affairs (ACVZ) published an advisory report on this policy document viewing it as a useful first step towards the development of a new policy on the admission of foreigners other than asylum-seekers. It approved the principle that admission should be based largely on the contribution migrants are able to make to Dutch society but also proposed a number of adjustments to the recommended migrant categories for admission. In *Poland*, the rules relating to access to the labour market for nationals of three neighbouring non-EU countries (i.e. Belarus, Russia and Ukraine) were relaxed in July 2007. Citizens of these countries can now take up employment in Poland for a period not exceeding three months within a six-month period without the need to obtain a work permit.

During 2007 in *Italy* a draft law was presented to Parliament, which, if adopted, would have changed the planning for the immigration quota to a system that operates on a three-year basis and would have enabled third-country nationals to enter *Italy* to look for work provided they possessed sufficient income for the duration of their stay and were supported by an Italian, EU citizen or a long-term resident willing to provide an economic guarantee. However, this draft law was abandoned by the new Parliament that was elected in 2008.

The three Baltic EU Member States continue to report labour shortages. In *Estonia*, employers remain interested in hiring third-country nationals to fill shortages in the construction and IT sectors, although their attempts to do so are hampered by the complex work permit regulations. The rapporteur observes, however, that employers do not appear to be exerting much effort to employ workers from other new Member States. In *Latvia*, an Immigration Concept was elaborated by the Ministry of Interior exploring the option of liberalizing the immigration rules relating to third-country nationals. However, no changes to immigration policy were adopted as the labour shortages in the country were not as significant as before due to the downturn in the economy. In comparison to the other two Baltic EU Member States, *Lithuania* contains the most foreign workers from third countries, with a significant majority originating from the neighbouring countries of Belarus and Ukraine and working mainly in the construction and transport sectors. Given continuing labour shortages in the country, discussions have also taken place on whether the rules relating to the admission and employment of third-country nationals should be relaxed.

In other Member States, however, the demand for migrant workers from third countries appears to be relatively small, and thus relatively restrictive measures are in place. In *Austria*, labour migration from third countries is limited with only 1,565 skilled migrants or "key personnel" permitted to enter for employment purposes in 2007. A further 7,500 temporary work permits and 7,000 permits for seasonal work were issued. A restrictive approach to the admission and employment of third-country nationals is also observed in *Slovakia*, which is exacerbated by the statements of politicians and the nature of the draft legislation presented.

Concerns were expressed in a number of Member States in 2007 regarding the treatment of EU citizens from other Member States, third-country national family members and other third-country nationals. In *Cyprus*, the treatment of the third-country national family members of Cypriot nationals and EU citizens was particularly problematic in relation to such issues as unjustified delays in the examination of applications for a residence permit, rejections of such applications, prohibitions on entry, arrests and deportations (including the deportation of asylum-seekers married to Cypriot nationals or EU citizens as soon as their claims are rejected), and declaring their marriages null and void. In *Ireland*, the Employment

Permits Act contains a range of important safeguards for migrant workers, including the granting of the employment permit directly to the employee rather than the employer; a statement in the permit of the rights and entitlements of the migrant worker; the right of migrant workers to change employment by obtaining a permit for another employer; the prohibition of employers from deducting expenses associated with recruitment and from retaining personal documents belonging to migrant workers; and significant fines as well as imprisonment for individuals for breaches of the legislation. However, the treatment of migrant workers from third countries as well as the new Member States continued to remain a concern in Ireland in the light of some highly publicized incidents of alleged exploitation and despite the applicability of employment protection laws to all persons irrespective of their nationality. The Irish Government is committed to setting up a new employment rights body in order to secure compliance with employment rights legislation and in February 2007 established the National Employment Rights Authority (NERA) on an interim basis with the functions of information, inspection, enforcement, prosecution and protection of young persons.

In *Greece*, a Consultative Migration Committee has been established in every district of the country. The Committee comprises four officials from the Alien and Migration Service in the region and a representative of the police authority. Its purpose is to decide on the issue or renewal of residence permits for third-country nationals on the basis of the presentation of all the necessary documents and the character of the individual concerned.

In *Malta*, the provisions of the April 2004 agreement with Libya on the facilitation of entry, exit and movement of nationals of both countries is described in some detail. In essence, the Agreement provides for facilitated access to business and professional persons on the basis of a Business Multiple visa valid for six months. In respect of Libyan nationals, this visa is valid only for Maltese territory and is thus in conformity with Schengen rules. A multiple-entry visa valid for three months can also be issued to frequent visitors from both countries.

## DEVELOPMENTS IN INTEGRATION POLICY

Integration of migrants is discussed in the reports of *Finland*, the *Netherlands* and *Portugal*. Only the report on the Netherlands refers to compulsory integration provisions, although these are not applicable to EU/EEA/Swiss citizens. Moreover, despite earlier intentions, these arrangements do not apply to third-country nationals who are family members of EU/EEA/Swiss citizens. In *Finland*, no significant developments have taken place in regard to the voluntary personal integration plan aimed at foreign permanent residents, including EU citizens and their family members, which has been discussed in previous reports. The integration arrangements in the *Netherlands*, both pre-admission and post-admission, were described in some detail in the 2006 Report. These arrangements do not apply to EU citizens, EEA nationals, Swiss citizens or third-country nationals who are family members of EU citizens. The Act on Integration (*Wet inburgering*) of 7 December 2006 entered into force on 1 January 2007 and applies to migrants after their admission requiring them to pass a further integration test on language and society at a higher level within a period of five years. Failure to do could result in migrants having their benefits reduced, being subject to fines and not having a permanent residence permit issued. In September 2007, the new Dutch Government also presented a “Delta plan Integration” which builds on the criteria of the current legislation on integration but emphasizes better cooperation between the partners involved,

more flexibility for municipal authorities and the introduction of "dualistic" integration programmes linked to education, employment or social participation. In *Portugal*, the Government approved the Plan for immigrants' integration, which formulates a national strategy concerning the reception and integration of immigrants. It includes measures in such fields as employment and vocational training, residence and health, education, culture, sport, social benefits and justice.

## NATIONAL POLICY PLANS ON MIGRATION

A number of reports describe national policy plans or strategies on migration. The report on *Romania* refers to the National Strategy on Migration, which was first adopted by the Government in 2004. With the accession of Romania to the EU, this strategy has been replaced by a new consolidated strategy covering the period 2007-2010, which focuses solely on the migration of third-country nationals and covers the following areas: controlled migration, prevention and combating of irregular migration, asylum and the social integration of non-nationals. Based on this strategy, annual action plans are elaborated containing precise objectives, defining the competent authorities and setting implementation dates. It is also expected that migration from third countries to Romania will increase in the near future.

In *Slovakia*, as in previous years, the report discusses the Migration Policy Conception of the Slovak Republic, which was adopted by the Government in 2005. This document was prepared by the Migration Office of the Ministry of Interior and thus focuses mainly on asylum for which the Ministry is responsible as well as irregular migration. Other issues are covered in passing and only a small part of this document is devoted to legal migration and the social integration of immigrants.

The report on *Slovenia* refers to the Resolution on Migration Policy of the Republic of Slovenia adopted by Parliament in November 2002. One important view espoused in this document is the "long-term macroeconomic advantage of relatively free migration" and its principles and objectives have informed the formulation of amendments to the legislation concerned with the admission of third-country nationals to Slovenia for the purpose of employment.

## MEASURES TO PREVENT IRREGULAR MIGRATION AND UNAUTHORIZED EMPLOYMENT

The report on *France* refers to a December 2007 decree approving the establishment of a database on foreigners who are subject to expulsion measures. The database will also contain statistics on expulsion measures and their implementation. While it is expected to have a limited impact on the free movement of EU citizens, it will nonetheless contain data on *all* foreigners subject to expulsion, who may of course include EU/EEA citizens and members of their families.

In the *United Kingdom*, consultations were held during 2007 on the new framework for employer sanctions set out in the Immigration Asylum and Nationality Act 2006, which was introduced in February 2008. This framework is based on a system of administrative sanctions for employers who hire migrant workers without authorization rather than on criminal law penalties. The fines are determined in accordance with a Code of Practice and the maximum fine per worker is set at GBP 10,000, which is GBP 5,000 more than under the previous regime of criminal sanctions, although reductions in the fine are possible for a first

breach in certain specified circumstances. Given that these are administrative rather than criminal penalties, the court will only become involved if the employer contests the sanction and any legal dispute will be assessed on the balance of probabilities rather than on the basis of proof beyond reasonable doubt which is the criminal law standard of proof.

## TRANSPOSITION OF DIRECTIVES CONCERNING THIRD-COUNTRY NATIONALS

The Directives concerning third-country nationals (i.e. on family reunification, long-term residents, students, researchers, victims of trafficking)[53] were transposed in a number of Member States in 2007. Indeed, in *Portugal*, the new Immigration Act transposed all of these measures. In *Italy*, amendments were introduced to the consolidated law on immigration during 2007 as a result of the implementation of the Directives on family reunification, long-term residents and students. The provision in the law regarding the issue of a residence permit for humanitarian reasons aimed essentially at protecting victims of trafficking was also amended. The transposition of the Directive on researchers in *Hungary* resulted in the establishment of a register of research organizations interested in third-country national researchers, which contained 38 organizations as at the end of 2007 (this number grew to 72 as of May 2008). However, not a single third-country national entered into a hosting agreement with a registered research organization in Hungary during 2007. In the *Netherland*s, the new procedure for the admission of third-country national researchers came into force in October 2007. Researchers and their families are exempt from work permit obligations as well as from the long stay visa requirement when in possession of a residence permit in another Member State. They are also not subject to the integration obligations discussed earlier.

## MISCELLANEOUS ISSUES

In *Bulgaria*, a fundamental conceptual change in the law with important repercussions on free movement of workers is the explicit provision in the foreigners' legislation that EU citizens, EEA nationals and Swiss nationals are no longer to be considered as "foreigners", which means that a number of limitations imposed on foreigners, including those in the human rights field, are not applicable to EU citizens, EEA nationals and Swiss nationals. The latter can also enjoy stronger substantive and procedural guarantees against expulsion (see Chapter I).

In *Belgium*, the high number of French students enrolling in studies (30-50% in some disciplines, particularly medical studies) in the French-speaking part of Belgium is giving rise to concerns especially as France is applying a *numerus clausus* in these studies whereas Belgium is not. However, a decree was adopted in Belgium in 2006 to ensure that only 30 per cent of students who have not been residing in the country for the previous three years could access such studies. This decree has been challenged before the Constitutional Court, which in February 2008 requested a preliminary ruling from the Court of Justice.

The relationship between migration and security is also of interest in some Member States. In *Bulgaria*, the State Agency for National Security (SANS) was established in December 2007 and its functions include the exercise of control over the stay of migrants in the country, which appear to include EU citizens and their family members.

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[53] See, respectively, Directives 2003/86/EC, 2003/109/EC, 2004/114/EC, 2006/71/EC, 2004/81/EC.

In *Greece*, a Migration Observatory has been established by the Labour Institute of the Confederation of Greek Workers in the framework of the EQUAL programme. Its aim is to provide support to migrants and refugees in Greece and to observe the migration phenomenon.

In *Germany*, the amended Nationality Act abolishes the general requirement to give up a previous nationality when acquiring German nationality with the general purpose of avoiding dual nationality. This also means that it will be easier for EU citizens to obtain German nationality even though they already had privileged status in maintaining a previous nationality provided there was reciprocity. However, the German courts experienced considerable difficulties in interpreting foreign nationality law and practice.

In *Hungary*, a number of potential obstacles to the free movement of EU citizens have been identified in the complaints submitted to the national Ombudsman. These include complaints concerning access to health care and social allowances for a Hungarian child born outside of Hungary; the inability of an Italian national resident in the country to open a bank account and obtain a mobile telephone contract without a Hungarian ID card; and unreasonable delays in the procedures for registering a vehicle in Hungary from another EU Member State.

The report of *Spain* lists a number of national measures, mainly in the employment and social fields, which were adopted in 2007 and which, according to the rapporteur, have repercussions on the free movement of workers, although no elaboration is provided. The report on *Sweden* refers to the fact that there were seven different pieces of legislation on discrimination in Swedish law in 2007 and to an ongoing debate on proposals to adopt a single new act on discrimination (finally presented by the Government to Parliament in January 2008). Such an Act would be applicable not only to the employment situation, in both the private and public sphere, but also membership in trade unions and other associations, access to education, services and accommodation, social security, including unemployment benefits, healthcare services, study loans, etc.

The lifting of internal border controls on 21 December 2007 is also identified in the reports of a number of new Member States as a significant development (e.g. *Malta*) with clear repercussions on the free movement of workers.

# Chapter VIII
# EU Enlargement

2007 was an important year for the EU from the perspective of enlargement. The year began with the accession of Bulgaria and Romania to the EU. The accession agreements with these two new Member States permit the 25 other Member States to apply transitional arrangements as regards free movement of workers which are identical in content to those applicable to the 2004 Member States (excluding Cyprus and Malta whose nationals have free movement rights as workers from accession. In this chapter we will refer to the 2004 Member States in respect of which transitional arrangements are permitted as the EU-8 2004 Member States) but in respect of which the timeline is of course different starting from 2007. So the possibility of temporarily limiting access to the labour market for nationals of these two states commenced on 1 January 2007; those Member States which apply a restriction must notify the Commission if they intend to continue to apply the arrangement by 31 December 2008. By 31 December 2011 those Member States which are still applying transitional arrangements as regards workers from the two countries must either lift them or justify why their continued application is necessary in accordance with the provisions of the accession treaty.

Regarding the EU-8 2004 Member States, 2007 was an important year in relation to free movement of workers not least because a number of pre 2004 Member States ended their use of the transitional arrangements permitting access to their labour markets. The number of Member States still applying transitional restrictions has diminished. The next deadline for a consideration of the remaining transitional arrangements which a few Member States are still applying will be on 30 April 2009 when the full first five year period will finish. At this time, the possibility of triggering the further two year period of transitional arrangements (until 30 April 2011) becomes an important question. The scope for use of the further two year period is much more limited than in respect of the three year period which preceded it. In the 2008 report we will focus on the movement towards this final point.

In 2007, two key issues emerge, on the one hand an increasing number of Member States ended their use of the transitional arrangements altogether thus bringing a close to an increasingly complex set of calculations on the temporal acquisition of rights by individuals in apparently similar situations. Secondly, a number of questions began to emerge regarding the proper application of the right of workers from the 2004 Member States to full free movement of worker rights after 12 months employment in any Member State still availing itself of the transitional arrangements.

This section will be divided into three parts:

- Changes to the regime regarding workers from 2004 Member States;
- Problems encountered in relation to transitional arrangements;
- Treatment of workers from the 2007 Member States.

## CHANGES TO THE REGIME REGARDING WORKERS FROM THE A8 2004 MEMBER STATES

*Austria*: this state continues to apply to the full extent the transitional arrangements for workers from the 2004 states. No substantial changes were made to the law. In the health sector both EU-8 2004 Member State nationals and 2007 Member State nationals are given a

work permit if their income exceeds 1,125 € per month. Agricultural workers from countries in both enlargements may work in Austria for nine months per year.

*Belgium*: continues to apply the transitional arrangements for EU-8 2004 Member State workers. There has been no change in the law.

*Bulgaria*: no transitional arrangements on a reciprocal basis as permitted in the accession treaty have been adopted.

*Cyprus*: never made use of the transitional arrangements.

*Czech Republic*: no transitional arrangements were applied.

*Denmark*: political agreement was reached to phase out the use of the transitional arrangements for EU-8 2004 Member State workers – the legislation entered into force in May 2008. However, these arrangements do not remove completely the restrictions while they do open up the majority of the labour market to EU-8 workers (ie any job covered by a collective agreement and some others).

*Estonia*: does not apply any transitional arrangements.

*Finland*: no transitional arrangements have been applied since 2006.

*France*: although transitional arrangements were applied, there has been a gradual relaxation of the regime to permit more and more sectors to be included in free movement of workers. In July 2008, on taking up the Presidency of the EU, France ended the transitional arrangements for EU-8 2004 Member State workers.

*Germany*: transitional arrangements have been extended until 2009 (also for services in the sectors listed in the accession agreements). The seasonal worker arrangements have been extended as well. New provisions to facilitate skilled workers from the EU-8 2004 Member States have been introduced and the labour market test for the issue of work permits dropped. Students who finish their studies in Germany are able to obtain a three year work permit.

*Greece*: transitional arrangements were abandoned in 2006.

*Hungary*: while no transitional arrangements regarding other 2004 Member State nationals have been applied, there is a duty on employers to register their employment. 93% of these workers come from Slovakia. As regards the pre 2004 Member State workers, Hungary continued to apply the principle of reciprocity to workers from Austria, Germany, (Liechtenstein and Switzerland) who must obtain work permits. Workers from Denmark, Norway, Belgium, France and Luxembourg must also obtain work permits but without a labour market test during the reporting period.

*Ireland*: notwithstanding political pressure to introduce restrictions in 2007, the authorities have not done so.

*Italy*: the transitional arrangements were lifted in 2006.

*Latvia*: no transitional arrangements or reciprocal arrangements have been adopted.

*Lithuania*: no transitional arrangements or reciprocal arrangements have been adopted.

*Luxembourg*: lifted the transitional arrangements in September 2007 for some sectors and completely from 1 November.

*Malta*: For a period of seven years after membership, Malta will be able to apply safeguards on the right of EU nationals to work in Malta. The seven-year safeguard will apply until 2011 and essentially allows Malta to withhold the issue of work permits in the event of a potential disruption to its labour market which is of an urgent and exceptional nature. Restrictions can be imposed if an inflow of EU workers may put a strain on the local labour market, even if in certain sectors only. In such cases, it is up to Malta to determine when

such cases arise and when restrictions may be imposed. So far this arrangement has not been invoked

*Netherlands*: in this reporting period the transitional arrangements were lifted. The arguments in favour of this were related to labour market shortages.

*Poland*: no transitional arrangements or reciprocal arrangements have been adopted.

*Portugal*: transitional arrangements were lifted in 2006.

*Romania*: transitional arrangements applied to workers from other states on a reciprocal basis until March 2007 when they were lifted.

*Slovenia*: reciprocal arrangements were lifted in 2006.

*Slovakia*: no transitional arrangements have been adopted.

*Spain*: transitional arrangements were lifted in 2006.

*Sweden*: no transitional arrangements were adopted.

*UK*: two small legislative changes were applied regarding diplomats and family members. Transitional arrangements were only applied in so far as EU-8 2004 Member State nationals must register when they take employment in the UK. If they do not they are not lawfully resident and according to the UK courts unable to enjoy free movement rights such as equal treatment, social benefits and the lifting of the 12 months restriction.

## ISSUES AND PROBLEMS ENCOUNTERED IN RELATION TO TRANSITIONAL ARRANGEMENTS

*Austria*: no specific problems have surfaced regarding the treatment of workers from the EU-8 2004 Member States. However, work which nationals of the EU-8 2004 and 2007 Member States undertake in the context of a limited partnership of which the national is a general partner is classified as self-employment.

*Belgium*: no specific problems or issues were signaled in the report.

*Bulgaria*: no transitional arrangements on a reciprocal basis as permitted in the accession treaty have been adopted.

*Cyprus*: as this country did not use the transitional arrangements there are no issues.

*Czech Republic*: no issues arise.

*Denmark*: concern about protection of Danish social welfare has been central to decisions on access to the labour market for EU-8 2004 Member State nationals which led to the introduction of residence requirements to some benefits. Under the terms of the agreement to lift the transitional arrangements, all workers covered by collective agreements and some other fields enjoy free movement rights. There is a power to the Minister to extend the regime to other workers.

*Estonia*: does not apply any transitional arrangements.

*Finland*: no transitional arrangements have been applied since 2006. The wage and tax treatment of posted workers has been problematic – national law now applies on the same basis as to Finish temporary agency workers. The supervision of posted workers continues to be problematic from the perspective of health and safety – according to inspections, between 20 and 30% of posted workers are not receiving minimum wages or there are incomplete health and safety arrangements.

*France*: problems regarding the lifting of restrictions by sector appeared in 2007.

*Germany*: the refusal of social benefits resulting in expulsion action to an EU-8 2004 Member State worker has been considered and rejected by the courts on grounds of automaticity contrary to EU law.

*Greece*: a number of complaints were brought to the Ombudsman regarding the treatment of EU-8 2004 Member State nationals.

*Hungary*: there are no reported problems regarding the application of the transitional arrangements.

*Ireland*: there have been press reports about exploitation in the labour market of EU-8 2004 Member State nationals.

*Italy*: no problems have been reported.

*Latvia*: no problems were reported.

*Lithuania*: no problems were reported.

*Luxembourg*: as a result of discussions in parliament the transitional arrangements were lifted. A court in Luxembourg considered the arrangements and upheld national law.

*Malta*: the work permit procedures applicable to all EU nationals have been onerous but in the reporting period there were improvements particularly in the length of time it takes to process an application.

*Netherlands*: there have been press reports about labour exploitation in wages and working conditions, sub-standard housing and claims of unjustified use of social security. Integration has been an issue in so far as EU nationals cannot be required to follow integration programmes as foreigners can be. There has been some judicial activity in particular regarding fines on employers in respect of minimum wages.

*Poland*: no problems were reported.

*Portugal*: no problems were reported.

*Romania*: no problems were reported.

*Slovenia*: no problems were reported.

*Slovakia*: no problems were reported.

*Spain*: the High Court held that EU nationals cannot be tried for the criminal offence of clandestine immigration. This decision also applies to 2007 Member State nationals.

*Sweden*: the main issues which have arisen are in respect of posted workers and the provision of services. This has been particularly politically problematic in Sweden not least because of the decision of the European Court of Justice in *Laval* in 2007.

*UK*: a series of problems emerged in 2004, relating to family members' access to employment, non EU national family members' access at all to the territory, the 12 month exemption: unless the individual is registered and notifies the registration scheme of any change in employment he or she does not accumulate time towards the 12 month exemption according to national tribunals.

## TREATMENT OF WORKERS FROM THE 2007 MEMBER STATES

*Austria*: applies the transitional arrangements available under the accession agreement to restrict access to the labour market. However, the exceptions which have been made for EU-8 2004 Member State nationals are also being applied to 2007 Member State nationals.

*Belgium*: has used the transitional arrangements to exclude 2007 Member State nationals from the labour market. Provision has been made to protect the position of all 2007 Member State nationals who were lawfully working in Belgium on the date of accession and in particular those who had completed 12 months employment. There have been a number of cases of 2007 Member State nationals seeking social benefits during a short period of residence. These applications have been refused and the individuals treated on the basis that their stay in Belgium is irregular.

*Bulgaria:* no transitional arrangements apply to Romanians.

*Cyprus:* no transitional arrangements have been applied to 2007 Member State nationals.

*Czech Republic*: no transitional arrangements were applied to nationals of the 2007 Member States. A change was made to the law to permit the Republic, in light of further enlargements to apply transitional restrictions only on a reciprocal basis. The numbers of Bulgarians and Romanians working in the Republic tripled from 2006 to the end of 2007.

*Denmark*: the position of 2007 Member State nationals has been assimilated to that of EU-8 2004 Member State nationals. So effectively only in respect of jobs not covered by collective agreements or specified in the legislation are closed to them.

*Estonia*: does not apply any transitional arrangements. Indeed, it is seeking workers.

*Finland*: no transitional arrangements have been applied to the 2007 Member State nationals.

*France*: transitional arrangements have been applied which mirror the restrictions on EU-8 2004 Member State workers – access to some sectors but not others. But the key problems relate to expulsion in particular of Romanian nationals and the extent to which these are consistent with EU treaty obligations.

*Germany*: 2007 Member State nationals have been subsumed into the regime application to the EU-8 2004 Member State nationals by and large.

*Greece*: in applying the transitional arrangements regarding 2007 Member State workers.

*Hungary*: transitional arrangements are applied but there is a partial lifting of restrictions of 219 job categories which are subject to simplified and accelerated work permit processes.

*Ireland*: transitional arrangements have been introduced for 2007 Member State nationals. There have been questions about the dividing line between self employment to which 2007 Member States nationals are entitled and work which is subject to limitations. There have also been very high profile expulsions of Romanian nationals from Ireland in 2007.

*Italy*: transitional arrangements have been introduced. Italy has withdrawn its alerts in the SIS against 2007 Member State nationals except where based on an expulsion issued by a judge on grounds of public policy. There has been substantial case law on Romanian nationals, in particular, regarding the legality of the application to EU nationals of criminal laws relating to foreigners.

*Latvia*: no transitional arrangements have been adopted in respect of the 2007 Member State nationals.

*Lithuania*: no transitional arrangements have been adopted in respect of the 2007 Member State nationals.

*Luxembourg*: there has been a lack of clarity on the application of transitional arrangements for Bulgaria and Romania. Indeed, it was not certain whether the lifting of restrictions on the EU-8 2004 Member States also applied to these two. It appears, however, from further clarification from the authorities that transitional arrangements still apply to them.

*Malta*: transitional arrangements are being applied in respect of the 2007 Member State nationals.

*Netherlands*: transitional arrangements have been applied to the 2007 Member State nationals. The argument used was the difference in GDP between the Netherlands and the 2007 Member States.

*Poland*: no transitional arrangements have been adopted in respect of 2007 Member State workers.

*Portugal*: transitional arrangements apply to the 2007 Member State nationals. Romania and Bulgaria have been removed from the list of 'target' countries for the purpose of identifying irregularly present persons.

*Romania*: no transitional arrangements were applied to Bulgarian workers.

*Slovenia*: no transitional arrangements were applied to 2007 Member State nationals.

*Slovakia*: no transitional arrangements were applied to 2007 Member State nationals.

*Spain*: transitional arrangements are being applied as regards Bulgarian and Romanian workers. There is substantial jurisprudence on the rights of these nationals primarily around expulsion decisions where the courts seem by and large to find the administration not to be correctly applying EU law.

*Sweden*: no transitional arrangements have been adopted in respect of 2007 Member State nationals.

*UK*: transitional arrangements have been adopted in respect of 2007 Member State workers. There has been a drop in the number of 2007 Member State workers coming to the UK since accession.

# Chapter IX
# Statistics

The availability, the quality and the level of detail of the statistical data varies considerably between Member States. Several national reports provide more detailed statistical data than in previous years. The data in this chapter should be considered as additional information against the background of general information on the total population and the total non-national population in all Member States, provided by Eurostat in its Yearbook and other publications such as Statistics in Focus no. 8/2006. Hereunder we focus on the main trends, both new developments and trends that were observed in previous years.

The absolute **number of residents who are nationals of other EU Member States** and the relative share of those EU nationals in the total non-national population of Member States varies highly between Member States. The absolute number varies between 2,615 registered EU nationals in *Latvia* and 3,618 registered EU workers in *Bulgaria* and almost 2,2 million nationals of other Member States living in *Germany* and 1,5 million registered EEA nationals in *Spain*. In some states the total number of EU nationals almost doubled with the accession of *Bulgaria* and *Romania*. In *Italy* nationals of *Romania* make up for more than half of the 606,000 EU nationals and in *Spain* nationals of *Bulgaria* (127,000) and of *Romania* (604,000) together are almost half of the registered EEA nationals. Romanian nationals in the first years after accession made up a considerable share of the EU nationals living in the *Czech Republic, Germany, Greece, Hungary, Malta, Portugal, Slovakia, Sweden* and to a smaller extent in *Austria, Bulgaria, Netherlands* and the *UK*. Nationals of *Bulgaria* are present, in far smaller numbers, predominantly in the *Czech Republic, Greece, Italy, Latvia, Poland, Slovenia* and, as mentioned before, in *Spain*.

In three Member States, *Belgium, Luxembourg* and *Ireland,* EU nationals are the large majority of the foreign population. In most Member States EU nationals count for between one fifth and one third of the non-national population: In a third group (e.g. the *Baltic States, Greece, Poland and Slovenia*) EU nationals make up only a tiny minority of the total non-national population.

The traditional pattern that in most Member States the majority of resident EU nationals originates from the neighbouring Member States, persisted in 2007. But migrants from Poland and the UK are no longer the only exception to this rule. We have seen above that large numbers of nationals of *Romania* are living in *Germany, Portugal* and *Spain*. 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 *Austria, Cyprus, Greece, Ireland, Italy, Netherlands* and the *UK*. *British* nationals are the largest EU immigrant groups not only in *Ireland*, but also in *Portugal* and *Malta*; they are the third largest group in *Finland*.

The Italian report presents information on the duration of the residence of the nationals of other Member States in *Italy*: almost half of the EU-14 nationals and 20% of the EU-12 nationals have at least eight years of registered residence in Italy; 137,000 EU-12 nationals resident in 2007 received their first residence permit in 2002 the year of the last big amnesty in Italy. The report also presents information on the 1,5 million Italian nationals living in other Member States, primarily in *Germany, France, Belgium* and the *UK*.

The data on **immigration and emigration** in the national reports indicate that in most Member States the immigration of EU nationals increased in the year before (2006) or after the accession of Bulgaria and Romania (2007). This increase is most visible in *Cyprus,*

*Finland, Ireland, Netherlands*, Sp*ain* and the *UK*. In *Ireland* in 2007 the number of immigrants from the EU-14 declined, but the number of immigrants from the EU-12 increased, predominantly (60%) from *Poland*. In the *Netherlands* the immigration from the EU-14 is almost equal to the emigration to those Member States, but the immigration from *Poland* and *Romania* increased considerably in 2007. In the *Czech Republic* the number of EU nationals resident in the country doubled (from 74,000 to 145,000) between 2004 and 2007, mainly due to immigration. In *Finland* the registered immigration in 2006 was almost double the number in the previous year, immigrants were coming mainly from *Estonia, Sweden, the UK* and *Germany*. In *Germany* in 2006 there was a net emigration to the EU-14 (-7,500) and a net immigration from the EU-12 (+54,200). In *Lithuania* the immigration from other EU Member States was only marginally higher than in the previous year: 6,456 in 2006 and 5,880 in 2005; but 11,422 Lithuanian nationals were recorded as emigrants (10% more than in 2006), whilst only 6,141 were returning to their country. A total of 108 EU nationals were refused entry in Lithuania, mostly Latvia nationals without travel documents; 18 Latvians were refused entry on the basis of a registration in SIS or on other public order grounds. In the *UK* we see a clear immigration surplus from other Member States, but a gradual slowdown of the number of immigrant workers from Poland.

Some Member States have a clear emigration-surplus: the Baltic States, Poland, Romania and the Netherlands. In the first five states emigration to EU-15 Member States far outnumbers the limited immigration from those states (both returning nationals and nationals of the EU-15). The reports on *Estonia, Latvia, Lithuania* and *Poland* mention an increasing replacement migration from third countries, either states just across EU external borders (Russia, Ukraine, Belarus) or from more distant countries such as China and Turkey. 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.

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. In *Luxembourg* cross-border workers from *France, Belgium* and *Germany* account for almost one third of the total labour force of the country, whilst non-national (75% nationals of other EU Member States) and Luxembourg nationals each make up approximately one third of the labour force. The importance of cross-border employment across internal EU borders is noted in other reports as well: e.g. across the border between *Germany* and *Poland* (see the German report), between *Hungary* and *Slovakia* and between *Hungary* and *Romania* (see the Hungarian report).

Data on **residence documents** are available for less than half of the Member States. This is mainly due to implementation of Directive 2004/38. In some Member States EU nationals no longer need to apply for a residence document (*France* and *Germany*). In other Member States there is no systematic collection or publication of data on the registration of residents of other Member States. In several Member States data on residence or work permits are only available concerning nationals of EU-8 and EU-2 Member States that are still subject to transitional measures.

In *Denmark* the number of EU residence certificates issued in 2007 was 14,600, i.e. 10% higher than the previous year; 6,000 of those registered were for students, 4,500 workers or self-employed persons, 3,000 family members and 1,000 persons with sufficient

means. A similar pattern is visible in *Sweden* where a total of 17,655 registered EU immigrants in 2007, was made up of 47% workers, 3% self-employed and service-providers, 28% family members and 16% students. Students made up 28% of the registered EU-14 nationals in Sweden. The number of residence documents issued to EEA nationals in *Hungary* in 2007 was considerably higher than in the previous year: 38.500 EEA residence permits and 22,400 EEA registration certificates. Not a single EEA registration was refused and only eight applications for registration of a permanent residence right were turned down.

At the beginning of 2007 in *Italy* a total of 538,000 EU nationals had been issued with valid residence documents. More than half of those residence documents (55%) were issued to workers, 5% to self-employed persons, 27% to family members, 2% to jobseekers and 1% both to students or for religious purposes. Apparently, the share of students in Italy is far smaller than in Denmark and Sweden, or EU students register far more often in those two countries than in Italy. In *Lithuania* 1,141 residence permits were issued to EU nationals (none refused): 43% to workers or self-employed persons, 34% to students or trainees, 15% to family members and 8% to persons with sufficient means; 228 permanent residence permits were issued to EU nationals. In 2007 in *Luxembourg* 27,000 residence permits were issued or renewed for EU nationals as opposed to a mere 8,100 for nationals of third countries. The report on *Romania* mentions 9,100 valid EU residence permits and 2,500 valid EU registration certificates at the end of 2007. The majority of those documents were issued for persons with "commercial activities" or to family members of Romanian nationals. Italian nationals were the largest group of EU nationals in Romania. The report on *Slovakia* mentions 60 EU nationals, mainly but not exclusively from the EU-12 countries, having a "tolerated" residence status. That status is not provided for in Directive 2004/38.

*France* in 2006 issued residence documents to 5,800 EU-8 nationals: 2,500 to workers, 2,100 to family members and 730 to students. In the *UK* almost 28,000 applications for registration certificates were filed by nationals of Bulgaria and Romania. The refusal rate was 7% in the first quarter of 2007 but had more than doubled in the last quarter. The largest proportion of applications is for registration certificates confirming that the applicant is exercising a Treaty right as a self-employed person.

Where information on the number of EU residence documents issued to **third-country national family members** is available in the national reports, the numbers are surprisingly low; 5 in *Finland*, 152 in *Hungary*, 18 in *Latvia*, 37 in *Lithuania*. *France* is the exception on this issue, having issued approximately 1,450 residence document for third-country nationals each year in 2004-2006. Possibly, the number of those family members is so small indeed in most Member State. Lack of awareness of their special status could be an alternative explanation for the small numbers.

The data on **work permits** relate mainly to EU-8 workers in EU-15 Member States or to nationals of those Member States employed in the EU-10. In *France* in 2006/2007 3,200 work permits were issued to EU-8 nationals and 1,800 to EU-2 nationals. In *Germany* 235,000 exceptional work permits were issued for seasonal work in 2006, 94% for Polish nationals; 45% of the 20,000 temporary work permits were issued to Polish workers and 13% to Romanian workers. Of the regular work permits 3,800 were granted to Romanian workers and 1,150 to Bulgarian workers. The German report contains detailed statistical data on the practice of several schemes for temporary and cross-border employment applied by the German government, partly on the basis of bilateral agreements with other EU member states or with third countries. *Greece* granted work permits for 10,300 EU-25 nationals and

7,300 to nationals of Bulgaria and Romania. Bulgarian workers received the majority of those permits. *Hungary* issued 1,334 work permits to EU-15 nationals under the transitional measures and 17,000 to Romanian nationals having full access to the Hungarian labour market. In *Ireland* between the May 2004 and February 2008 a total of 447,400 social security numbers were issued to EU-12 nationals, 60% to nationals of Poland and 15% to nationals of Lithuania. Most of those workers came for temporary employment and stay in Ireland. Only half of the workers who arrived in 2004 were also employed in Ireland in 2006. Luxembourg granted 428 applications and denied 75 applications for work permits for EU-8 workers in 2006.

In the *Netherlands* 32,000 work permits were issued to EU-8 nationals in the first four months of 2007, before the transitional measures for those workers were abolished in May 2007. In the whole year 2007 only 2,700 work permits were granted for workers from Romania and 1,000 for workers from Bulgaria. The numbers of permits granted for workers from those two countries started to increase already before the accession of the two countries. In *Poland* 810 work permits were issued to EU-15 nationals from those Member States still applying a transitional regime to Polish workers. In *Slovenia* 3,400 EU-workers were registered, mostly Slovak nationals employed as posted workers.

In the *UK* in 2006 a total of 234,300 registrations of EU-8 workers were recorded, 10% more than in the previous year. The number of employed workers is considerably lower, since each time an EU-8 worker changes his job he has to register again. 66% of those registered were Polish nationals, 10% Lithuanian nationals. In 2007 5,080 applications by EU-2 nationals for an accession worker cards were filed, the majority by workers from Romania; 3,715 applications were granted.

As to the **branches of employment and the level of the jobs** performed, it appears from the national reports that the same four general patterns mentioned in our previous report can be observed in 2007 as well. 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. In *Spain* 60% of the EU workers are employed in service related jobs, 24% in construction, 9% in industry and 8% in agriculture. 50% of the 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-8 and EU-2 workers employed in the EU-15 Member States. The reports on *Denmark, Ireland, Lithuania, Netherlands* and the *UK* mention clear indications for this pattern. In *Denmark* most of the EU-8 workers are employed in agriculture, gardening, forestry and construction. More than two third of the Lithuanians registered as working elsewhere in the EU were working in the packing industry or agriculture. In the *Netherlands* more than 90% of the EU-8 workers are employed in jobs shorter than one year, mostly in seasonal jobs in horticulture, construction, manufacturing and the food industry. Of the Romanian workers 80% are employed in agriculture or horticulture,10% in inland shipping and only 3% in academic, IT or consultancy jobs. In the *UK* only 60% of the EU-8 workers declared at the time of registration that they expected their stay to last for more than three months. They are mostly employed in seasonal jobs. The development noted already in 2006 that the share of EU-8 workers registered as working in ‘administration, business and management’ increases and has overtaken the category ‘hospitality and catering’, formerly the dominant category, continued in 2007.

The third pattern, we observed, 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, Hungary,* and *Poland.* In *Slovenia* the workers from Bulgaria, Romania and Slovakia are employed mainly in construction and manufacturing. The Italian nationals in Slovenia are working mostly in business and trade.

The fourth pattern is that EU-8 workers employed in other EU-8 Member States often are employed on short term contracts (Polish workers in *Slovakia*), in cross border employment (Slovak workers in *Hungary*) or as posted workers (Slovak nationals in *Slovenia*). In the *Czech Republic* almost half of the 100,000 Slovak nationals is employed in manufacturing jobs. In *Hungary* the EU-15 nationals work mainly in finance and processing industry, whilst nationals of Romania are employed predominantly in building and Slovak nationals in industry and construction; only 10% of the Slovak workers is employed in white collar jobs.

The large majority of EU migrants is of working **age** (20-64 years). In Spain more than three quarter of the EEA nationals is of working age. Young children are underrepresented among EU migrants as compared with their share among third-country nationals. In Spain 7% of EU nationals and 16% of third-country nationals is under 15 years of age. In Austria 11% of the EU nationals and 18% of the third-country nationals is under 15 years of age. The share of young EU nationals is also small in comparison with the share of minors in the total population of the host country: in Malta only 16 % is under 25 years of age and in Slovenia only 17% of the EU nationals in that age group.

The gender composition of EU migrants varies considerably between the Member States and between the migrants from different Member States in the same host Member State. We have summarized the information from the national reports in the table below.

From this table it appears that women are underrepresented among Community workers (40% in *Greece* and 43% among EU-8 workers in the *UK*). Free movement to the EU-8 Member States is predominantly a male business for the time being: only 17% of the EU workers in *Slovenia*, 20% in *Latvia* and 30% in the *Czech Republic* are female. .

In the EU-15 states mentioned above the share of resident female EU nationals resident in the host country is between 45% (*Ireland* and *Spain*) and almost 50% (*Austria, Germany, Portugal* and *the Netherlands*). Italy is an exception with 58% female EU nationals.

Clearly, women are overrepresented among migrants from the EU-8 and EU-2 Member States in the EU-15: see Austria, Germany and Italy. Female Romanian migrants by far outnumber their male compatriots in Austria and Italy. According to the Dutch report in the Netherlands among the residents from Greece, Italy, Portugal, Ireland and the UK male migrants outnumber their female compatriots, but among residents from the Scandinavian countries, Belgium and the EU-12 it is the other way round: female migrants outnumber the male ones. Apparently, gender plays an important role in determining migration even under conditions of free movement.

| Host Member State | Percentage of female EU nationals or workers | |
|---|---|---|
| Austria | 49% of | EU-14 nationals |
| | 55% | EU-10 nationals |
| | 41% | Italian nationals |
| | 62% | Czech nationals |
| Czech Republic | 30% | registered workers |
| Germany | 48% | EU-26 nationals |
| | 40% | EU-8 nationals with exceptional work permits |
| | 66% | Czech nationals |
| | 60% | Romanian nationals |
| | 57% | Bulgarian nationals |
| Greece | 40% | EU-26 workers |
| Ireland | 45% | resident EU-26 nationals |
| Italy | 58% | registered EU-26 nationals |
| | 72% | Romanian nationals |
| Latvia | 20% | EU-26 workers |
| Netherlands | 50% | resident EU-26 nationals |
| Portugal | 47% | registered EU-26 nationals |
| Romania | 24% | EU-26 nationals with valid residence permit |
| Slovenia | 17% | EU-26 nationals with valid work permit |
| Spain | 45% | registered EU-26 nationals |
| UK | 43% | EU-8 workers |

Data on **naturalisation** are mentioned explicitly in four national reports only. The trends mentioned in our previous report are visible in 2007 as well. Firstly, EU nationals relatively seldom and only after long residence in the host Member State apply for naturalisation. The absolute numbers and naturalisation ratios are low. Nationals from the EU-8 in some host Member States are an exception to this trend. In *Finland* in 2006 a total of 476 EU nationals acquired Finish nationality by naturalisation, 70% were citizens of Estonia or Sweden. In *Lithuania* the total number of persons naturalised in 2007 was 370. Only two of them were EU nationals both from Poland. Most of the persons naturalised were either stateless (184) or had Russian nationality (113).

In the *Netherlands* in 2006 less than 1% of the resident EU nationals acquired Dutch nationality by naturalisation: 2,000 naturalisations in a total resident EU population of 245,000. The naturalisation ratio among resident third-country nationals was four times higher. The largest absolute numbers of naturalisations were recorded among nationals from Germany, UK, Poland and Romania. The total number of residents of the first two Member States is far greater than from the latter two. The absolute number of naturalisation of British and Romania nationals was almost equal, whilst the total number of British nationals with residence in the Netherlands is 14x times higher than the number of Romanian residents. This is a clear indication of the second trend: a great difference in the propensity to apply for naturalisation, depending on the Member State of origin of the migrants.

The third observation is that the naturalisation policies vary considerably between Member States. The absolute numbers of naturalisation in e.g. *Finland* or *Lithuania* are rather low, whilst the clear reduction in the number of EU nationals resident in *Belgium* in 2007 in comparison with the previous year (40,000 less), is probably partly due to a liberal naturalisation policy in Belgium

The fourth trend is that among the few Member States with an official policy opposing dual nationality, some in practice are more liberal in the actual application of their national legislation or they apply more liberal rules on the basis of reciprocity to the nationals of some Member States or, generally, to the nationals of all other Member States. The *German*

report mentions that in 2006 almost 100% of the nationals of Greece, Italy and Poland were permitted to keep their first nationality upon acquisition of German nationality, whilst only 3% of the Romanian nationals were allowed to keep their first nationality. From the report on the *Netherlands* is appears that the number of nationals from Belgium, Germany, Great-Britain and Italy resident in the Netherlands also having Dutch nationality (dual nationals) equals the number of nationals of those four Member States resident in the Netherlands having one nationality only. Hence, the number of persons originating from those four Member States is twice as high as would appear from the population data based on non-Dutch nationality only.

# Chapter X
# Miscellaneous

Under this heading, many Member States reported studies, seminars, legal literature, legislation links and other links to important sources of information. Not everything mentioned in the reports will be referred to here. Some reporters took the opportunity to highlight specific issues deemed important.

For instance, in *Cyprus*, the existence of a cease fire line, which cuts across a de facto divided country is reported to have repercussions on the freedom of movement of workers. A "Green Line regulation," regulates problems deriving from "the de facto partition of Cyprus." According to the Cyprian report, authorities are allowed some discretionary power as to whether to allow to EU citizens living in the northern territories to exercise their rights under the directive.

In *Bulgaria*, literature and reports mainly concentrated on *emigration* tendencies in Bulgaria and the access to the labour market of the EU Member States and on harmonization of Bulgarian legislation in the field of recognition of diplomas and professional qualifications.

In *Hungary*, emigration also seems to attract attention: the Labour Public Foundation (OFA) launched a research on Hungarian labour migration. Furthermore a project aims to contribute to combating irregular migration and irregular employment of migrants in Belgium, Finland, Germany, Ireland, Spain, Hungary, Poland and Romania. The Hungarian Academy of Sciences launched a comprehensive assessment of enlargement and European integration how its impacts appear on the Hungarian society, economy and policy.

In the *Czech Republic*, third country nationals are the issue which is publicly discussed and most of the academic and political energy focuses on it. Two conferences are mentioned: a conference on "European Justice on the Constitutional Crossroad", and a conference on "Migration and Development".

*Estonia* and *Malta* pay attention to their nationality legislation and the topic of dual nationality.

*Poland* reports a number of conferences on migration, and free movement of persons, organised by three Universities, the Ministry of Labour and Social Policy, and Association of Offices for Citizen's Advise.

Integration was an issue mentioned by *Germany* and *Greece*. In a representative German survey published in 2008, Turkish, Greek, Italian and Polish nationals as well as nationals from the former Yugoslavia have been interviewed in a large survey in order to identify integration problems. The Greek Ombudsman in February of 2007 organised an International Conference titled "Integration of immigrants and mechanism for intervention and consultation".

In the *UK*, there have been five seminars and workshops dedicated to free movement of persons in EU law in the UK in 2007. The main provider of these training opportunities has been the Immigration Law Practitioners Association. They have been well attended by practitioners in the field and provide an important source of information regarding the current state of the law.

The *Netherlands* reports one course by Leiden Institute of Immigration Law of two days on European Migration Law in The Hague for lawyers, civil servants, judges and other professionals. Furthermore, it is reported that EU students will have to pay tuition fees in the

Netherlands to the educational institute where they follow a course if a pending bill will be adopted by the Dutch parliament. The same will however apply to Dutch students.

In *Belgium*, a colloquium was held on 6 and 7 February 2007 in Leuven relating to the reform of the Alien's Act called "La Belgique en alignement sur le droit communautaire".

In *Ireland*, seminars were organised by the Law Society of Ireland on Employment Rights of Immigrants and Other Issues and on New Rules for the New Irish.

In *Finland*, the Central Organisation of Finnish Trade Unions (SAK) and its partner organisations have in Tallinn a Finnish Working Life Information Point that provides information and advice about working in Finland.

Finally, *Italy* draws attention to the unclear consequences for national law of the fact that providers and recipients of services are not referred to in Directive 2004/38. Italian law does not deal with providers or recipients of services. A Legislative Decree states that, subject to special regulations in line with the EC Treaty and EC laws, Union citizens and their family members staying in Italy for up to three months, are subject to the same obligations as Italian nationals in the exercise of allowed activities. According to the Italian report the scope and the content of the provision do not seem clear. In fact, if Union citizens provide services in Italy, to be subject to Italian law on the same footing as Italian nationals might amount to a breach of Article 49 EC.