EUROPEAN REPORT
on the Free Movement of Workers in Europe in 2012-2013

Rapporteurs: Prof. Kees Groenendijk,
Prof. Elspeth Guild, Dr. Ryszard Cholewinski,
Dr. Helen Oosterom-Staples, Dr. Paul Minderhoud,
Sandra Mantu and Bjarney Fridriksdottir

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(includes Member States' comments in annex)

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EXECUTIVE SUMMARY
FREE MOVEMENT OF WORKERS 2012-2013

2013 is an important year in the history of EU free movement of workers as it marks the end of transitional restrictions on free movement of workers for nationals of Bulgaria and Romania. This has impacts in only nine Member States which are still applying restrictions.[1] Equally, 2013 is an enlargement year with Croatia joining the EU on 1 July. Thirteen Member States are applying transitional restrictions on Croatian workers.[2] Although there are substantial differences in unemployment rates between the Member States as a result of the economic situation, these unemployment rates do not appear to be a determining factor in the application of transitional restrictions on Croatian workers. For instance, Ireland and Portugal where there are relatively high unemployment levels have not applied restrictions.

Although the interior ministries of four Member States (Austria, Germany, the Netherlands and the UK) expressed concern about their social costs in respect of EU workers from other Member States in a letter to the Presidency, none of the ministries followed up these concerns with evidence of a problem, when so requested by the Commission. At the same time a number of Member States (e.g. the Czech Republic and Sweden) have taken steps or are considering steps to improve national legislation implementing Directive 2004/38.

National rules and practice around the issue of residence certificates, residence cards for third country national family members, permanent residence certificates and cards remains less than satisfactory. While the declaratory effect of such documents is increasingly clearly stated in national law (see for instance Finland), what have been particularly simple procedures such as the German automatic issue of documents when an EU citizen registers as a resident have been discontinued. Similarly, a new Spanish requirement that EU citizens register in the Central Register of Foreigners (rather than the register of citizens) in order to be able to access health care and social benefits is indicative of a similar trend towards more paperwork.

Legal remedies and in particular judicial remedies in a number of Member States for EU citizens against whom a host state has taken action are still not fully compliant with the Directive.

The entitlement of EU citizens to equal treatment with nationals of a state appears to be a victim of austerity in a number of Member States and in a variety of ways. Nowhere is this more evident than in the reluctance of the local authorities in a number of Member States to provide equal treatment in access to housing including social housing to EU workers. Similarly, equal access to employment in the public service has not advanced over the years of austerity notwithstanding efforts by the Commission.

The treatment of third country national family members of EU workers also reveals shortcomings in a number of Member States where they are treated as 'ordinary' third country nationals under the immigration laws and rules rather than privileged persons under the Directive and Regulation. Further, there are increasing reports of invasive practices by

1 Austria, Belgium, France, Germany, Luxembourg, Malta, the Netherlands, Spain (Romanians only) and the UK.

2 Austria, Belgium, Cyprus, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Spain, Slovenia and the UK.

Member State authorities to determine the genuineness of marriages often causing distress to families.

EU citizens of Roma ethnicity are still having difficulties in a number of Member States when exercising their free movement rights as workers. Discrimination on the basis of ethnicity seems to exaggerate the negative responses of the authorities of some Member States towards applications for documents and attempts to access equal treatment.

In a number of Member States, Ombudsmen are taking an increasingly active role in assisting EU workers and their families to establish their entitlements to rights. But the increase in the number of references to the CJEU on workers' rights may be both positive and negative - to some extent it indicates an increasing awareness in the judiciaries of the Member States of the availability of assistance with EU cases, but it may also indicate an increase in the number of problems EU workers are encountering.

GENERAL INTRODUCTION

1. POLITICAL AND ECONOMIC DEVELOPMENTS

This report covers the main developments on free movement of workers issues between 1 July 2012 and 1 July 2013. It also includes information on the situation in the new Member State Croatia, which joined the European Union as of 1 July 2013.

Many nationals of the accession Member States have used the freedom of movement they acquired after 2004 or 2007. According to Eurostat, almost four million Polish and Romanian nationals had registered residence in another Member State in 2011. That is about the same number as the total of nationals of Italy, Portugal, the UK and Germany living in other Member States.[1] The latter migration occurred over decades; the first one took place within less than a decade. This has created feelings of loss of control, fears for abuse of the social system (the so-called ‚benefits tourism') and the apparent need for some politicians to make strong statements about nationals from other Member States and the need to be strict and regain control.

In most Member States free movement of Union citizens is perceived as an important asset of the EU and not as a political problem or a major issue for debate in the press or other media. However, in some Member States the political reaction to the economic crisis is explicitly focussed on nationals of some specific other Member States. This is perceived in the Member States of origin too. The treatment of Polish workers in the Netherlands is noted in Poland and the negative remarks of leading British politicians on the alleged abuse of the UK National Health Service by Romanian nationals are reported in the press in Romania.

In April 2013 the Ministers of Interior of four Member States (Austria, Germany, the Netherlands and the UK) in a letter to the Presidency of the Justice and Home Affairs Council confirmed that their countries will always welcome Union citizens who move to another EU country to work or to take up professional training or university studies. But in the same letter they state:

> *„Currently, a number of municipalities, towns and cities in various Member States are under a considerable strain by certain immigrants from other Member States. These immigrants avail themselves of the opportunity that freedom of movement provides, without, however, fulfilling the requirements for exercising this right. This type of migration burdens the host societies with considerable additional costs, in particular caused by the provision of schooling, health care and accommodation. On top of this strain on vital local services, a significant number of new immigrants draw social assistance in the host countries, frequently without a genuine entitlement, burdening the host countries' social welfare systems."*

The Ministers ask for an urgent discussion on the EU rules on access of Union citizens who arrived recently in another Member State to social benefits in that state. They propose a discussion on the interpretation of Directive 2004/38 in order to be able to take effective sanctions against fraud and abuse of the right to free movement, including such sanctions as expulsions and entry bans.[2]

The letter of the Ministers of Interior dealt with issues that in most Member States are in the competence of Ministers of Social Affairs. The qualification 'immigrants' in the letter

1 Statistics in focus no. 31/2012, p. 2.
2 Council document 10313/13.

indicates that the authors do not perceive those persons primarily as Union citizens. Four other Member States with large numbers of resident nationals from other Member States (Belgium, France, Italy and Spain) did not make similar statements. The total number of nationals of other Member States living in the latter four states (5.7 million) exceeds the number of nationals of other Member States living in the four Member States that signed the letter of April 2013 (5.3 million).

The European Commission reacted to the letter of the four Member States in a letter of May 2013 with a summary of the key principles of European free movement law and an offer to assist Member States in the application of current free movement law.[3] In a first reaction to the press the Commission mentioned that none of the four Member States had been able to provide evidence that there is a problem with benefit tourism.[4] At their meeting in June 2013 the JHA Council asked the Commission to report on this issue and postponed the discussion until the end of the year.

The large differences in unemployment rates between Member States, partly due to Member States being unequally effected by the economic crisis, has resulted in increased migration from Member States with high unemployment levels (e.g. Greece, Italy and Spain) to Member States with lower unemployment levels (Germany, Netherlands and the UK). The limited scale of this migration does not produce major effects in reducing the unemployment in the countries of origin. In some Member States the high net emigration and the negative birth rate have resulted in a considerable reduction of the population (e.g. Latvia and Romania). In Poland the government embarked on a programme that actively promotes the return of Polish workers.

2. TRANSPOSITION OF DIRECTIVE 2004/38/EC

In most Member States the national legislation implementing Directive 2004/38/EC[5] did not change between January 2012 and June 2013. Important amendments in the relevant national law were adopted in Germany, Lithuania and Slovakia only. The new rules on the implementation of Directive 2004/38/EC in a separate Act on Free Movement in the Czech Republic have not yet been adopted. In France the national courts have started to apply and interpret the new procedural rules in cases of termination of residence right or removal of EU nationals from the territory adopted in 2011 after the European Commission had openly criticized the incomplete implementation of the Citizens Directive. In Sweden a public investigation on the implementation of Directive 2004/38/EC, started after critical comments from the European Commission, resulted in an official report suggesting several amendments of the Swedish immigration legislation. The proposed changes had not been adopted by July 1, 2013. The Latvian report again mentioned, that implementation of free movement rules in Latvia in a separate Decree, based on the national Immigration Act but having a lower status in the hierarchy of norms, results in rules of the Immigration Act on third-country nationals being applied to Union nationals and their family members in violation of Directive 2004/38/EC. In the Netherlands several rules on free movement of EU citizens in 2012 were transferred from the Aliens Circular to the Aliens Decree making those

3 Council document 10316/13.
4 Migration News Sheet April 2013, p. 3.
5 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 EC* 2004 L 158/77; *OJ EC* 2004, L 229/35 (Corrigendum).

rules legally binding and complying with the case law of the European Court of Justice that directives have to be implemented in binding national law not in ministerial or administrative circulars. However, the redrafted Aliens Circular published in 2013 explicitly states that it still contains rules supplementing or elaborating the rules implementing Directive 2004/38/EC in the Aliens Decree. In Spain amendments in the immigration legislation were introduced with can be considered as limiting the access of national of other Member States to public health services and to social benefits.

3. APPLICATION OF DIRECTIVE 2004/38/EC

Registration of EU citizens appears to cause problems in three respects: firstly, some Member States at registration still require more or other documents than those specified in Directive 2004/38/EC; secondly, in some Member States registration is related to the issue of a national identification number in law and both are in practice a condition for access to a wide range of public services and benefits; thirdly, in the national law or administrative practice of some Member States there is a strict relationship between registration and the residence right, amounting to the denial of that right in case of non-registration.

A recent amendment to the German Free Movement Act has codified that EU citizens staying beyond a period of three months are no longer entitled to a special certificate certifying their status as persons entitled to free movement upon registration with the local authorities.

The Supreme Administrative Court in Finland in 2013 clarified that the registration of a Union citizen's right of residence is an administrative formality and not a constitutive act in the sense that the existence of the right of residence would be dependent on its registration. In Finland the procedures for removal are different dependent on whether the EU citizen is registered or not. If a Union citizen is not registered s/he is entitled to less procedural protection. Moreover, not being registered or having a Finnish personal identification number creates problems for EU citizens seeking employment.

It appears that in Denmark some job centres require EU citizens to be issued with a Danish personal identification number (CPR) and hence recorded in the Civil Registration System before being entitled to courses, internships and employment with salary, a practice neither in accordance with Danish legislation nor with Article 25 of Directive 2004/38/EC. Not having a CPR also creates problems with getting a National Health Card or opening a bank account.

The new Spanish immigration rules require nationals of other Member States to register in the Central Register of Foreigners as a condition to be eligible for health care or social benefits in that Member State.

The Italian report makes reference again of an unexpected side-effect of the transferral of the registration of Union citizens to the local population registers. The national rule that those who do not respond to the 2011 Census are considered to be no longer resident in the municipality, resulted in the removal of Union citizens from those registers, making it more difficult to prove their residence right.

The recognition of the permanent residence right continues to create problems in Ireland and the UK due to the amount of documentation required. Moreover, the processing in Ireland routinely requires up to six months, which is hardly compatible with Article 19(2) of the Citizens Directive providing that the document shall be issued as soon as possible. In Lithu-

ania the State Security Department is informed routinely about the issuance of each residence certificate or a permanent residence certificate to an EU citizen. In Belgium the fact that five years residence is required to obtain the right of permanent residence ex Article 16 of Directive 2004/38/EC was used as an argument to raise the residence requirement for naturalization from three to five years.

As regards available remedies against decisions of immigration authorities on the rights of EU citizens to enter and reside in another Member State, a positive development is that in Austria as of 2014 administrative authorities will be replaced by administrative courts. In the Belgian report the rather limited scope of the judicial review of the specialized court (*Conseil du Contentieux des étrangers*) is mentioned as a serious problem. In Ireland there is no appeal against refusal of EU citizens at the border. In Finland the national law does not provide a specific procedure for lifting an entry ban imposed on a EU citizen. The Maltese rapporteur notes the absence of legal clarity regarding procedural rights regarding the residence rights of EU citizens.

In the UK, EU citizens are no longer entitled to publicly financed legal aid regarding their residence rights except in cases of domestic violence. This change may seriously affect the actual realisation of free movement rights in that Member State.

4. EQUAL TREATMENT

The developments referred to in § 1 above are also reflected in national reports mentioning that as a result of the economic crisis and austerity measures, national authorities are increasingly interested in curbing what they see as the exploitation of EU rules regarding social and tax advantages and limiting access to social assistance and benefits, more generally (Belgium, Czech Republic, Denmark, Finland, Greece, Malta, the Netherlands, Portugal and the UK). The Dutch and UK governments have announced their intention to closely monitor access to social benefits and assistance by non-nationals. One noteworthy development is the increasing number of EU citizens who are homeless in Member States but also workers, and yet who are assumed by the authorities as being unemployed and a burden on the social assistance system, a new category of "working poor".

Direct discrimination on the basis of nationality with respect to the issues dealt with in Chapter IV is extremely rare, and most issues brought to light by the national reports refer to indirect discrimination. Residence requirements are the most used criteria for restricting access to EU rights. Regarding working conditions, based on this report and also previous ones it is fair to say that most cases of discrimination concern EU-10 workers. The main issues identified in some national reports suggest that these workers enjoy worse working conditions and lower pay. One should also point out the issue of being properly informed about one’s rights, which is mentioned as an area where more efforts could be made by state authorities. According to several national reports, assistance with understanding one’s rights and accessing services in the host state were provided by charities (e.g. Denmark, Ireland and the UK).

The economic crisis has had an impact upon social rights more generally. In the context of EU workers and/or job-seekers and their capacity to access social benefits, including social assistance, the trend is towards stricter scrutiny from national authorities with a view to end residence. In many Member States, the administration of social protection is a competence of the municipalities. Several reports mention that this may lead to problems for EU

workers attempting to access social rights as not all municipalities are familiar with the applicable rules. Sometimes permanent residence in the municipality is required as a condition of access to benefits, which may limit the right of EU workers to access some benefits (e.g., Italy, Hungary and Finland).

In several Member States where there are no residence or nationality condition in force in order to be eligible for posts in the academic or maritime sector or measures to address youth unemployment, knowledge of the national language, as a qualifying condition, is reported to be operating as an obstacle to equal access to these posts/entitlements by EU citizens from other Member States. Trends in the opposite direction with regards to quotas for the number of foreign players allowed in sport teams are detectable in some Member States. While various Member States have lifted limitations, thus including EU citizens on an equal footing with nationals, others have introduced significantly stricter rules over the last year, sometimes limiting the number of other than 'home grown' players to one. So far changes at the national level in response to the Court of Justice judgment in *Commission* v. *Netherlands*[6] on the access to study grants are limited to a few Member States. The responses have been both positive and negative. Some Member States have reacted, or are planning to, by replacing the requirement for residence by other requirements that would limit the number of persons that could be eligible for the grants. The argument being that the system cannot be allowed to become 'overburdened'.

5. ACCES TO EMPLOYMENT IN THE PUBLIC SERVICE

Most of the legislation that was identified in the 2010 Ziller Report as 'problematic' in several Member States as regards compliance with Article 45(4) TFEU continues to remain in force in 2013. In Bulgaria in certain ministries all posts are reserved for nationals irrespective of whether the activities are performed as a civil servant or on the basis of a employment contract. In Estonia, Lithuania and Poland non-nationals are being confronted with very strict language requirements which operate as an obstacle to employment in the civil service. In Poland only one non-Polish person was appointed in the civil service in 2012. The lack of statistical information on the number of non-nationals employed in the public sector as well as the fact that no Member State appears to have a comprehensive monitoring system on access to employment in the public sector by non-nationals, makes it difficult to gain an overview of the situation and assess whether or not EU workers are experiencing discrimination or obstacles to their right to free movement due to the practices of Member States. To remedy this, Member States are encouraged to start monitoring their administrative practices governing access to employment in the public sector and regularly collect statistical information on the numbers of non-nationals who apply for employment in the public sector and non-nationals who are employed in the public sector (see Chapter III).

6. THIRD COUNTRY NATIONAL FAMILY MEMBER AND REVERSE DISCRIMINATION

Two problems persist: (1) family members are treated primarily as third-country nationals under the general immigration law rather than as persons with free movement rights under

6 CJ EU (second chamber) case C-542/09, 14 June 2012, n.y.r.

EU law, and (2) EU citizens returning to their home-Member State with their third-country family members after a period of residence in another Member State are the subject of systematic and rigorous checks. The definition and rights of Article 3(2) 'other' family members remain subject of discussion in courts in several Member States after the CJEU judgment in *Rahman*.[7]

The issue of reverse discrimination gives a diverse picture as it is not a problem in all Member States. As a rule Member States are applying the *Ruiz Zambrano* judgment[8] restrictively, with the Austrian Administrative Court taking the most liberal approach, by arguing that refusing to reunite family members always impacts on free movement rights (see Chapter II).

The unequal treatment of Union nationals who have not used their free movement rights and nationals from other Member States regarding reunification with their third-country national family members is under discussion in several Member States. The issue is subject of judicial review in Cyprus, Germany, Ireland and the Netherlands. In Belgium the income requirement for admission of third-country national parents of Belgian nationals introduced in 2011 ended the equal treatment of Belgium nationals and EU migrants codified in the Belgian Aliens Act since 1980. The question of the compatibility of this new rule with the Belgian Constitution and with international law is still pending before the Belgian Constitutional Court.

Almost half of the national reports explicitly mention measures of national authorities to combat fraud or marriage of convenience by nationals of other Member States in the exercise of their free movement rights. Most concrete examples mentioned relate to the reunification with family members who are nationals of third countries. Abuse has a new chapter: three Member States have reported seeing cases in which EU-citizens (including own citizens) are making fake statements of paternity so that the child becomes a national of a Member State and, by virtue of that nationality provides its third-country national mother with a right of residence.

7. FREE MOVEMENT OF ROMA WORKERS

The two general trends identified in the previous reports with regard to EU Roma workers persist during this reporting period. Firstly, EU citizens of Roma origin are continuing to make use of EU free movement provisions to escape poverty, marginalization and discrimination in their Member State of origin. They have sought jobs in the formal labour markets of other EU Member States and, secondly, despite reports of better treatment in some instances, EU Roma workers are experiencing considerable problems regarding access to the labour market, which can be attributed to the following circumstances: difficulties in demonstrating their quality as "workers", an overall lower level of education and working skills, discrimination, and a greater tendency of Member States to expel EU Roma on grounds relating to public order and being a burden on the social assistance system of the host-Member State. Incidences of human trafficking of Roma, especially women and children originating from the EU-12 Member States have also been reported. Further, continued transitional arrangements in several Member States restricting the access of A-2

7 CJ EU (Grand Chamber) case C-83/11, 5 September 2012, n.y.r.
8 CJ EU (Grand Chamber) case C-34/09, 8 March 2011, n.y.r.

workers to employment in general appear to be exacerbating this situation. For more details, see Chapter I.4.

8. APPLICATION OF TRANSITIONAL MEASURES

The transitional measures that apply to Romanian and Bulgarian workers will come to an end on 1 January 2014 in Austria, Belgium, France, Germany, Luxembourg, Malta, the Netherlands, Spain and the United Kingdom.

Croatian workers, following that Member State's accession to the European Union on 1 July 2013, were granted full free movement rights in 14 of the 27 other Member States: in Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia and Sweden. The other 13 Member States have decided to apply transitional measures to Croatian workers during the first two years after the accession of Croatia to the European Union. Hence, Croatian workers will have to apply for work permits in Austria, Belgium, Cyprus, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Spain, Slovenia and the United Kingdom; thus, ten of the EU-15 Member States and three of the ten Member States that acceded to the European Union in 2004 apply transitional measures. Croatia informed the European Commission that during the first two years it will restrict access to its labour market to nationals from those 13 Member States on a reciprocal basis. For more details see Chapter VII.

9. POSITIVE DEVELOPMENTS

In Denmark, Greece and Sweden the national Ombudsman continues to play an important and visible role in enforcing the rights of EU workers and in combating unequal treatment of EU workers and their family members. The Czech national Ombudsman appears to perform a similar function. In two Member States, however, the national equal treatment body is hesitant as to its competences to apply EU rules prohibiting discrimination on the ground of nationality (Denmark and the Netherlands). The adoption of the European Commission's proposal for a Directive on measures facilitating the exercise by workers of their free movement rights[9] may well assist those bodies to overcome their hesitation.

Finally, there is a notable increase in the number of questions referred by national courts to the European Court of Justice in this area of EU law. This is a positive development, suggesting that EU law is engaged with and made use of by migrants and national authorities alike.

9 COM(2013)236 final, 26 April 2013.

CHAPTER I
THE WORKER: ENTRY, RESIDENCE, DEPARTURE AND REMEDIES

INTRODUCTION

This chapter examines the transposition in the 28 EU Member States of the provisions of the EU's Citizens Directive (hereafter "the Directive")[1] regarding the entry, residence and departure of EU workers and their family members, and the remedies available to them in the event of violation of their rights. It also considers the specific situation of EU job-seekers in Member States with reference to the pertinent provisions of the Directive. The chapter also highlights a number of shortcomings concerning residence rights in some Member States; expulsion of EU citizens, particularly those coming from the EU-2 and EU-8 (referred to also as EU-2 and EU-8 nationals); and in the application of procedural safeguards and remedies. Building on the information provided in previous reports, the situation of the free movement of EU workers of Roma origin is re-examined from the perspective of both EU destination and origin Member States. Moreover, it should be noted that *Croatia* acceded to the EU during this reporting period (on 1 July 2013) and free movement of workers will not be applicable to nationals of those twelve EU Member States that have decided to apply transitional measures in respect of Croatian workers, since the Government has recently adopted a regulation activating equivalent measures (see Chapter VII below).

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

While the transposition of the Directive's provisions relating to workers in most of the EU Member States does not differ significantly from the information provided in the reports since 2008, this reporting period (2012-2013) has seen the introduction of a few amendments in a number of Member States (*Austria*, *Germany*, *Italy*[2], *Lithuania*, *the Netherlands*, *Slovakia*, *Spain* and *the United Kingdom*) which have resulted in improved transposition in some countries, but also reversals of positions that were previously in conformity with the Directive in others, and these are highlighted in the sections below. During the reporting period, in *France*, the Ministry of Interior posted online several web pages setting out the rights of EU citizens and members of their families,[3] reflecting a new government approach to facilitate understanding and use of these rights by EU citizens.

The concern expressed previously that transposition is not always undertaken by express legal guarantees but in other instruments such as circulars, which have been found unaccept-

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 EC* 2004, L 229/35 (Corrigendum).

2 In Italy, Law 6-8-2013 n. 97 amended Legislative Decree 2007 n. 30 (transposing Directive 2004/38/EC), following a request by the European Commission. The amendments regard the documents required in order to demonstrate the registered partnership or the durable relationship, and to demonstrate to have sufficient economic resources, and to make clear that the partner of the EU national enjoys protection against expulsion as the EU national.

3 See http://www.interieur.gouv.fr/A-votre-service/Mes-demarches/Etranger-Europe/Etrangers-en-France/Citoyens-europeens-en-France.

able for implementation of a directive,[4] has been partially addressed in the *Netherlands* where a number of provisions during the reporting period were moved from the Aliens Circular to the Aliens Decree. Similarly, in *Lithuania*, recent amendments to the Aliens' Law relating to free movement of workers have resulted in the transfer of a number of important provisions from instruments with lesser legal status to the level of legislation, which, in the view of the rapporteur, will contribute to improved legal certainty for the individuals concerned. In *France*, a circular implementing the amendments made by the law that transposes the Directive was adopted in September 2011 is still in place, although the rapporteurs note that the Minister of Interior will present a new draft law after the local elections in 2014. While the Directive is implemented in *Latvia* by regulations, the rapporteur reiterates the observation in earlier reports that this is problematic in terms of ensuring supremacy of EU law because regulations are lower in the hierarchy of legal norms than ordinary laws in the country, which in this particular instance is the umbrella Immigration Law. In *Romania*, the principal measure transposing the Directive continues to be the Government Emergency Ordinance No. 102/2005, as amended. In August 2012, a public investigation in *Sweden* proposed the introduction of a new legislation, in particular to address the rights of EU citizens, including their family members, with the aim of making a clearer distinction between regulations concerning EU citizens and other foreigners, although, in principle, the proposal would not mean any substantial legal amendments.

Improvements in transposition in a number of Member States have also resulted in some changes to the informal ranking of Member States, discussed in previous reports, which may be categorized as follows: (1) detailed and comprehensive, where careful attention has been given to each provision in the implementing legislation or regulations, or where transposition has been essentially verbatim (*Cyprus*, *Denmark*, *Estonia*, *Finland*, *Greece*, *Luxembourg*, *Portugal* and *Sweden*); (2) generally complete, with the exception of one or two gaps or relatively minor inaccuracies (*Austria Belgium*, *Croatia*, *Czech Republic*, *France*, *Germany*, *Hungary*, *Ireland*, *Italy*, *Lithuania*, *Latvia*, *Malta*, *Netherlands*, *Romania, Slovakia, Spain*[5] and *the United Kingdom*); and (3) partial or incomplete, where more gaps or even serious deficiencies in transposition have been highlighted (*Bulgaria* and *Slovenia*).. As noted in previous reports, verbatim transposition does not guarantee smooth application of the Directive's provisions in practice which is particularly evident from the reports on *Cyprus*, *Denmark* and the *United Kingdom*. In *Cyprus*, on taking up office in March 2013 in the wake of the economic recession and subsequent banking crisis, the newly elected conservative government imposed transitional arrangements on free movement of workers from Croatia following the accession of that country to the EU on 1 July 2013. Politicians, officials, and representatives of the employers' association and trade unions support more stringent controls on the employment of migrants, including EU citizens, and are almost unanimously calling for priority to be given to employment of Cypriot nationals. An official of the new government announced a 'gentlemen's agreement' with social partners about imposing a quota on 'foreign workers' at a 70-30 ratio, i.e. 70 per cent Cypriot nationals and 30 per cent foreigners. However, it is unclear how such an arrangement would operate in practice, although it could well amount to nationality discrimination prohibited by EU law on free movement of workers.

4 CJ EU joined cases C-361/88 and C-59/89, *TA Luft* [1991] ECR I-02607.

5 In *Spain*, amending legislation was adopted in the reporting period transposing Articles 7, 8(3)-(4) and 14(a) and (b) of the Directive.

There are some more favourable rules relating to these provisions in a few Member States, although in the case of *Belgium* they are no longer in place. The previous position was that EU workers and family members acquired the right to permanent residence after three years of continuous residence (which is also the period of residence required to apply for Belgian nationality) rather than the five years stipulated in the Directive (Article 16). However, this favourable position was changed by a law of June (modifying the 1980 Aliens Law), which entered into force on 11 July 2013, with the result that a minimum period of five years of residence is now the qualifying period for permanent residence. Moreover, as noted previously, reverse discrimination against Belgian nationals who have not exercised free movement rights was reintroduced in respect of family reunification conditions by the 2011 law amending the 1980 Aliens Law. In *Bulgaria*, the law transposing Article 7(3)(b) of the Directive, places fewer conditions for retention of worker status by omitting the requirement of "duly recorded involuntary unemployment", with the result that the person concerned can only be unemployed. As observed in previous reports, in *Italy*, with regard to the transposition of Article 7(3)(c) of the Directive, the worker in involuntary unemployment, after completing a fixed-term employment contract of less than one year or after having become involuntary unemployed during the first twelve months, continues to retain the status of worker for one year rather than the minimum six months specified in the Directive.

Article 7(1)(a) – right of residence for more than three months of workers or self-employed persons

Most EU Member States have transposed this provision correctly (*Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden* and *the United Kingdom*). In *Italy*, as also alluded to in the 2011-2012 report, the results of the 2011 Census in June 2012 revealed a smaller number of foreigners (3.86 million) in the country than those (4.57 million) registered in the population registry. Given that the registration of EU citizens is also included in the local population registry, EU citizens who did not complete the Census form could now be removed from the population registry with the result that they would lose their registration for the purpose of the Directive. In *Lithuania*, the rapporteur draws attention to a number of concerns in the new version of the 2013 Order on EU Residence Certificates and Residence Permits implementing the recent amendments to the Aliens' Act, in particular that there is no possibility to question inclusion of the data of EU nationals in the national list of foreigners who are prohibited from entry, with the result that their application for a residence certificate would not be accepted and returned to them. (general appeal possibility against any decision of state institution is available only after decision within certain time limits, but not later on). Moreover, the reasons of the Migration Department informing the State Security Department about the issue of residence certificates to EU citizens and transmitting data relating to the EU national's place of residence are unclear. In *Finland*, the Supreme Administrative Court held in a judgment on 10 May 2013 that the registration of an EU citizen's right of residence is an administrative formality which has to be performed if the person in question meets the pre-conditions laid down in the Aliens Act, and that in this context it is not possible to examine whether or not she or he constitutes a threat to public order or security.

A 2013 amendment to the Freedom of Movement Act in *Germany* now means that EU citizens staying beyond a period of three months no longer receive a special certificate of their status as persons entitled to free movement upon registration with the authorities dealing with foreigners or city administrations. However, they remain obliged to register according to the generally applicable laws of the Federation and *Länder* when they take up residence in a city or district. While the 2013 amendment does not change the legislative provisions on the requirements for free movement of workers, or the content of their rights, the abolition of the certificate of registration with the administrative authorities for EU citizens may have a substantial impact upon their status. The absence of a formal certificate may lead to difficulties for EU citizens in easily proving their free movement rights. Therefore, the certificate of registration with the cities, on taking up a domicile there, is likely to fulfil a complementary function in order to demonstrate entitlement to free movement. However, it needs to be noted that this registration fulfils a different purpose and is primarily based upon residence rather than proving the existence of a specific legal status.

In *Poland*, the compatibility with EU law of the Act on evidence of people and registration documents, which obliged all foreigners - including EU citizens and members of their families – to register their stay if the period of their stay exceeded three days, has now been addressed by amendments to the legislation. According to the new wording of the Act, EU citizens and members of their families are obliged to register their stay for a permanent or temporary stay exceeding 3 months within 30 days upon arrival, and they are no longer required to register if their stay is less than three months. In *Croatia*, all EU citizens and their family members, including job-seekers, are required to report their presence within 15 days of their arrival in the territory, as well as any changes of their residence. According to the rapporteur, the period of 15 days should be regarded as "a reasonable and a non-discriminatory period of time" within the meaning of Article 5(5) of the Directive given that Croatian citizens also have to report within 15 days any changes in their residence lasting longer than three months. Moreover, breach of this obligation constitutes a misdemeanour punishable by a fine ranging from HRK 500 to 5,000 (i.e. EUR 66 to 666), which the rapporteur considers as a proportionate and non-discriminatory sanction within the meaning of Article 5(5) of the Directive in light of the fact that this range of fines is also prescribed for Croatian citizens. However, according to some high-level Ministry of Interior officials, the duty to report one's presence on the territory within 15 days from the day of arrival should not be applied strictly in practice since Croatia is a popular tourist destination, especially for nationals from EEA countries. Consequently, the Ministry is considering issuing guidelines (instructions) for police stations and administrations.

According to the Aliens Circular 2000, EU citizens in the *Netherlands* are exempted from the obligation to report their presence to the authorities, and only have to do so in cases of residence for more than three months. Non-fulfilment of this obligation is sanctioned by imprisonment for one month or payment of a fine of the second category. To ensure conformity with the Court of Justice ruling in *Ergat*[6] a Bill was presented to Parliament in July 2012, to remove the sanction of imprisonment, but to maintain the possibility of a fine.

6 CJEU case C-329/97, *Ergat* [2000] ECR I-1487.

Article 7(3)(a)-(d) – retention of status of the worker or self-employed person by EU citizens who are no longer in employment

Correct transposition of Article 7(3)(a)-(d) is reported to be in place in *Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden* and *the United Kingdom*. In *Croatia*, Article 7(3)(c) has only been partially transposed and the national provisions appear to be more restrictive in two respects. First, with regard to persons duly recorded as being in involuntary unemployment after completing a fixed-term employment contract of less than a year, the condition of registration as an unemployed person seems to be more restrictive than envisaged by the Directive given that in Croatia there are two categories of job-seekers, i.e. "unemployed persons" and other job-seekers, and the latter are excluded under the national law. Second, with regard to persons becoming involuntarily unemployed during the first 12 months, the legislation suggests that only persons employed on the basis of an open-ended employment contract would retain the status of a worker or a self-employed person. Since in Croatia fixed-term employment contracts can be concluded for a period longer than one year, the rapporteur argues that the domestic provision in question should be amended accordingly. In *Bulgaria*, as also underlined in previous reports, the transposition of Article 7(3)(d) continues to be incorrect because in the case of an EU citizen becoming involuntarily unemployed, the law expressly stipulates that vocational training shall not be related to the previous employment. This is not in accordance with Article 7(3)(d) which does not exclude vocational training related to the previous employment in the event of involuntary unemployment. This discrepancy was not addressed in the amendments adopted in March 2012. In *Ireland*, the minor ambiguities in the wording of the regulations transposing Article 7(3)(c) and (d), as observed previously, are still in place, while in *Slovenia*, as noted in the 2011-2012 report, these provisions have been transposed in a way that does not expressly maintain the status of worker or self-employed person but rather the right to remain.

In the *United Kingdom*, the Supreme Court has referred the following questions to the Court of Justice: (i) whether Article 7 of the Directive is to be interpreted as not precluding the recognition of further persons who remained workers; (ii) if so, did it extend to a woman who reasonably gave up work, or seeking work, because of the physical constraints of the late stages of pregnancy (and the aftermath of childbirth); and (iii) if so, was she entitled to the benefit of the national law's definition of when it was reasonable for her to do so.[7] In making the reference, the Supreme Court judge, Lady Hale, noted her own view that the Council and the European Parliament, when enacting the Directive, were not precluding further elaboration of the concept of worker, and that unless special account is taken of pregnancy and childbirth, women would suffer comparative disadvantage in the workplace, which, in her opinion, offends against the foundational EU law principle of equal treatment of men and women.

Article 8(3), first indent – administrative formalities relating to the residence of EU workers and self-employed persons

Correct transposition of this provision has taken place in *Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Latvia, Luxembourg,*

7 *St Prix* v. *Secretary of State for Work and Pensions* [2011] EWCA Civ 806. See case C-507/12 *Saint Prix*.

Netherlands, Portugal, Romania, Slovakia, Slovenia (but see below), *Spain* and *Sweden*.[8] The position is now also much clearer in *Italy* as a result of amendments to the procedure for registration in the population register (see above in relation to Article 7(1) of the Directive). A circular letter underlines that the only documents that EU citizens are required to provide are an identity card and proof of being a worker, a student or having economic resources. In *Ireland*, there is no registration system for EU citizens, including Irish citizens and therefore, according to the rapporteurs, questions regarding the documentation required for the issuing of registration certificates to EU citizens do not arise. In the *United Kingdom*, the improvements in the times taken to process registration certificates and residence cards, discussed in previous reports, no longer apply to the issue of residence cards, as practitioners have noted that processing times for residence card applications are now longer than they were last year, with many applications being decided just before the six-month limit set by the government (see also section 3 below).

The administrative formalities in relation to residence of EU citizens for a period longer than three months continue to be overly onerous in a number of Member States, whereas there are discrepancies in others. In *Lithuania*, no additional documents are required under the legislation, although, as also observed previously, those documents that have to be provided must be certified and officially translated into the Lithuanian language, which may serve as a practical barrier to obtaining the residence certificate. This position has been upheld by the Order on EU Residence Certificates and Residence Permits implementing the recent amendments to the Aliens' Act (see above). In *Malta*, as also referred to in previous reports, a licence has first to be issued to EU workers for employment. While the law expressly stipulates that such a licence shall not be withheld, this formal requirement may nonetheless constitute an administrative impediment to free movement of workers. While there is no requirement in the *Czech Republic* for EU citizens to register if they intend to stay longer than three months in the country,[9] if the EU citizen concerned requests a residence certificate, a number of the documents required to obtain the certificate, namely a document confirming guaranteed accommodation and photographs, are not in compliance with the Directive . In *Poland*, the application that has to be completed in order to register residence continues to request information (e.g. names of parents, height, special marks, colour of eyes) not required by the Directive. Moreover, while support is provided to EU citizens to complete application forms, the application itself can only be written in the Polish language and in those cases when documents are submitted in a foreign language, a certified translation is to be attached. According to the rapporteur, it should be sufficient to attach a statement to an uncertified translation that it is reliable and fully reflects the foreign language version. In addition to the continuing delays in processing EEA/EU residence documents in the *United Kingdom*, applicants for such documents - particularly family members - are still being asked many questions and are being requested to submit documents beyond what is stipulated in the Directive. Moreover, in February 2013, the UK Border Agency (which was abolished during the reporting period and reincorporated into the UK Home Office) issued a consultation paper on proposals to introduce biometric residence cards for third-country national family members of EEA nationals. While these documents would not be mandatory, there would be no alternative documentation produced which could be used to evidence their residence rights (which would also mean that a prospective employer would have no statutory excuse against sanctions imposed for unauthorized work, and that the person concerned would have difficulty in travelling to the UK). However, the assertions on the part of the

8 However, it should be noted that the 2012 public investigation (referred to earlier) has proposed that EU citizens staying in Sweden for more than three months should not be required to register on the basis that a right to residence cannot be conditioned by registration.

9 However, the Act on Residence of Foreigners requires EU citizen to report their presence in the Czech Republic within 30 days (if they intend to stay in the country for more than 30 days).

Immigration Law Practitioners' Association (ILPA) and the Advice and Information on Rights in Europe (AIRE) Centre that the proposed measures would, on their adoption, be discriminatory (i.e. requiring only third-country national family members and not EEA nationals to obtain these documents), disproportionate, and raise data protection concerns (in particular in relation to children) are disputed by the authorities.

In *Hungary*, however, there continues to be a requirement of a minimum monthly income, which must exceed the lawful monthly minimum pension per capita in the family amounting to approximately EUR 105, or proof of assets, real estate or other sources of income taking into account the size of the family so that the EU citizen concerned will not be deemed an unreasonable burden on the social assistance system. As noted also in earlier reports, transposition of Article 8(3), first indent in *Slovenia* is imprecise because the three conditions in that provision are listed cumulatively rather than as alternatives.

Despite the correct transposition of this provision in *Denmark*, in practice the rapporteurs observe that in situations of temporary employment without a fixed number of working hours, some Regional State Administrations are reported to require EU citizens to present three months' pay slips before issuing the registration certificate. In some instances, these Administrations appear to require the worker, who has worked in Denmark for three months, to present a declaration from the employer stating that the EU worker will be employed for an additional three months, which does not appear to be in accordance with Article 8(3) of the Directive. Moreover, following the Court of Justice's ruling in C-46/12, *L.N.*, in order for EU citizen students to be regarded as workers (or self-employed persons) with genuine and effective employment, as a rule they must have worked a minimum of 10-12 hours per week. This must be documented by for example "an employment contract or pay slips for the whole period", which need to be submitted together with the application form. While acknowledging the fact that pay slips are mentioned merely as an example of documentation by the Agency for Higher Education and Educational Support, and the fact that the documentation is not required for the purpose of issuing registration certificates, it appears somewhat unfortunate, according to the rapporteurs, for the Agency to refer to documents that cannot be required from workers as proof of their status in connection with the issue of registration certificates without violating Article 8(3) of the Directive, since this may leave EU citizens with the impression that pay slips are in fact required as proof of their status.

In *Belgium*, in February 2013, the City of Antwerp decided to raise the administrative tax/fee from EUR 17 to EUR 250 on any foreigner, including EU citizens, who wished to register their residence at the local administration. Exceptions were created for students, asylum-seekers and third-country nationals with long-term residence status in another EU Member State. In March 2013, this decision was suspended by the governor of the Province on the basis of Articles 20 and 45 TFEU, Articles 7(1)(c) and 8(3) of the EU Citizens Directive, Directive 2003/109/EC on the status of third-country nationals who are long-term residents as well as the case law of the Court of Justice and the European Convention on Human Rights (ECHR).

As noted in previous reports, in *Finland* under the legislation transposing the Directive the authorities are expressly prohibited from requesting the applicant to submit any other documents, certificates or other means of proof than those mentioned. In *Germany*, the rapporteurs refer to a number of court cases concerning the definition of worker under EU law. The courts have concluded that in terms of EU law, workers are persons executing an economic activity even if it is on a minor scale provided that the activity is not of an insubstantial and negligible nature. Thus, in one case, for example, cleaning work for approximately

five hours per week (and subsequently 10 hours per week) with a starting salary of € 180 was accepted by the court as employment entitling the person concerned to the status of a worker.

Articles 14(4)(a)-(b) – prohibition on expulsion of EU citizens or their family members if they are workers or self-employed persons, or job-seekers

According to the rapporteurs, Articles 14(4)(a)-(b) have been correctly transposed in *Austria*, *Belgium*, *Croatia*, *the Czech Republic*, *Cyprus*, *Denmark*, *Estonia*, *Finland*, *France*, *Greece*, *Italy*, *Luxembourg*, *the Netherlands*, *Portugal*, *Romania, Slovakia* (but see below), *Spain* and *Sweden*. However, in *Denmark*, the rapporteurs observe that in practice the stay of unregistered EU citizens (who may nonetheless be workers, job-seekers or self-employed persons) seeking assistance available to homeless persons is considered illegal by the social authorities, thus raising issues of incompatibility with Article 14(3)-(4). Moreover, in *Finland*, the rapporteur observes that the prohibition on imposing restrictions on free movement on economic grounds as laid down in Article 27 of the Directive is not explicitly transposed in the Aliens Act with the result that there is a discrepancy between the Act and the Directive. In *Slovakia*, the rapporteur notes that the Foreigners Act, which amended the previous legislation and came into force on 1 January 2012, appears now to be in conformity with Articles 14(4)(a) and (b) as regards EEA citizens, although the position of family members is less clear. The Act permits the withdrawal of the residence permit from third-country national family members on the ground of being in material need, including family members of EEA workers, self-employed persons, or those seeking employment. While the situation of the family members concerned should be taken into consideration when deciding on the withdrawal, this raises questions regarding full conformity of the law with Articles 14(a) and (b). While these provisions have now been transposed in *Spain*, the rapporteurs observe that EU/EEA/Swiss citizens are also required to register in the Central Register of Foreigners in order to access health care or social benefits, which gives rise to the question whether such a condition may open the door to possible expulsion proceedings on a case-by-case basis against those who have not registered and who are perceived as abusing the system.

There are no specific national provisions in the laws of *Bulgaria*, *Germany*, *Ireland*, *Lithuania*, *Latvia*, *Malta*, *Poland*, *Slovenia*, and the *United Kingdom* fully transposing Articles 14(4)(a) and (b). In *Malta*, there is no mention of family members which gives rise to the impression that an expulsion order may not be adopted against an EU citizen who is employed or self-employed or a job-seeker, but that it could be exercised against a family member. However, the Maltese authorities argue that this will not occur because, for implementation purposes, once they are dealing with EU citizens who are employed or seeking work, they will include family members and their right to reside, together with all other benefits. In *Lithuania*, as noted in the 2011-12 report, EU nationals can only be expelled if they lose their right of residence and fail to leave voluntarily and in *Poland*, only when the individual's conduct constitutes a threat to the interests of Polish society, such as defence policy, national security or public order; while in *Bulgaria*, an amending provision inserted into the law in March 2012 expressly indicates that mere economic considerations, recourse to social assistance, expiration of the validity of an ID card or passport, or job-seeking does not serve as a ground for expulsion, and is thus in accordance with Recital 16 of the Directive. In the *United Kingdom*, according to anecdotal information obtained by the rapporteurs the pilot

project aimed at removing homeless EEA nationals mentioned in previous reports is continuing. Moreover, no attention appears to have been given to a First-tier Tribunal (Immigration and Asylum Chamber) ruling in June 2011 which found the expulsion of an applicant who was on the facts a qualified job-seeker unlawful on a number of grounds, as well as disproportionate.

Article 17 – right of permanent residence for persons and their family members who are no longer in employment

Full transposition of Article 17 has taken place in *Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden* and *the United Kingdom*. In *Lithuania*, the last ground in Article 17 relating to the surviving spouse who has lost the nationality of the Member State following marriage to the worker or self-employed person has not been transposed and, as observed above in relation to Article 8(3), first indent, all supporting documents have to be officially confirmed and translated into the Lithuanian language. As observed in previous reports, in *Estonia*, the national legislation does not contain any rules relating to Article 17(4)(c), which is considered as not fulfilling the Directive's requirements, while, in *Malta*, Article 17(2) has not been literally transposed, which in the rapporteur's view may give the impression that there is incorrect transposition. As noted in previous reports, in *Greece*, the conditions as to length of residence and employment do not apply if the spouse of the worker or self-employed person possesses Greek nationality or has lost Greek nationality by marriage to that worker or self-employed person.

In *Ireland*, as observed previously, the transposition of Article 17 is generally correct, although there is a minor discrepancy in the implementing regulations in relation to Article 17(1)(c), while, in *Spain*, all the provisions in Article 17 have been transposed but for Article 17(1)(a) of the Directive.

Article 24(2) – derogations from equal treatment regarding entitlement to social assistance during the first three months of residence and study grants prior to the acquisition of the right of permanent residence

The derogations in Article 24(2) have been transposed in *Cyprus*, *Estonia*, *France*, *Germany*, *Greece*, *Ireland*, *Italy*, *Lithuania*, *Malta*, *Portugal* and *the United Kingdom*. In *Denmark*, *the Netherlands* and *Poland*, transposition is not found in a single legal document but in various other pieces of legislation on social assistance and study grants. However, as noted above, there appear to be serious issues in practice in *Denmark* pertaining to unregistered EU citizens seeking assistance available to homeless persons: they are unable to access certain publicly-financed shelters and care homes because their legal status does not appear to be examined in a proper manner. There are no explicit national provisions transposing Article 24(2) in *Austria*, *Bulgaria*, *Croatia*, *Hungary*, *Romania*, *Slovakia*, *Slovenia* and *Spain*. In *Bulgaria*, however, the overall analysis tends to the conclusion that the monthly allowances under the Law on Social Assistance are regulated as "social assistance" benefits within the meaning of Article 24(2) of the Directive and are not regarded as benefits for job-seekers of

a financial character designated as facilitating access to the labour market within the meaning provided by the Court of Justice's judgment in *Vatsouras and Koupatantze*.[10] As discussed in the previous report, the degree of transposition in *Belgium* is somewhat ambiguous, given that Article 24(2) was only transposed in 2012 by a law amending the legislation on reception of asylum-seekers. The rapporteurs find it regrettable that the right to social assistance has been restricted for *all* EU citizens in a law specifically aimed at the reception of *asylum seekers*. Moreover, a circular was adopted in March 2012 to clarify that the restriction regarding maintenance aid for study purposes only concerns persons other than workers, self-employed persons and their family members.

In *Romania*, there have been no changes to the position stated in earlier reports that, as a general rule, EU citizens are entitled to the same State social protection measures as Romanian nationals. As observed in previous reports, in *Estonia*, the position appears to be favourable because all persons who have a right to stay (on either a permanent or 'fixed' basis) also have the right to obtain social assistance, study loans and vocational training. However, the meaning of 'fixed' and how this differs from 'permanent stay' is not defined. In *Finland*, workers, self-employed persons, and those who retain this status, as well as members of their families, continue to be entitled to social assistance after their entry into the country. They are also entitled to maintenance grants for studies. As noted in previous reports, the regulations transposing Article 24(2) in *Ireland* preclude access to maintenance grants for students (including those undertaking vocational training) prior to acquisition of the right of permanent residence, although, in practice, permanent residence is not needed to receive such a grant since the Student Support Act 2011 provides for equal treatment in respect of access to student grants for EU, EEA and Swiss nationals, as well as their family members. Similarly, in *Austria*, the law does not differentiate between Austrian nationals and other EU citizens as regards access to social assistance or to maintenance grants for studies.[11]

Transposition of Article 24(2) in *Latvia* continues to be inaccurate because only EU citizens and their family members holding permanent residence and who have registered their place of residence in a municipality may access social assistance and social services. Further, only EU citizens have a right to education on the basis of equality with nationals, and not their third-country national family members. As noted in previous reports, in *Sweden*, for periods of stay of up to three months, those persons (irrespective of their nationality) who are not resident in the local community are only entitled in principle to acute social assistance in emergency situations.

2. SITUATION OF JOB-SEEKERS[12]

As noted in the last three reports, there are essentially two broad categories of national rules applicable to job-seekers coming from other EU Member States: (1) where the rules explicitly govern their status to varying degrees; and (2) where there are no specific rules concerning their status, with the exception, in some instances, of an express prohibition on their expulsion in accordance with Article 14(4)(b) of the Directive.

10 CJEU case (Third Chamber) joined C-22/08 and C-23/08 [2009] ECR I-4585.

11 But as regards social assistance, economically non-active EEA-citizens do not have the same rights as Austrian nationals within the first 3 months of their stay

12 See also the separate report on the "*The situation of job-seekers under EU law on free movement: National practices and legislation*" prepared during the 2011-2012 reporting period.

Member States in which the position continues to be unclear

The specific situation of EU job-seekers in a number of Member States continues to be unclear. In *Estonia*, as noted in previous reports, no special rules are foreseen for this group, and the rapporteur observes that improvements to the legislation are needed to clarify the situation for EU citizen job-seekers, particularly during the first six months of residence. In *Greece*, there are no explanatory memoranda or administrative guidelines concerning the right of residence of job-seekers. Nor is their situation formally regulated in the *Czech Republic* and *Lithuania*, even though 149 EU citizens were registered as job-seekers in *Lithuania* during 2012 according to information from the national Labour Exchange Office. While the amendments to the Aliens' Law in *Lithuania* clarify the situation of EU job-seekers to some extent, the provisions concerned do not apply to first-time job-seekers who have not previously worked in the country. In *Bulgaria*, as noted in previous reports, there is no express national regulation regarding job-seekers and the law implementing the Directive makes no reference to the right of EU citizens who are registered job-seekers to stay in the country for longer than three months, to Article 14(4)(b) (see above) or to C-292/89, *Antonissen*, although the national provisions explicitly refer to discontinuation of the right to residence if the person concerned no longer meets the requirements of Articles 7(1)(a)-(c). In *Italy*, the rapporteur also notes that during the reporting period no reference to *Antonissen*[13] could be found in the case-law or in administrative guidelines. The position of job-seekers who enter *Ireland* continues to be unclear as Article 14(4) of the Directive has not been transposed. Moreover, as described in previous reports, in the regulations implementing the Directive residence for up to three months is made conditional upon the person concerned not becoming an unreasonable burden on the social welfare system, and no specific derogations are foreseen for workers, self-employed persons, or job-seekers.

Residence registration requirements

In some Member States (*Croatia*, *Estonia*, *Greece*, *Hungary*, *Lithuania*, *Luxembourg*, *the Netherlands*, *Poland*, *Portugal*, *Slovakia*, *Slovenia* and *Spain*), the general rules on residence, either expressly or implicitly, also apply to EU job-seekers who need to register their residence if they are going to stay longer than three months in the territory. On the other hand, in other Member States (*Belgium*, *the Czech Republic*, *Denmark*, *Finland*, *Latvia*, *Malta*, *Sweden* and *the United Kingdom*) there is no such requirement. As observed in the 2011-2012 report, in *Belgium*, EU job-seekers can obtain a registration certificate with no formalities from the municipality as soon as they arrive in the country. This is a provisional document issued by the local administration, which is confirmed when job-seekers bring documents attesting their job-seeker status. In *Croatia*, all EU citizens, including job-seekers intending to stay in the territory for a period longer than three months are required to register with the competent police administration or police station based on the place of their stay at the latest within eight days of the expiration of the three-month residence period. In *Hungary*, EU job-seekers need to supply as proof a document that they are seeking work, if they have been placed by the competent labour centre. As observed in previous reports, in *Portugal*, EU job-seekers staying longer than three months are required to register their residence in the municipality within a period of 30 days after three months from the date of

13 CJEU case C-292/89 [1991] ECR I-745.

entry into the national territory and, in addition to showing a passport or valid identity card, to make a declaration of honour that they have sufficient resources for themselves and their family members as well as sickness insurance (provided this is also required of Portuguese citizens in the Member State of their nationality). Similarly, in *Slovakia*, the EU job-seeker applying for registration of residence for a stay longer than three months for the purpose of seeking employment has to make a solemn declaration that she or he is continuously looking for work in the country. However, a 2013 amendment to the Foreigners Act has now introduced a new obligation for a job-seeker to be registered – submission of a document on health insurance – which is not in conformity with the Directive.

Registration with employment agencies and access to employment services

In a number of Member States, job-seekers (including own nationals) need to register with the national or local employment agencies or labour offices so that they can access their services (*Austria, Bulgaria*, *Croatia*, *Czech Republic*, *Cyprus*, *Finland*, *France*, *Germany*, *Hungary*, *Latvia*, *Malta*, *Poland* and *Sweden*). But even when there is no formal requirement to register, non-registration may create practical problems for job-seekers in some Member States. In the *Czech Republic*, the rapporteurs note that registration as a job-seeker may be relevant for the purpose of granting a permanent residence permit, which is issued by the Ministry of Interior to EU citizens upon their request on completion of five years continuous (temporary) residence. That the persons concerned were employed or unemployed during this period is not decisive, i.e. periods of unemployment also count towards this five-year period, and the labour office confirms the length of the registration of a job-seeker for this purpose. In *Denmark*, it appears that in practice some job centres require job-seeking EU citizens to be recorded in the Civil Registration System before being entitled to courses, internships, and employment with a salary subsidy, etc. In *Finland*, job-seekers coming from other EU Member States who apply to be registered at the employment office can now be registered irrespective of whether or not they have registered their right of residence. As registered job-seekers, they are entitled to all employment services offered by employment offices ranging from information services to labour market training. However, they continue to encounter practical obstacles because of the difficulty in obtaining a Finnish identity number, which, as a general rule, is only given to a person who resides in the country in a non-temporary manner, for instance, as a worker or a student; who has registered their right of residence; and who has either a temporary or permanent home municipality in Finland. The identity number is needed to access a number of basic services, such as opening a bank account, lending books from public libraries, obtaining consumption credits, and buying on hire purchase, as well as accessing other comparable public and private services. As observed in previous reports, the situation in *Lithuania* continues to be restrictive because employment support (i.e. counselling, mediation, active employment measures, etc.) is only provided to nationals and lawfully resident foreigners, which seems to indicate that EU job-seekers are excluded from this definition because they are unlikely to be considered as resident, meaning that they would only have access to basic health services. A positive development in *Latvia*, however, is that the practical problem regarding registration of EU citizens as job-seekers or unemployed reported previously has been resolved. EU citizens may now be registered officially as unemployed or job-seekers without having first to obtain a registration certificate from the Office for Citizenship and Migration Affairs.

Right of residence of up to six months or more

In *Denmark*, *France*, *Latvia*, *Malta*, *Romania* and *Sweden*, the national rules explicitly provide EU job-seekers with a right of residence for at least up to six months without the need to obtain a residence certificate. In *Austria* (as confirmed by the Administrative Court in the reporting period), *Denmark*, *France*, *Latvia*, and *Sweden*, it is also clear that EU job-seekers may stay longer and not be removed from the country if they can demonstrate that they are continuing to seek employment and have a genuine chance of obtaining it. In *Sweden*, however, the rapporteur notes that in practice there appears to be a lack of knowledge at the local level in applying the criteria of having 'a real/genuine chance' of obtaining a job and cites a report broadcasted on the radio in May 2013 in which it was stated that in Stockholm the local authority considers a person seeking social assistance after three months' residence as not having a 'real chance' to obtain a job. Consequently, there is a need for further assistance to local municipalities so that they can address such situations in practice. On the other hand, in the *United Kingdom* the expectation previously stated in the Border Agency's guidance that EEA nationals should be able to find work within six months of looking for it (referred to in the 2011-2012 report) has been removed, and there is now no reference to any presumption that they will no longer qualify as job-seekers if they have been unable to secure a job after six months, provided they are continuing to seek employment and have a genuine chance of being engaged.

While job-seekers are required to register their residence after a period of three months in *Greece*, *Hungary*, the *Netherlands* and *Portugal*, in principle there is no time limit on their stay so long as they can demonstrate that they are looking for work and have a reasonable prospect or genuine chance of obtaining it. In *Greece*, as observed in the 2011-12 report, the right of residence on Greek territory without any conditions or any formalities other than the requirement to hold a valid identity card or passport has been extended *automatically* for another three months for EU jobseekers. Moreover, the law expressly stipulates that EU citizens and their family members may not be expelled so long as they can provide evidence that they are continuing to seek employment and have a genuine chance of being engaged.

In the *Czech Republic*, as noted in previous reports, the legislation does not contain any possibility to terminate the stay of EU citizens if they are unable to find work after a certain period of time, and so it appears that they would be allowed to seek employment without any time restrictions. In *Finland*, job-seekers may reside for a reasonable period of time beyond three months without the need to register their residence (which, according to the National Police Board, in practice means six months after which they should register their right of residence or leave the country) provided they continuously look for work and have genuine chances of obtaining it. However, what are "genuine chances" of obtaining work are not defined, although job-seekers cannot be removed from the country even if they constitute a burden on the Finnish social security system. In *Germany*, as also observed in previous reports, the Administrative Guidelines on the Implementation of the Freedom of Movement Act explicitly refer to *Antonissen* (*supra.*) and stipulate that EU job-seekers have a right of residence as long as there is a reasonable expectation of finding employment, which is assumed if, based on their qualifications and the situation on the labour market, they have a reasonable prospect to be successful with their job applications. Residence permission may,

however be denied to an EU job-seeker if he or she does not display any serious intention to take up employment.[14]

Access to benefits

The question of access to social benefits was not addressed in all of the national reports. In some reports, it is recalled that job-seekers can normally transfer unemployment benefit from their EU Member State of origin if they register their job-seeking status with the destination country employment services (*Austria*, *Croatia*, *Czech Republic*, *France*, *Hungary*, *Ireland* and *Latvia*).[15] In other Member States, they may, in principle, request social welfare/assistance payments (*Austria*[16] and *Croatia*), social integration (*Belgium*) or a jobseeker's allowance (*Ireland*), provided they meet certain qualifying conditions (such as the 'habitual residence condition' in *Ireland*). However, such payments are not automatically granted and accessing them puts job-seekers at risk of becoming a burden on the social assistance system of the Member State concerned. In *Estonia*, as noted above, there are no special rules foreseen for job-seekers from other EU Member States and clarification is necessary regarding their right of residence, particularly as all persons with a "right to stay" are entitled to obtain social assistance. In *Denmark*, however, first-time EU job-seekers are expressly excluded from social cash benefits, with the exception of those benefits related to return to their home country. The rapporteurs observe that these rules appear to be in accordance with Articles 14 and 27 of the Directive, arguing however that they may be questioned in the light of recent Court of Justice jurisprudence. In *Portugal*, job-seekers do not enjoy entitlement to non-contributory benefits of the solidarity sub-system. But it might still be possible for them to access an allowance applicable under a 2003 law on social income for insertion, which is aimed at fostering integration in the labour market, if they are *inter alia* between 18 and 30 years of age and register as a job-seeker in their local employment centre for at least six months. In this instance, after six months of job-seeking, the rapporteurs argue that the existence of a real link with the labour market, as per the judgment of the Court of Justice in the *Collins* case,[17] appears to be beyond doubt. In *Spain*, the recent austerity measures have resulted in amendments to the 2006 Royal Decree on Active Insertion Income, with the result that going abroad for any reason or duration interrupts registration as an unemployed person and therefore the loss of social assistance measures. In the view of the rapporteurs, this amendment will likely have a disproportionate impact on job-seekers registered in Spain if it means that going to another EU Member State for a job interview is considered sufficient to cancel their registration as a job-seeker and consequently access to social assistance.

14 According to the established jurisprudence of the Social Appeal Court of North-Rhine-Westphalia, as explained in a judgment of 22 June 2012, after six months of unsuccessful search for a job, EU citizens are no longer entitled to a right to free movement unless they can demonstrate on the basis of the *Antonissen* judgment that they are still seriously seeking employment. After 18 months of unsuccessful job-seeking, the administrative authorities may assume that the EU right of entry and residence has ceased to exist, and the burden of proof that they are still looking for work rests with EU citizens.

15 See Articles 64 and 65 of Regulation (EC) No. 883/2004.

16 Job-seekers who have never worked in Austria do not receive a payment automatically. Job-seekers who have had a job in Austria, can benefit from the social assistance as long as they retain their status as a worker.

17 CJEU (Full Court) case C-138/02 [2004] ECR I-2703.

In *Ireland* (as noted above) and in the *United Kingdom*, EU job-seekers are explicitly denied access to social assistance under the social welfare legislation. As noted in the 2011-2012 report, in *Poland*, job-seekers who do not fulfil the criteria for receiving an unemployment benefit are not entitled to receive any financial benefits and can only receive non-financial forms of support, such as general assistance to find a job and participation in various workshops and vocational trainings that aim to raise their qualifications with a view to securing employment. The validity of restrictive social legislation preventing access to social assistance for EU job-seekers continues to be discussed by the social courts in *Germany*. The Social Code II excludes foreigners whose right to reside in Germany is based solely on the fact that they are looking for employment. The interpretation of the relevant provisions and their compatibility with Article 24(2) of the Directive, as interpreted by the Court of Justice in its judgment in *Vatsouras (supra)*, has still not been resolved. The question has repeatedly arisen, particularly in the context of EU citizens from Bulgaria and Romania applying for social benefits. In principle, social courts as well as administrative courts have accepted a right of free movement for job-seekers (which as a right of entry and residence they do not consider to be directly related to the question of social benefits), irrespective of the granting of a work permit which may be required until the end of the interim restrictions under the Accession Agreements. With regard to *Lithuania*, the rapporteur reiterates previous findings that EU job-seekers are likely to experience difficulties in accessing social security benefits, particularly if they have not been contributing to such benefits or are not permanent residents.

3. OTHER ISSUES OF CONCERN

Delays concerning the issuing of residence certificates and residence cards for EU citizens and their family members continue to be a problem in *Cyprus* and the *United Kingdom*, where, as discussed above, applications for residence cards by third-country national family members of EU citizens can still take up to six months to be processed.

In *Denmark*, the rapporteurs draw attention to a 2012 report of the organization *Project UDENFOR*, according to which the vast majority of at least 500 homeless migrants in Copenhagen are EU citizens. Furthermore, four out of five are migrant workers, whose biggest problems are poverty, unemployment and homelessness. In October of the same year, the relief organization *Kirkens Korshær* issued a project description of its new initiative: the establishment of a counselling service for homeless migrants - *Kompasset*, the purpose of which is to offer legal and social counselling and support to the increasing number of homeless migrants in Copenhagen, and thereby to improve their condition. The target group is homeless migrants who are not registered in Denmark under the Civil Registration System or have a foreigner's number and who, consequently, do not have access to assistance from the public authorities. *Kompasset* further offers independent guidance for job-seeking migrants, specifically on the Danish registration system and a letter of information to employers. In October 2012, the target group comprised mainly of EU/EEA citizens from Eastern Europe. Since January 2013, *Kompasset* has recorded more than 400 requests for assistance; the majority from job seeking EU citizens. Another example of the problems encountered by EU homeless working citizens is an incident on 17 October 2012, when the Copenhagen Municipality, together with the Copenhagen police, cleared *Folkets Park* ('the People's Park') in Copenhagen of what appeared to be more than 50 - mostly foreign - homeless persons'

belongings. Apart from the unfortunate method used, the presence of the mostly foreign homeless persons may be regarded as reflecting not only how the Municipality deals with destitution and homeless foreigners, but also the difficulties encountered by job-seeking EU citizens in Denmark, which have been referred to earlier. When seeking access to shelters or care homes, the rapporteurs observe that a more thorough examination of inter alia the duration of the EU citizen's stay, his or her personal circumstances or whether she or he has acquired the status of a worker, is a self-employed person or is a genuine job-seeker with real chances of employment does not appear to be conducted in practice. Similarly, in *Sweden*, the rapporteur notes that the charity *Stadsmissionen* has observed an increasing number of homeless EU citizens in Stockholm. According to a spokesperson for the organization, the EU citizens in question often do not have serious social problems, but a serious practical obstacle is obtaining the personal social security number needed to register at the employment office, find an apartment, or open a bank account, etc.

With regard to the refusal of entry and expulsion of EU citizens, as also observed in previous reports, concerns persist in a number of Member States that EU-8 nationals and, especially, EU-2 nationals, are being treated less favourably. This section focuses on the more general concerns raised in this respect, while Section 4 below discusses *inter alia* expulsion as it pertains to EU workers of Roma origin.

As noted in previous reports, discrepancies continue to exist in *Finland* in respect of the procedural safeguards relating to the expulsion of EU citizens and their family members. Such safeguards are considerably stronger in the case of those who have registered their residence or obtained a residence card than in the case of those who did not, irrespective of the length of time they have *de facto* resided the country. The former are considered for removal by way of deportation and the criteria in Article 28(1) of the Directive are applied to them but not to the latter who are considered under a different procedure applicable to refusal of entry. Moreover, a person excluded from Finland on grounds of public order or public security may be prevented from re-entering on the basis of such a decision regardless of how long ago the decision was taken and without any obligation to re-examine the personal circumstances of the individual concerned in order to assess whether she or he continues to pose a real and serious risk to the fundamental interests of society.[18] While the person concerned may apply for the lifting of the exclusion decision, such an application does not prevent enforcement of the decision to refuse entry. In *Germany*, the rapporteurs observe that the 2013 amendments to the Freedom of Movement Act did not change the rule that the duration of the validity of a re-entry ban resulting from an administrative expulsion measure under the Act may be determined on application only, which raises the question whether this conflicts with the Court of Justice's jurisprudence whereby an unlimited entry ban is generally not compatible with EU law. However, this question was addressed in practice by the Federal Administrative Court in a July 2012 judgment, which interpreted the provisions regulating the termination of re-entry bans in expulsion cases in such a way that administrative authorities are now obliged to automatically connect an expulsion decision with a decision determining the time period of a re-entry ban's validity. Consequently, a determination on the loss of the residence right of an EU citizen on public order grounds must automatically be combined with a decision determining the time period of a re-entry ban. In *Luxembourg*, in response to a parliamentary question regarding the number of cases which have resulted in

18 Refusal of entry as described here is possible if the person has an effective prohibition of entry. The duration of the entry ban depends on the seriousness of the criminal activity and it can vary between 1 and 15 years.

withdrawal of residence on the basis of insufficient resources, the Government Minister responsible responded that 110 withdrawals of residence rights had taken place since the 2008 Law on free movement of persons and immigration (as amended in 2011) had come into force. While the effect of such a withdrawal does not prohibit the return of the EU citizen to the territory (as only expulsion on the grounds of public order can have this effect), the rapporteur notes that the EU citizens concerned receive information that they only have eight days within which to challenge the withdrawal of the right to stay as part of the non-contentious administrative proceedings. However, in response to criticism from ASTI – the association supporting foreign workers – the Directorate of Immigration has introduced changes and, since January 2013, the period specified in such information is one month. As noted in the 2011-2012 report, ambiguities regarding the transposition of the provisions in the Directive relating to entry and procedural safeguards are also found in *Malta*. In the case of entry, the possibility in Article 5(4) of the Directive for EU citizens to bring their travel documents to the authorities "*within a reasonable period of time*" in the case that they do not have them is not found in the national legislation. In the case of procedural safeguards, no literal transposition of the pertinent provisions of the Directive can be detected even though the rapporteur notes that such safeguards are generally respected by the courts.

In *Cyprus*, NGOs and human rights lawyers have raised questions about the conditions of detention and expulsion of foreigners, including EU citizens. Since 2004, the government has deported a total of 1,795 EU citizens. More recently, 208 EU citizens were deported in 2011, 288 in 2012 and 114 in the first five months of 2013, mostly from Romania (697), Bulgaria (338), Poland (222) and Greece (175). According to the rapporteur, these numbers are very high given that the grounds for expelling EU citizens are narrowly defined under the Directive. In *Italy*, the rapporteur refers to a 2013 research report by MEDU (*Medici per i diritti umani*) on Identification and Deportation Centres (*centri di identificazione ed espulsione* –), which found that, in 2011, 494 Romanian nationals were detained, of whom 346 were repatriated, out of a total of 7,734 detained foreigners, of whom 3,880 were repatriated. In 2012, 7,944 foreigners were detained, of whom 4,015 were repatriated. Under Italian legislation, EU citizens may be detained for a period required by the court to validate the immediately enforceable expulsion decision (such a decision must be communicated to the court within 48 hours and validated within the subsequent 48 hours). Once validated, the decision can be enforced; otherwise it loses force and effect. Nonetheless, the report observes that in practice some EU citizens continue to be detained in the CIE after the expulsion decision has been validated in cases where immediate deportation is not possible, which is not in accordance with the law.

As underscored in previous reports, the inclusion in *Hungary* of HIV infection as a disease endangering public health that may preclude the residence of an EEA national is not in conformity with EU or international law. For example, ILO HIV and AIDS Recommendation, 2010 (No. 200) prohibits exclusions from migration on the basis of the migrant worker's "real or perceived HIV status".[19] The rapporteur also observes that the inclusion of HIV in this context has elicited criticism from human rights organizations since the mid-1990s. In *Lithuania*, as referred to in the 2011-2012 report, amendments adopted in December 2011 to the provisions in the Aliens Law on the timelines for departure are not in conformity with the Directive because they have abolished the one-month guarantee for EU nationals and intro-

19 See ILO Recommendation No. 200, para. 28: "Migrant workers, or those seeking to migrate for employment, should not be excluded from migration by the countries of origin, of transit or of destination on the basis of their real or perceived HIV status".

duced a general time-limit of 7-30 days, which, in practice, may mean that EU nationals will have less than one month to leave the country. However, the rapporteur reiterates that there has not yet been any practice applying this provision. Moreover the possibility of EU nationals being detained under the same conditions or grounds as foreigners generally has been removed as of 1 January 2013. EU citizens can now only be detained on two grounds: (1) for reasons of public health as stipulated in Article 29(1) of the Directive: and (2) pending expulsion from the country.

In the *United Kingdom*, EEA residence cards issued to third-country national family members of EU citizens are not recognized for the purpose of automatic admission to the UK in accordance with Article 5(2) of the Directive, unless they were issued by the UK authorities. Such family members are obliged to obtain EEA family permits (equivalent to an entry visa) in order to travel. This question is the subject of an outstanding reasoned opinion by the European Commission and a reference for a preliminary ruling of the Court of Justice.[20] Moreover, the rapporteurs observe that practitioners continue to report difficulties at ports of entry for EEA nationals and their family members due to some immigration officers' lack of knowledge about or training in EU free movement law. Concern is also expressed by the rapporteurs in respect of the 2012 amendments to the Regulations which enable the authorities to cancel EEA citizens' and their family members' right of residence if they are deemed to be an unreasonable burden on the public assistance scheme, or on public policy, public security or public health grounds. They contend that there is no authority in the Directive or elsewhere in EU free movement law for the 'legal limbo' that a person will be placed in if their right of residence is cancelled. These amendments also confirm that persons with a derivative right of residence can be excluded or expelled where to do so would be "conducive to the public good", which is similar to one of the key tests for exclusion and deportation of non-EEA nationals under domestic UK law. The justification for this different standard of protection is unclear.

In the *Netherlands*, the rapporteurs draw attention to an extensive body of case law concerning detention and departure of EU citizens during the reporting period. This case law indicates that administrative decisions still fall short of the requirement of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in respect of the personal conduct of the individual concerned. The existence of such a threat can also be based on the nature and frequency of the offences, although each offence in itself does not constitute such a threat. Moreover, as reported previously, the application of the stricter criteria of the so-called 'sliding scale', introduced for the withdrawal of residence on public order grounds in respect of non-EEA nationals who have been convicted of serious offences or are habitual offenders, is continuing, and the scale has now been tightened even further and introduced in the Aliens Decree by amendments adopted in March 2012. This has occurred despite the concerns of the Advisory Committee on Migration Affairs (ACVZ), which expressed its doubts on the proportionality and legitimacy of the proposals. On a more positive note, Article 28(1) of the Directive, according to which Member States are required to take into account a number of personal considerations when making an expulsion decision, has now been fully transposed by a decision amending the Aliens Decree in April 2012.

In June 2012, the Supreme Court of Justice in *Portugal* ruled that the expulsion of EU citizens could not be automatically enforced after the completion of a prison sentence. The simple fact that an EU citizen was sentenced to a term of imprisonment for drug trafficking

20 See respectively and http://europa.eu/rapid/press-release_IP-12-417_en.htm and *R (McCarthy and others)* v. *Secretary of State for the Home Department* [2012] EWHC 3368 (Admin).

does not justify expulsion from the Portuguese territory, unless the latter is grounded in public order, public security or public health reasons.

As described in previous reports, in *Bulgaria*, exit bans imposed on Bulgarian citizens and their conformity with the Directive has been the subject of the bulk of judicial practice relating to the Directive at the national level. Two preliminary rulings by the Court of Justice, *Aladzhov* and *Gaydarov*[21] have already been issued, and the ruling in a third case, *Byankov*,[22] was adopted on 4 October 2012. The Court of Justice held that EU law must be interpreted as precluding the application of a national provision which provides for the imposition of a restriction on the freedom of movement within the EU of a Member State national, solely on the ground that she or he owes a legal person governed by private law a debt which exceeds a statutory threshold and is unsecured. Furthermore, that Court stipulated that in those cases where there is a breach of EU law, the exit ban in question should be subject to re-examination, although it is final and non-contestable under national law. However, the amendment to national law referred to in the previous report that will enter into force on Bulgaria's accession to the Schengen area and that will allow for the withdrawal of a residence permit of third-country national family members of an EU citizen or prohibit their entry if they have been signalled in the Schengen Information System (SIS) is still place.

In *France*, the rapporteurs refer to several cases, mostly concerning Romanian nationals, in application of the June 2011 legislative reform providing *inter alia* for a right of residence for EU, EEA and Swiss nationals for a maximum period of three months without any conditions or formalities provided that they do not become an unreasonable burden on the social security system, In *Spain*, there have been a number of court judgments during the reporting period confirming or invalidating expulsion decisions taken by the authorities against EU citizens. The cases also demonstrate the practice of administrative authorities to adopt expulsion decisions together with a prohibition of entry between five to ten years. Since such decisions have not been sufficiently justified, the prohibitions of entry have usually been annulled by the courts.

With regard to remedies, and as observed in previous reports, the limited jurisdiction in *Belgium* of the Council for Aliens' Disputes (CCE – *Conseil du Contentieux des étrangers*) in respect of the residence of EU citizens and their family members continues to raise the concerns of the rapporteurs about its compatibility with Article 31(3) of the Directive providing for "an examination of the legality of the decision as well as of the facts and circumstances". Given that the CCE has full jurisdiction in respect of other aspects of the Aliens Law (i.e. asylum-seekers and refugees), the rapporteurs contend that this could raise questions under the EU principle of non-discrimination (Article 18 TFEU) regarding access to justice and the right to an effective remedy under the ECHR.[23] The transposition of the procedural safeguards provided for in Articles 30 and 31 of the Directive have not been transposed correctly in *Ireland* as the implementing regulation fails to provide access to independent redress procedures against a refusal by the authorities to grant admission to the territory, to issue a residence card, a permanent residence card or against an expulsion decision. Instead, "an officer of the Minister who (a) is not the person who made the decision, and (b) is of a grade senior to the grade of the person who made the decision" is tasked with reviewing the original decision. This mechanism lacks independence as required by EU law, as most recently interpreted by the Court of Justice in *ZZ* v. *Secretary of State for the Home*

21 CJ EU (Fourth Chamber) case C-434/10 [201] ECR I-11659 and *idem*., case C-430/10 [2011] ECR I-1163.
22 CJ EU (Second Chamber) case C-249/11, 4 October 2012, n.y.r.
23 See: Application No. 30696/09 *M.S.S.* v. *Belgium*, Eur.Ct H.R., judgment of 21 January 2011.

Department.[24] In *Sweden*, the aforementioned public investigation conducted in 2012 has proposed that appeals against a general court's decisions on deportation because of criminal offences should be dealt with by the Migration Board or the Migration Courts, and not by the government.

4. FREE MOVEMENT OF ROMA WORKERS

The two general trends identified in the previous reports with regard to EU Roma workers persist during this reporting period: (1) EU nationals of Roma origin are continuing to make use of EU free movement provisions to escape poverty, marginalization and discrimination in their Member State of origin, and have sought jobs in the formal labour markets of other EU countries; and (2) Despite reports of better treatment in some instances, EU Roma workers experience considerable problems regarding access to the labour market because of difficulties in demonstrating their quality as "workers", generally lower levels of education and skills, discrimination, and a greater tendency to expulsion on grounds relating to public order and being a burden on the social assistance system of the host-Member State. Incidences of human trafficking of Roma, especially women and children from the EU-12 have also been reported. Further, continued transitional arrangements in several EU Member States restricting the access of EU-2 workers to employment appear to be exacerbating this situation.

With regard to the first trend, it is specifically reported that a combination of poor housing and living conditions, insufficient salaries to maintain families, limited access to education and health care, high levels of unemployment, discrimination, marginalization and social exclusion continue to be widespread in a number of EU-8 Member States (*Bulgaria*, *the Czech Republic*, *Hungary*, *Latvia*, *Lithuania* and *Poland*).

Specifically, and worryingly, in the *Czech Republic*, the rapporteurs observe an increase of anti-Roma sentiments in several cities in 2012 and 2013, and organization by extremist groups of demonstrations also attended by local people, which is seen as a new phenomenon. Moreover, some politicians play the "Roma card" to gain votes, which can be viewed as a *de facto* obstacle to free movement of Roma workers. However, there have also been a number of positive initiatives taken to assist the Roma community, which are discussed below.

Discrimination against the Roma, particularly in education, has been the subject of cases before the European Court of Human Rights, for example *D.H. and others* v. *Czech Republic*,[25] referred to in the 2011-2012 report and which the rapporteur notes has still not been resolved. Consequently, free movement to other Member States is seen as an opportunity for EU citizens of Roma origin, particularly those who are less-skilled, to escape poverty and discrimination at home. In *Croatia*, it is recognized that Roma have largely been marginalized in social and public activities and experience worse living conditions on average than the majority population and other minorities. While a national programme to enhance the Roma's integration into society has been in place for over 10 years (see below), the rapporteur also refers to the *Oršuš* case (*supra*) in which the European Court of Human Rights condemned the segregation of Roma in schools on the grounds of their inadequate official language skills, thus demonstrating the importance of Roma education and their integration

24 CJ EU (Grand Chamber) case C-300/11, 4 June 2013, n.y.r.

25 Application No. 57325/00, *D.H. and others* v. *Czech Republic*, Eur. Ct H.R., judgment of 13 November 2007.

in the educational system in breaking the vicious circle of their socio-economic deprivation.[26] In *Latvia*, the rapporteur reiterates the information submitted in previous reports that persons of Roma origin claim that they are able to find employment in other Member States, especially in Ireland and the United Kingdom, and also feel free from everyday discrimination in their social life, with the result that an estimated 10,000 (out of 15,000) Latvian Roma have made use of their free movement rights.

In *Germany*, the rapporteurs refer to extensive media reports about Bulgarian and Romanian EU citizens, often of Roma origin, who move to Germany and often live in precarious conditions and without work. It seems that most issues arise at a municipal level and primarily concern social questions with local politicians raising concerns about the significant financial costs they might have to bear for providing adequate housing, childcare, etc. In *Hungary*, there has been an increase in the adoption of decrees by local authorities sanctioning conduct deemed to constitute public disorder on the basis of an expanded conception of this notion in the legislation by municipalities relating to matters that disproportionately impact on persons of Roma origin (e.g. failing to register one's address). While the provision in question has since been annulled by the Constitutional Court as contrary to the Fundamental Law, the rapporteur notes that adoption of local decrees has continued. In *Luxembourg*, the rapporteur cites 2012 press reports, which discussed the issue of begging, perceived to be largely undertaken by gangs of Roma from Romania. On the other hand, in *France*, the rapporteurs observe that the stigmatization of the Roma population in public and political debate has eased somewhat, although there has been no change of policy by the Interior Ministry or any specific statement by the new Minister.

In the *Czech Republic*, the departure of Roma to seek asylum in Canada, an issue that contributed to the re-imposition by Canadian authorities of visa requirements on Czech nationals in 2009, was not debated much during 2012-2013, but remains a topic on the political agenda. The *Hungarian* rapporteur also notes a trend that some Roma Hungarian citizens are seeking asylum abroad.

With regard to the second trend, the continued transitional measures in place for EU-2 citizens in some Member States clearly contributes to the disadvantaged position of EU workers of Roma origin in the labour market, for instance in *Spain* which has re-imposed the transitional arrangements in respect of Romanian citizens until the end of 2013. Similarly, the rapporteurs for the *United Kingdom* note that the restrictions on EU-2 nationals limit their options for escaping an exploitative working environment.

It should be emphasized at the outset that it continues to be difficult to obtain a full picture of the situation of EU Roma workers in a number of Member States because of the absence of relevant official statistics on this specific group or on the ethnicity of EU and other workers admitted to the country in question (*the Czech Republic*, *Denmark*, *Germany*, *Hungary* and *Lithuania*). In *Hungary* there are no official statistics based on ethnicity relating to employment or migration, only fragmented data based on surveys. In *Lithuania*, as observed in the 2011-2012 report, statistics on the nationality or ethnicity of workers are not collected at all, with the result that it is impossible to ascertain whether workers coming to the country are of Roma origin. While there are no official statistics relating to the number of Roma workers in *Ireland*, a NGO Roma Support Group estimates that there are more than 3,000 Roma in the country, with the majority being EU citizens; this figure was also cited by the Irish Minister for Justice, Equality and Defence in response to a parliamentary question in February 2013. Official figures in *Latvia* count 8,291 persons of Roma origin, although ex-

26 Application No. 15766/03, *Oršuš and others* v. *Croatia*, Eur.Ct H.R., judgment of 16 March 2010.

perts estimate that there are approximately 15,000 (see above).[27] A report of the Federal Office for Migration and Refugees published in 2012 notes that EU citizens from Romania and Bulgaria entering *Germany* are not registered on the basis of ethnicity or any other criteria, with the result that there are no data available in the Federation and the *Länder* on the extent to which Roma workers have migrated to Germany and whether, as job-seekers, they are pursuing employed or self-employed activities. The report, however, observes that there has been a substantial overall increase of EU citizens from Romania and Bulgaria in Germany by approximately 40-50 per cent from 2010 to 2011 (in 2011, 160,000 Romanians and 94,000 Bulgarians respectively were residing in Germany). The report also notes a significant agglomeration of family groupings of supposedly Roma origin in a number of large cities. In *Poland*, the 2011 national census indicated that about 16,000 respondents declared their Roma affiliation, although the number of Roma living in Poland is likely to be in the region of 20,000-25,000, whereas in *Sweden* around 50,000 persons of Roma origin are living in the country. The European Commission's June 2013 Progress Report on Roma integration[28] highlighted that Roma in *Bulgaria* constitute 10 per cent of its population, which is the highest share of Roma minority among EU Member States. According to the 2011 census in *Croatia*, there are 16,975 Roma persons living in the country amounting to 0.4 per cent of the total Croatian population, while in *Spain* it is estimated that there are approximately 925,140 persons of Roma origin living in the country.

In *Denmark*, based on findings in the period 2007-2010, the Danish Centre against Human Trafficking estimates that half of the prostitutes in the streets of Copenhagen from Romania are Roma. Prostitutes with a Roma background also work in massage parlours outside of Copenhagen. Nineteen women from Romania, Slovakia and the Czech Republic were identified as victims of trafficking and the Danish Centre against Human Trafficking is also aware that some of these women are Roma. In ten cases involving minors from Bulgaria, Slovakia and Romania with a Roma background, social workers found varying degrees of indicators of human trafficking. In *Finland*, it has been estimated that in Helsinki there are currently about 400-600 Roma from Bulgaria and Romania, who mainly earn their living by playing music or begging in the streets or by collecting empty bottles. They live in camps and in cars, and occasionally in private apartments. In *Belgium*, a new draft law relating to begging has been introduced in Parliament. While it does not only concern Roma or EU citizens, the draft law's principal feature is to sanction more strictly those people who beg with children. In *Germany*, a position paper of the German Association of Cities (*Deutscher Städtetag*) of 22 January 2013 identified difficulties in the following areas: *poor health*, with most Bulgarians and Romanians missing important vaccinations or lacking health insurance, and only having access to emergency health care provided for by the State; *education*, with cities registering an increasing number of children taken charge of by the State, since their parents cannot provide adequate living conditions, and problems in the schools due to children's and adolescents' lack of language skills; *living conditions*, with many Bulgarians and Romanians living in crowded parts of the city in squalid apartments, partly in other temporary accommodation, and being charged exorbitant sums by landlords for dilapidated property; *social integration*, with residents complaining about misconduct (i.e. cases of crime, begging and prostitution); and *labour market*, with many migrants working without authori-

27 According to the rapporteur, the difference between the official number and the situation in reality is explained by the fact of discrimination against the Roma in all spheres of social life which leads to some Roma changing their official ethnic origin to either Latvian or Russian.

28 European Commission, *Roma integration: Progress Report and Recommendation*, Brussels, 26 June 2013, available at: http://europa.eu/rapid/press-release_MEMO-13-610_en.htm.

zation. Employment offices are also registering a significant increase of (allegedly bogus) business registrations as self-employed. Nonetheless, the rapporteurs note that in an answer of 18 March 2013 to a parliamentary inquiry, the federal government adopted a nuanced position, highlighting that many EU citizens from Bulgaria and Romania come for legitimate reasons and that their migration does not cause major frictions within most German cities. In *Italy*, the rapporteur observes that the situation of Roma has not significantly improved, as indicated in two recent reports of Amnesty International: *Italy's discriminatory treatment of the Roma breaches EU Race Directive*, July 2012; and *Sgomberi forzati e segregazione dei Rom in Italia* [*Forced evictions and segregation of Roma in Italy*], September 2012.

In *Sweden*, as observed in the 2011-2012 report, EU Roma job-seekers experience discrimination in society generally and also have difficulties in accessing employment because of a low level of education. Consequently, they resort to other means to earn a living, such as begging. Moreover, the practical issues discussed above in relation to the limited understanding of local authorities regarding what is a genuine chance of obtaining employment in respect of EU job-seekers and the difficulties in obtaining a personal social security number, as well as the absence of a definition of 'unreasonable burden' on the social system, is likely to disproportionately impact Roma job-seekers from other EU Member States. In *Lithuania*, the rapporteur draws attention once more to the actions of the Vilnius municipality, which, in 2012, started to destroy temporary housing occupied by persons of Roma origin, and which have raised concerns among human rights organizations. In the *United Kingdom*, the rapporteurs refer to research cited in earlier reports on the situation of Roma workers, from EU-8 and EU-2 Member States, noting that their access to mainstream employment with decent wages remains very limited. Roma workers are often employed as casual day labourers and opportunities for this type of work have decreased during the economic recession. While there have been instances of severe exploitation, sometimes amounting to forced labour, according to the rapporteurs, the social and economic marginalization of the community and their limited trust in authority has made it difficult to begin to address this exploitation. Moreover, the situation of the Roma has been worsened by the cuts in employment-related benefits introduced by the coalition government and they are also frequently denied welfare benefits through misapplication of the habitual residence test by staff of the Department of Works and Persons. Furthermore, the rapporteurs highlight the lack of any national strategy or plan to promote the social inclusion of the Roma population.

Facilitated expulsion of Roma contrary to the strict EU free movement rules and human rights law is also reported. For example, in *France*, as observed above, legal amendments make it easier for the authorities to expel Bulgarian and Romanian nationals, some of whom belong to the Roma minority.

In *Finland*, as also reported in 2011-2012, the authorities are well aware of the rights of Bulgarian and Romanian nationals belonging to the Roma minority as EU citizens and there is no information on any unlawful expulsions having taken place, although there have been media reports of police dispersing illegal camps of persons belonging to the Roma minority under the Act on Public Order as well as of prohibiting obtrusive begging, which is punished by a fine under the same legislation.

It is of concern to learn that expulsions of EU Roma citizens have not necessarily given rise to critical reaction in EU Member States of origin, which reflects the low profile of the Roma in those countries and the existence of inherent discriminatory attitudes towards them. For example, in *Bulgaria*, as reported in 2011-2012, the expulsions in 2010 did not give rise to any public debate of note and the media focused more on the funds returnees received

from the expelling authorities rather than on the reason for or conduct of the expulsions. The voluntary return and expulsion of persons of Roma origin to *Romania* is noted as a concern that, in the view of the rapporteur, requires an effective European-wide response to protect Roma from discrimination and to assist in their integration.

A number of positive initiatives in respect of the Roma community are also reported. The European Commission's June 2013 Progress Report on Roma integration draws attention to work undertaken in *Bulgaria* to better mobilize EU funds for Roma integration through the establishment of an inter-ministerial working group. The group is chaired by the Ministry of EU Funds Management and comprises deputy ministers, experts from the authorities in question and operational programmes and representatives of Roma NGOs. It aims to propose instruments and schemes, as well as to verify the measures planned under each operational programme. In *Croatia*, the rapporteur takes note of the Government's efforts for the better integration of Roma in society. In October 2003, the Government adopted a National Programme for the Roma which aims to resolve many of the difficulties encountered by Roma in their day-to-day lives. The Programme aims to abolish all forms of discrimination, violence, stereotyping and prejudice against Roma, while ensuring that they do not lose their own identity, culture or traditions. In order to achieve this aim, the National Programme sets out a series of measures in areas such as access to citizenship, education, housing, access to public services and relations with the police. In 2004, a Committee for the Surveillance of the Enforcement of the National Programme for the Roma, comprising representatives from the Government, Roma and NGOs, was set up to monitor the Programme and develop the action plan for different line ministries. Since then, there have been improvements in Roma integration in the social, cultural and political life of the country.

In *Denmark,* in December 2011, the Minister of Social Affairs and Integration presented the European Commission with the country's national strategy for Roma inclusion, which, in August 2012, was translated into Danish and forwarded to the municipalities. The Action Plan for Roma Inclusion has 3 components: (1) full realization of the integration tools available for the benefit of Roma inclusion; (2) continuation and strengthening of efforts towards combating poverty and social exclusion in general; and (3) dissemination of knowledge on best practices and agreed principles for Roma inclusion at the municipal level. The Roma community is considered to be relatively small and persons with Roma background do not have the status of a national minority. Consequently, the government has chosen to promote Roma inclusion through the integrated set of policy measures and no special monitoring mechanisms will be established. With regard to Roma workers in particular, the national strategy observes *inter alia* that there might be Roma working within the green sector (agriculture and gardening) as well as the construction sector, as migrant workers from Eastern Europe are frequently working in these sectors.

In *Finland*, it is reported that the Deaconesses' Institution, a non-profit organization in Helsinki, runs a centre where members of the Roma minority are offered some basic services, such as an opportunity to take a shower and to do their laundry. Once a week, the centre hosts a clinic which is run by volunteers and which offers some basic health care services to members of the Roma minority as well as to undocumented migrants. In 2012, there was a total of 13,539 visits to the centre, with approximately 5-10 children visiting each day.

In *Germany*, the position paper of the German Association of Cities (*Deutscher Städtetag*), referred to earlier, was widely discussed in the media. It calls on federal and state governments, as well as the EU, to deal more effectively with poverty migration of persons from Bulgaria and Romania. According to this association, a discussion at European level

needs to be initiated on how living conditions can be improved in countries of origin to make poverty migration within the EU unnecessary. In addition, the affected cities request support from federal and state authorities as well as the EU to cope with existing problems. As noted in the 2011-2012 report, in *Hungary*, the EU Roma Framework Strategy, adopted in May 2011 by the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), will be integrated into future national human resources initiatives. In *Ireland*, the National Traveller Roma Integration Strategy was found to be deficient by the European Commission in its 2013 assessment of European Roma strategies, because only four out of the 22 criteria used to assess the strategies had been met. However, significant amendments have been passed to disapply, in relation to EEA nationals and their dependents, provisions in the Immigration Act requiring foreigners to be in possession of and to present their passport or other equivalent document, and any other information reasonably required, when requested to do so by an immigration officer. Previously, members of the Roma community were frequently charged with offences under these provisions and concerns have been raised that this may be in breach of the equal treatment provision contained in Article 24 of Citizens Directive as this requirement was not applied to Irish and UK citizens. In *Poland*, a new Governmental Programme on the Roma Society, which is funded by an annual budget of € 2.8 million, is being prepared for 2014-2020 with the purpose of supporting the Roma community in education, health, employment and housing. According to the authors of the draft 2014-2020 Programme, the vital problem to be addressed concerns the isolation of the Roma population from Polish society in general given that a number of traditional Roma communities are very closed and defend their independence. In *Spain*, the government continued applying the integration programme for the Roma approved in 2011, with the Employment Ministry budgeting EUR 41 million to develop and integrate actions focusing on their integration into the labour market. As noted in the 2011-2012 report, a new long-term strategy for inclusion of persons of Roma origin has been launched by the government in *Sweden*, with the aim of ensuring full equality of treatment and opportunity for Roma with other ethnic groups within a period of 20 years. Approximately € 4.5 million has been allocated for local projects during 2012-2015.

In some Member States, the rapporteurs observe that there are no EU workers of Roma origin in the country (*Malta*), or that their presence did not give rise to any problems or specific issues of concern in the reporting period (*Cyprus*, *Estonia*, *Portugal* and *Slovenia*), or that no particular importance was attached to the free movement of Roma workers in the case law, media or academic literature (*Austria* and *Greece*). In *Romania*, the rapporteur notes that no problems have been encountered regarding the free movement of Roma workers to the country from other EU Member States. Finally, the issue of Roma workers leaving or returning to *Slovakia*, or moving there from other Member States, has not given rise to any debate.

CHAPTER 2
MEMBERS OF A WORKER'S FAMILY

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

This chapter examines the position of family members of EU citizens under the Citizens Directive. It starts with an analysis of the definition of family members as implemented in the 28 Member States and then moves on to the position of family members in the EU citizens Member State of nationality. In § 2 entry and residence rights and pracitce are considered in detail and the issue of abuse of free movement rights, including marriages of convenience, is considered in § 4. Finally, the rules and practices in the 28 Member States concerning the right to access the labour market and the position of a job seekers' family members is addressed in § 5 and 6.

1.1 Definition of family member

The overall position is that the implementation of the definition of family member by the Member States is correct.

In the *Croatian* Aliens Act, the definition of family members who benefit from free movement rules is found in Article 162. This provision includes both the family members listed in Article 2(2) and Article 3(2) of the Citizens Directive. As *Croatia* does not recognise registered partnership relations, these are not included in the definition in the aforementioned provision. De facto relations include both opposite-sex and same-sex relations, if the relation has lasted for at least three years or if a child has been born from the relation and the partners intend to continue cohabitation.

Legislation

(Proposals for) amendments to law and/or policy are reported for France, Lithuania, Malta, the Netherlands, Poland, Swedish and the United Kingdom.

The law introducing same sex marriages in *France* has meant that spouses in same-sex marriages now also benefit from the Citizens Directive.[1] The rapporteur notes as a further development that the information on the website of the Minister of the Interior reveals a very liberal reading of the concept of family member compared to earlier circulars.

An amendment to the *Lithuanian* Aliens Law has introduced the terminology 'other person who is entitled to free movement of persons under EU law' in that Act. Thus, Article 2(11) of the Lithuanian Aliens Law now includes Article 3(2) family members. Following this amendment qualifying family member are also: a partner with whom the EU-citizen has lived in a duly attested durable relation for the past three years; a person who was supported by the EU-citizen in the EU-Member State at the point of departure; and a person who is a member of the EU-citizen's household or needs the EU-citizen's personal care due to serious health reasons, if duly attested. Article 3(2) family members do not benefit from the provi-

1 Loi No. 2013-404 of May 17, 2013.

sions on the retention of the right of residence and the right of permanent residence prior to five years of continuous residence.[2]

In *Malta* amendments introduced to LN 191/2007 in 2011 and early 2012 have redefined the concept of 'other family member'. 'Other family member' is now defined as 'a person who, irrespective of his nationality, in the country from which he has come, is a dependant or a member of the household of the EU-citizen having the primary right of residence; or a person who, for serious health reasons, strictly requires personal care by the EU-citizen'.

The *Dutch Vreemdelingencirculaire* 2000, B10/2 no longer includes an enumeration of family members who enjoy derived rights under the Citizens Directive, as its predecessor did, leaving Article 8.7(2) and (3) *Vreemdelingenbesluit* 2000 as the sole reference for qualifying family members. This has put an end to a discrepancy in the wording of the text in the *Vreemdelingenbesluit* 2000 and the *Vreemdelingencirculaire* 2000. According to the wording of *Vreemdelingenbesluit* 2000 the provisions in the section EG/EER of that Decree 'also' and 'likewise' apply to Article 3(2)-family members. The policy rules now merely provide clarification of the notions: 'direct descendants'; dependent'; and 'durable relation', which have not been amended. A further amendment concerns the *Teixeira* and *Ibrahim* case law.[3] *Vreemdelingencirculaire* 2000, B10/2.3 now explicitly precludes expulsion measures directed against a caring parent of minor, school attending EU-citizens if they are on benefits and their reliance on public funds qualifies as 'more than supplementary'.

Registered partners, either between opposite or same-sex partners, are not recognised in *Poland*. A ruling of the Warsaw Administrative Court, however, has changed the position of these family members in that Member State. By applying Article 3(2)(b) of the Citizens Directive to a case in which the Polish Border Guard had failed to recognise as a family member within the meaning of Article 3(2) Directive 2004/38/EC a partner in a durable relation returning to Poland after having stayed in the United Kingdom with the Polish partner that had formally recognised the partnership relationship, the Warsaw Administrative Court gave that relationship legal effect in Poland.[4] This ruling was followed by the issuing of a special circular on the application of Article 3(2) of Directive 2004/38/EC by the Polish Border Guard. The procedure according to this circular is as follows: Article 3(2) of Directive 2004/38/EC is to be applied by the Border Guard that is thus obliged to facilitate entry and stay of the family members listed in that provision. A visa, valid for 15 days, is issued to these family members if they accompany an EU-citizen, including a Polish national, to that Member State and do not possess a visa or an equivalent document that entitles its holder to enter Poland. A partner in a durable relation has to make a statement confirming this relationship when presenting (a copy of) the document that formally attests the relationship. As Article 3(2) of the Citizens Directive obliges Member States to 'facilitate' entry and residence, there is no automatic right to stay under Directive 2004/38/EC if the family member is a third-country national. Any refusal to enter Poland is to be communicated using the form provided for by Regulation (EC) No. 562/2006.[5]

2 Article 97(3) Lithuanian Aliens Law.

3 CJ EU (Grand Chamber) cases C-480/08 *Maria Teixeira* [2010] ECR I-1107 and C-310/08 *Nimco Hassan Ibrahim* [2010] ECR I-1065.

4 Judgment of the Administrative Court Warsaw, March 15, 2013, File No. IV SA/Wa 154/13. For a similar case still pending before this court see: File No. IV SA/Wa 2093/12.

5 Regulation (EC) No. 562/2006 of the European Parliament and of the Council of March 15, 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ EC* 2006, L 105/1.

Following comments made by the European Commission concerning the transposition of the definition of family member in *Swedish* law, a proposal to amendment ch. 3a § 2 of the Swedish Aliens Act was presented in 2012. The proposal includes other family members, who are dependent on the EU-citizen for their livelihood and shared a household with the EU-citizen or if serious health reasons require the EU-citizen to take care of the family member.[6]

To comply with the Court of Justice's ruling in the *Rahman*-case,[7] the *United Kingdom* has removed the requirement in Regulation 8(2)(A) that the relative of an EEA-national has to be residing in the country in which the EEA-national also resided. It now sets out that the family member has to have been residing in 'a country other than the UK'. A failure to implement the Directive is noted by the UK-rapporteur where the United Kingdom does not allow extended family members of EU-citizens to have their residence in the United Kingdom considered under EU-law, when they are already lawfully residing in the United Kingdom, before the arrival to the United Kingdom of the EU-citizen on whom they are dependent. The rapporteur notes that this failure means that a section of people who are dependent on EU-citizens within the United Kingdom are unable to apply as extended family members under the EEA-Regulations. The Court of Appeal, however, has found that, provided there has been dependency in the country from which the family member came and there is still dependency at the date of application, it does not matter if their arrival predates that of the EU-citizen although irregular entry or stay would be a weighty consideration in exercising discretion as to whether to issue a permit.[8]

Case law

References to case law are found in the *German*, *Italian*, *Luxembourg*, *Dutch* and *UK* reports.

In *Germany* the Augsburg Administrative court ruled that EU-citizens do not enjoy an unlimited right of residence, thus denying an EU-citizen who was permanently dependant on social welfare rights those rights which are normally derived from the rules on free movement of persons by EU-citizens. The Social Appeal Court of Baden-Württemberg has confirmed that non-registered partners are generally not to be treated as a 'spouse' within the meaning of EU-free movement rules.[9]

Two developments in the case law are reported by the *Italian* rapporteur. The first is a decision by the Florence Appeal Court in appeal proceedings against a refusal to issue a visa for the purpose of family reunion to a child in custody of an Italian relative under *kafalah*. Though according to the Italian Supreme Court's case law *kafalah* does not trigger the application of Legislative Decree No. 30, 2007, the Florence Court of Appeal decided otherwise. The rapporteur notes that it is unfortunate that the decision does not set out in detail the justification for the ruling, as this makes it hard to establish what was decisive for the court: the existence of family ties prior to the *kafalah* (the child is a *nipote* of the Italian national, meaning the nephew or grandchild) or the *kafalah* itself.[10] The other development concerns marriages between same-sex partners, which cannot be entered into in Italy. Following several court rulings quashing the decision to refuse a residence permit to the third-country national spouse in a same sex-marriage that was convened in a State that does recognise such

6 Official report Ds 2012:60, pp. 47 and 82 f.
7 CJ EU (Grand Chamber) case C-83/11, 5 September 2012, n.y.r.
8 *Aladeselu v SSHD* [2013] EWCA Civ 144.
9 Social Appeal Court of Baden-Württemberg, May 16, 2012, L 3 AS/477/11.
10 Appeal Court of Florence, judgment of December 14, 2012, 4279/12.

marriages,[11] the Minister of the Interior issued a Circular spelling out that Legislative Decree No. 30, 2007 does not provide for the issuing of a residence permit to same sex-spouses. Residence permits that have been issued to spouses by the police authorities are however being recognised.[12] Press coverage reveals that the police authorities in Reggio Emilia Rimini, Milan, Rome and Treviso have issued residence permits to same sex partners. Applicants for residence as a same-sex partner are being assisted by the Association *Certi Diritti* that has also drawn up a list of the documents that have to be supplied upon making a request for a residence permit.

The *Luxembourg* Administrative Court annulled a decision to refuse family reunification to a sister-in-law who is a Turkish national. The refusal had been justified by the authorities for lack of evidence of dependency and the presence of three daughters in Turkey who were considered first in line to take care of their mother.[13]

The question whether a third-country child benefits from the Citizens Directive in *the Netherlands* by virtue of the fact that his mother also has a child who is an EU-citizen was answered in the negative by the Haarlem District Court. The District Court acknowledged that descending and ascending family members of third-country national spouses and registered partners are covered by that Directive by virtue its Article 2(2)(c) and (d), but finds that there are no reasons to extend this principle to other family members.[14]

The *UK* Court of Appeal held that dependency must be on the EU-citizen him or herself, not on the EU-citizen's spouse.[15]

Miscellaneous

The following information concerning the application of the definition of family members in their Member State is taken from the reports written up by the *Belgium*, *Bulgarian,* the *Czech*, *German, Hungarian, Maltese, Polish* and *Slovakian* rapporteurs.

In *Belgium* family members seeking admission as dependant family members of an EU-citizen are experiencing difficulties which are attributed to the evidence necessary to establish dependency and the burden of proof. A refusal to cancel a decision of the Council for Aliens' Disputes because dependency had not been established to the satisfaction of that authority, was upheld by the Belgium Council of State that choose to apply the rules developed by the Court of Justice in the *Jia* case[16] strictly.[17]

The confusion caused by the use of factual partnership (§ 1.1(a) LERD) and certified factual partnership (Article 5(1)(2) LERD) in relation to the application of Articles 2(2) and 3(2) of the Citizens Directive, already reported for *Bulgaria*, still awaits a solution in terms of a definition of a de facto partner relationship; which conditions have to be satisfied and what evidence has to be submitted?

The rules in section 180f of the *Czech* FoRa apply indiscriminately to registered partnership relations. Partnership relations can, however, only be registered in the Czech Republic if they are between same-sex partners and if one of the partners is a Czech national, excluding

11 Court of Reggio Emilia, order of February 13, 2012. See, on this decision, De Felice, La libertà di circolazione dei coniugi dello stesso sesso nello spazio di libertà dell'Unione, *Il diritto di famiglia e delle persone*, 2012, 1660-1668. See also: Court of Pescara, order of January 15, 2013

12 Circular October 26, 2012, No. 400/C/2012/8996/IIdiv, Annex.

13 Judgment No. 28549.

14 Rechtbank 's-Gravenhage zp Haarlem, November 1, 2012, AWB 12/15475, LJN: BY3325.

15 *Soares v SSHD* [2013] EWCA Civ 575.

16 CJ EU case C-1/05 *Jia* [2007] ECR I-1.

17 Council of State, judgment of June 26, 2012, No. 219.969.

EU-citizens from other Member States in a registered partnership from registering their relation in that Member State,

A proposal to introduce a provision in the *German* Freedom of Movement Act submitted by '*Die Linke'*, was not adopted, seeing the Federal Government arguing that the Court of Justice's ruling in the *Rahman* case (*supra*) does not oblige Member States to adopt a separate provision transposing Article 3(2) of the Citizens Directive; a reading which the rapporteurs feel is correct. Applications made on behalf of the family members listed in Article 3(2) of the Citizens Directive are decided on the basis of Section 36 of the Residence Act that provides the authorities discretionary powers to admit family members in cases of 'hardship'. A proposal to amend German Nationality law did, however, make it to law. Following this amendment children of foreign nationals who are holders of a long-term residence permit automatically acquire German nationality without having to renounce their parents nationality (section 4 § 3). Now that an increasing number of these children are reaching the age of majority and are getting married to third-country nationals, the German courts are being requested to establish their entitlements under the free movement rules. The line is that until these children have exercised free movement rights, they do not benefit from free movement rules in Germany.[18] It is argued that the situation of these children cannot be compared to that underlying the Court of Justice's ruling in *Kahveci & Inan*, as that case concerned Article 7 of Decision No. 1/80 adopted by the Turkey-EEC Association Council.[19]

The *Hungarian* rapporteur notes that the exclusive nature of the definition of family discriminates against (registered) partners and children born from extra-marital relations even if they share a household.

It is still unclear whether in *Malta,* that only recognises monogamous marriages, same-sex marriages and partnership relations will trigger the application of the Citizens Directive.

Article 71.1 of the Act on Civil Status, that reflects the principle in Article 18 of the *Polish* Constitution that marriage is a union between man and woman and that family motherhood and parenthood is placed under the protection and care of the Polish Republic, remains a highly debated issue in Poland. According to this provision a certificate to enter into a marriage or partnership cannot be issued if the partners to be are of the same sex. Even if the relationship is formalised in a State other than Poland, the necessity to obtain this certificate will bar the partners to be from entering into the intended relation as they are required to state the name of their partner to be when applying for this certificate that is refused if the partner to be is of the same sex. Despite court rulings establishing that the authorities are not entitled to assess the reasons why applicants apply for this certificate[20] and declarations to amend the application form, the competent authorities continue to refuse a certificate for intended same-sex marriages and partnerships.

In *Slovakia* the children of registered partners do not qualify as family member within the meaning of Directive 2004/38/EC if they are younger than 21 and not dependant of their parent.

18 See Bavarian Administrative Appeal Court, August 9, 2012, 19 CE 11/1893; Administrative Appeal of Northrhine-Westphalia, March 17, 2008, 18 B 191/08.

19 CJ EU (First Chamber) joined cases C-7/10 & C-9/10, *Kahveci and Inan*, March 29, 2012, n.y.r.

20 Gdańks Administrative Court, August 6, 2008, No. III SA/Gd 229/08.

1.2 Reverse discrimination, including return situations

As reported in previous reports, the assimilation principle that applies in the *Czech Republic*, *Hungary, Italy, Malta* and *Poland* ensures equal treatment of own nationals and EU-citizens. As Article 153(4) of the *Croatian* Aliens Act explicitly provides that applications for family reunification made on behalf of family members of Croatian citizens are to be assessed according to the same rules that apply to EU-citizens, this Member State can be added to the list of Member States where reverse discrimination is not an issue.

Though assimilation is the rule in both the *Czech Republic* and *Hungary*, both rapporteurs provide examples illustrating that in practice there are differences between EU-citizens and own nationals. Along this line, the *Czech* rapporteur reports that, as reported in previous reports, in practice third-country national family members of Czech nationals are experiencing differential treatment as they do not benefit from Regulation (EEC) no. 1408/71,[21] but have to pay for their own health care or take out an health insurance with a private company during their first two years of residence. Differential treatment is also experienced with regard to social benefits. Delays in the issuing of residence permits to the family members of Czech nationals are assumed by the rapporteur, though no evidence is available to substantiate the claim that such delays are only experienced by family members of Czech nationals, not by family members of other EU-citizens. In *Hungary*, different fees apply to residence permits issued to family members of Hungarian nationals (€ 34) and those of EU-citizens (€ 5).[22]

The *Italian* rapporteur notes that most case law on the Citizens Directive concerns Italian nationals, but the principles spelled out by the courts in those cases apply mutatis mutandis to EU-citizens.

Legislation

New developments are reported for the following Member States: *Belgium*, *the Netherlands, Sweden* and *the United Kingdom*.

As reported in the *Belgium* 2011-2012 report, that Member State amended its legislation on July 8, 2011, entering into force on September 22, 2011 to the effect that reverse discrimination was reinstalled. According to the new rules Belgium citizens applying for family reunion have to satisfy the same conditions as third-country nationals applying for family reunion.[23] The 38 applications for cancellation of the law which were brought before the Belgium Constitutional Court in March 2012 are still pending. Amongst others, applicants are requesting that Court to test the validity of the legislative amendment against the general stand still-principle. The oral proceedings were on January 17, 2013, with no clarity as to the date of the final decision. A request to suspend the law until these cases have been decided was turned down by the Constitutional Court on February 2, 2013. The following example illustrates how this amendment affects the rights of Belgium nationals: Belgium citizens can no longer be reunited with family members in the ascending line or children who have become of age; they have to earn 120% of the minimum average wage; and have to apply for a visa or residence permit. The rapporteur notes that the 120% minimum income requirement is the most often used reason to justify a refusal to issue a visa or residence permit to third-

21 Regulation (EEC) No 1408/71 of the Council of June 14, 1971 on the application of social security schemes to employed persons and their families moving within the Community, English special edition: Series V, Volume 1952-1972, p. 89.

22 Appendix 2 to the Hungarian FeeD.

23 M.B., September 12, 2011.

country national family members (9,912 visa and 4,758 residence permits). As the nationality of applicants is not reported, it is not clear how many of these refusals concern applications made by family members of Belgium nationals. Regarding the 120% minimum wage requirement, the Belgium rapporteur notes that it is at odds with the *Chakroun* case, where the Court of Justice held that automatic refusals justified by insufficient income are not permitted.[24]

The general overhaul of the *Dutch Vreemdelingencirculaire* 2000 has meant a rewriting of the policy rules on the position of (family members of) Dutch nationals which are now found in *Vreemdelingencirculaire* 2000, B10/2 (return cases, dual nationals and naturalised Dutch nationals) and B7/2.9 (*Ruiz Zambrano*-cases). Applications made claiming a right of residence as a cross-border service provider (*Carpenter*) are no longer addressed in the policy rules. Policy rules addressing the *Ruiz Zambrano*-ruling took effect on 1 January 2013.[25] According to these policy rules, a residence permit is issued to the caring parent of a Dutch minor child if no residence permit can be issued under Article 3.3 or Chapter 8 of the *Vreemdelingenbesluit*. The residence permit is issued in accordance with Article 3.13(2) *Vreemdelingenbesluit* and qualifies as a residence permit within the meaning of Article 14 *Vreemdelingenwet*, rather than Article 9 *Vreemdelingenwet*, which is the normal legal basis for residence permission granted in accordance with Directive 2004/38/EC.[26] The residence permit is endorsed with the phrase 'Residence with [name of the child]'. To qualify as a caring parent it needs to be established that i) the minor child is a Dutch national that is; ii) dependent of the parent to whom the permit will be issued; and iii) will have to leave the territory of the European Union if no residence permit is issued to the parent. This enumeration is followed by a clarification of the following concepts: 'dependent'; 'no obligation to leave the EU-territory'; 'other parent'; and 'de facto impossible'. Dependent is to be read as: 'de facto caring for the child or will be caring for the child'. There is no obligation to leave EU-territory if the other parent has lawful residence in the Netherlands within the meaning of Article 8, opening and sections a-e or l *Vreemdelingenwet* or is a Dutch national, unless that parent cannot take on the de facto care for the child. The explanation given for 'other parent' means that the authorities cannot refuse rights to third-country national family members arguing that other family members (for instance grandparents) or acquaintances who have cared for the child in the past can assume the role of carer of a Dutch child enabling it to remain in the Netherlands, i.e. not forced to leave EU-territory. 'De facto impossible to care for the child' does **not** mean that a residence permit is issued to the third-country national parent if the parent who enjoys lawful residence in the Netherlands or is a Dutch national cannot cope with the care and upbringing of a child. The latter parent is expected to seek assistance in the care and upbringing of a child that is offered by the State or social institutions and includes eligibility for financial assistance through public funding to which every Dutch national, habitually resident in the Netherlands, is, in principle, entitled. Applications made for a residence permit cannot be rejected for lack of a valid long stay visa (*machtiging tot voorlopig verblijf*). A residence permit is issued to the caring parent of a Dutch child sub-

24 CJ EU (Second Chamber) case C-578/08, *Rhimou Chakroun* [2010] ECR I-1839.

25 *Besluit van de Staatssecretaris van Veiligheid en Justitie van 17 december 2012, nummer WBV 2012/26, houdende wijziging van de Vreemdelingencirculaire 2000* [Decision of the Secretary of State for Security and Justice, December 17, 2012, No. WBV 2012/26 amending the Immigration Circular 2000], *Staatscourant* December 21, 2012, No. 26248.

26 See, however, Vz. *Vreemdelingenkamer Rechtbank* 's-Gravenhage zp Amsterdam, July 13, 2012, AWB 12/8019, 12/20155, JV 2012/423 that does take Article 9 *Vreemdelingenwet* as legal basis.

ject to the obligation to take out adequate health insurance and entitles the caring parent to take up paid employment.[27] These policy rules reflect the case law of the courts.

Sweden is considering an amendment to Aliens Act ch. 3a § 4 to the extent that family members of Swedish nationals would also derive a right of residence and permanent residence from Directive 2004/38/EC. The latter will be granted even if the relationship with the Swedish national no longer exists.[28] The proposed amendments are considered to reflect the Court of Justice's rulings in *Surinder Singh*, *Eind* and *McCarthy*.[29] The proposal provides that family members of returning Swedish nationals who have exercised free movement rights will have to provide evidence of their relationship. The reference to free movement rights is emphasised by the Swedish rapporteur.

In response to the *McCarthy* judgment the *UK* authorities have amended the definition of 'EEA national' to mean 'a national of an EEA-state who is not also a British citizen'. This amendment means that persons with an EEA-nationality and British citizenship cannot benefit from EU-law when trying to bring their family members to the United Kingdom, but must follow the domestic law route. The rapporteur notes that this appears particularly harsh in cases where dual nationals are exercising a Treaty right in the United Kingdom, but are unable to fulfil domestic rules, arguing that the rules could result in absurd situations.

Case law

New developments in the case law addressing the issue of reverse discrimination, including the Court of justice's rulings in *Ruiz Zambrano* and *Dereci,* are reported for *Austria, Finland*, *Germany*, *Ireland, Luxembourg*, *the Netherlands* and the *United Kingdom*.

The rules on return cases, which require stays exceeding three months in a different Member State to be eligible for protection under the free movement rules on return to *Austria*, have been interpreted by that Member State's Administrative Court as stays of more than three months at any time in the past. Thus free movement rules could be relied on successfully by an Austrian national who had resided in the Netherlands in 2001 and 2005 for a few months and who had married in Spain to a Nigerian in 2009 and an Austrian who had lived in Germany from 1992-1999 who married a Nigerian citizen in 2008.[30] Key is that the use of free movement rights was effective and real, with some significance.[31] The same court has ruled that the purpose for which free movement rights were exercised is immaterial, i.e. the return rights are not restricted to economically active Austrian nationals.[32] It is for the authorities to act upon statements which suggest that free movement rules have been exercised, to ensure that free movement entitlements are not lost. Regarding the *Ruiz Zambrano/Dereci* case law, the Austrian Administrative Court has ruled that a refusal to grant a family member of an EU-citizen a right of residence always amounts to a threat to the EU-citizen's free movement rights. Building on earlier cases,[33] the reference to Article 8 ECHR

27 *Vreemdelingencirculaire* 2000, B2/10.2.
28 Official report Ds 2012:60, p. 11, 20, 44-46 and 83.
29 ECJ cases C-370/90 *Surinder Singh* [1992] ECR I-4265 and C-291/05 *Eind* [2007] ECR I-10719; and CJ EU (First Chamber) case C-434/09 *McCarthy* [2011] ECR I-3375.
30 Austrian Administrative Court, October 18, 20012, 2011/22/0071 and *idem*, October 18, 2012, 2011/22/0163.
31 Austrian Administrative Court, February 23, 2013, 2010/22/0011, *idem*, February 26, 2013, 2010/22/0104, *idem*, April 17, 2013, 2013/22/0019 and *idem*, April 17, 2013, 2011/22/0103.
32 Austrian Administrative Court, February 26, 2013, 2010/22/0182, *idem*, February 26, 2013,2010/22/0129 (language course) and *idem*, March 20, 2012, 2010/21/0438.
33 E.g. Austrian Administrative Court, March 28, 2012, 2008/22/0140, *idem,* April 24, 2012, 2008/22/0870 and *idem*, April 24, 2012, 2009/22/0299.

in the *Dereci* case is read by that Court as an obligation to consider protection by virtue of that provision in these cases.[34]

Following the Court of Justice's decision in joined cases *O&S, L*,[35] the *Finnish* Supreme Administrative Court decided that in both cases a refusal to issue a residence permit to the parent of an EU-citizen's spouse was justified as it did not mean that the EU-citizen and her guardian could no longer remain resident in the European Union.[36]

Reverse discrimination in *Germany* still sees German nationals moving to Denmark for the sole purpose of getting married; the so-called Denmark cases. New case law clarifies that such movement is insufficient to trigger the application of free movement rules upon return to Germany. Germans who have stayed in Denmark for a longer period, however, can rely on free movement-rules upon their return. The formalities applicable in the latter cases were set out by the North Rhine Westphalia Administrative Appeal Court on April 24, 2012, establishing that there is no obligation to provide evidence of a health insurance or sufficient financial means when issuing a provisional residence certificate to family members of returning German job-seekers.[37]

Although, in *Ireland*, the parents of minor Union citizen children are entitled to the rights of residence and work based on the *Ruiz Zambrano* judgment, reverse discrimination continues to exist in relation to other family relationships. A decision to refuse an Irish national to bring her South African parents to Ireland to care for them was quashed by the Irish High Court, arguing that the decision was not based on a fair and reasonable assessment of the underlying facts of the case and that inadequate consideration had been given to the balancing of interests of the State - maintaining an immigration system - and the applicants' family rights. The issue of reverse discrimination, though the Judge granting leave had expressly permitted the decision to be challenged on the basis of this argument, was not addressed in the judicial review hearing by the High Court. [38] In December 2012 the High Court nevertheless refused to grant relief based on reverse discrimination by relying on this case in a case involving an Irish citizen and her Albanian husband, stating that in *O'Leary* relief based on reverse discrimination had been refused, despite the fact that the ground had not been considered extensively in the decision because the alternative ground discussed above had been made out. [39]

In *Luxembourg* a third-country national mother of two French children whose father lived in France, but with whom she has no more contact, saw her application for a residence permit refused and was ordered to leave that Member State. She invoked the *Ruiz Zambrano* decision to stay the expulsion measures, but found her claim not be discriminated on grounds of nationality rejected.[40]

In the 2011-2012 *Dutch* report, two decisions handed down by the Judicial Division of the Council of State were discussed with opposing outcomes regarding the implications of the *McCarthy* case.[41] The Judicial Division of the Council of State has handed down two

34 Austrian Administrative Court, February 23, 2013, 2010/22/00111. See also: *idem*, March 21, 2013, 2011/09/0142, *idem*, April 17, 2013, 2013/22/0067, *idem*, April 17, 2013, 2013/22/0062 and *idem*, April 17, 2013, 2013/22/0092.

35 CJ EU (Second Chamber) joined cases C-356/11 & C-357/11, *O. and S. and L.,* December 6, 2012, n.y.r.

36 Supreme Administrative Court, May 22, 2013, KHO:2013:97. See also: KHO:2012:47, June 20, 2012.

37 Administrative Appeal Court North Rhine Westphalia, Decision of April 24, 2012 18B 1572/11.

38 *O' Leary & Ors v MJELR* [2012] IEHC 80.

39 *Troci v. Minister for Justice & Equality & Ors* [2012] IEHC 542.

40 Administrative Court of Luxembourg, judgment No. 27509.

41 Afdeling Bestuursrechtspraak Raad van State, October 28, 2011, No. 2010012858/1/V2, LJN: BU3406, *JV* 2012/44, with commentary P. Boeles & *idem*, November 2, 2011, No. 2011201011940/1/V1. LJN BU3411, *JV* 2012.45, with commentary P Boeles.

new rulings addressing this issue,[42] thus confirming that the correct reading given of the *McCarthy* case is that found in the November 2, 2011 case. The case law concerning the *Ruiz Zambrano*-ruling was translated into policy rules which entered into force on January 1, 2013 (infra). The Dutch courts are still being asked to adjudicate on cases addressing the issue of rights upon return; the so-called Europe-route. Though the Court of Justice had not yet answered the preliminary reference that was made by the Council of State Judicial Division on October 5, 2012, concerning the rights upon return of recipients of services, on December 17, 2012 the Council of State Judicial Division saw no reason to stay proceedings until the Court of Justice had had time to the answers in the aforementioned preliminary reference as it felt that in that case residence in Belgium did not qualify as 'genuine and effective' and, therefore, could not trigger entitlements under Directive 2004/38/EC on return to the Netherlands irrespective of the reason why residence had been taken up in Belgium.[43]. Along the same lines the District Court 's-Gravenhage zp 's-Hertogenbosch found that residence in Germany in the period April-August 2010 did not qualify as 'genuine and effective', as the Dutch national had only resided in Germany during the weekends, had kept her living accommodation in the Netherlands, where she remained registered in the Municipal Population Administration [*Gemeentelijke Basisadministratie*], and her child attended school in the Netherlands and therefore did not qualify as 'genuine and effective'. The fact that the German authorities had recognised rights under EU-law in this case was dismissed as being 'inconclusive, arguing that the Dutch authorities have their own responsibility to assess whether the facts of a case merit application of EU-law upon return to the Netherlands.[44]

The *UK* Court of Appeal has declined, in the light of *Dereci*, to regard the principle in *Ruiz Zambrano* as effective where the child's enjoyment of citizenship rights would be impeded in ways that fall short of enforced departure.[45] On the other hand, the right in *Ruiz Zambrano* was recognised as directly applicable so that the child's carer was not a person subject to domestic immigration control.[46] The Tribunal has found that the *Ruiz Zambrano*-principle applies to admission decisions as well as to claims against expulsion.[47] The principle may extend to an EU-citizen child who is not a UK national if an adverse decision would force the child to leave the territory of the European Union.[48] However, the Court of Session in Scotland found that this would only be the case if the EU-citizen child could not return with the carer to the State of nationality.[49]

Miscellaneous

The following information is taken from the *Irish* and *Lithuanian* reports.

The *Irish* rapporteur relates of two new immigration initiatives, which were announced early 2012 by the Minister for Justice and Equality that will allow non-EEA migrant entrepreneurs and investors as well as their families to enter that Member State and remain there for a defined period, thus making it easier for third-country nationals in general to enter Ire-

42 Afdeling Bestuursrechtspraak Raad van State, November 20, 2012, No. 201105940/1V4, LJN BY4031, *JV* 2013/38 and *idem*, December 3, 2012, No. 201108991/1/V1, LJN BY5575, *JV* 2013/48.

43 Afdeling Bestuursrechtspraak Raad van State, December 17, 2012, 2012201209994/1/V4, LJN: BY7401, *JV* 2013/67, cons. 2.5.

44 Rechtbank 's-Gravenhage zp 's-Hertogenbosch (meervoudige kamer) July 9, 2012, AWB 11/31165, LJN: BX0739.

45 *Harrison v SSHD* [2012] EWCA Civ 1736.

46 *Pryce v Southwark LBC* [2012] EWCA Civ 1572.

47 *Campbell (exclusion; Zambrano)* [2013] UKUT 00147 (IAC).

48 *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs* [2013] UKUT 00089(IAC).

49 *JYZ* [2013] CSIH 16.

land.[50] The Immigrant Investor Programme allows those investing anywhere from € 400,000 to € 2m (in certain areas) and their families to enter Ireland on multi-entry visas and remain for a defined period; ordinarily five years but reviewable after two years. The Start-up Entrepreneur Programme gives residency to migrants with good business ideas in the innovation economy and funding of € 70,000. Revisions to the Immigrant Investor Programme were announced in July 2013 with the intention of making the programme more attractive to investors.[51] These changes include a 50% reduction in the investment threshold for a number of the investment options, as well as a stated intention to market the revised programme abroad.

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2. ENTRY AND RESIDENCE RIGHTS

Like in previous years the information provided on the implementation of entry, including visa obligations, and residence conditions, including the issuing of registration certificates to family members who themselves are EU-citizens and residence permits to third-country national family members, reveals that the rules in Directive 2004/38/EC on entry and residence are, as a rule, respected and complied with by the Member States. This also holds true for the implementation measures put in place by *Croatia* that has chosen to issue registration certificates to family members who are EU-citizens. The conditions for entry that apply to family members who are EU-citizens (Article 154 Croatian Aliens Act) and third-country national family members (Article 166-167 Croatian Aliens Act) and residence conditions for stays longer than three months that apply to third-country national family members, however, do include the condition 'not barred by the prohibition of entry and stay'. Prohibition of entry and stay is pursuant to Article 103 always issued as a consequence of the expulsion measure. Regarding issuance of expulsion measure one should differentiate two situations: 1) situation when expulsion measure may be issued if an alien poses a threat to public policy, national security or public health (prescribed by Art. 102 of the Croatian Aliens Act),[52] and 2) situations when expulsion measure is to be issues in the case of heightened social threat (situations prescribed by Article 106 of the Croatian Aliens Act. [53]

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50 http://www.inis.gov.ie/en/INIS/Pages/PR12000003.

51 http://www.inis.gov.ie/en/INIS/Pages/Shatter%20announces%20changes%20to%20Immigrant%20Investor%20Programme.

52 In relation to Article 102, Article 105 of the Aliens Act enumerates examples of behaviour that represent threat to public policy and national security. It provides that the decision on expulsion may be issued in particular if: 1) the alien's stay is illegal, 2) the alien crossed or attempted to cross the state border illegally, 3) the alien provides assistance in illegal entries, transit or stay, 4) concludes a marriage of convenience, 5) the alien violated the regulations on the employment and work of aliens, public order and peace, weapons, abuse of narcotic drugs or taxes, 6) the alien committed a criminal offence that is prosecuted in the line of duty, 7) a legally effective decision was issued against the alien while he was abroad for a serious criminal offence, which is also punishable under the Croatian legislation, 8) the alien repeats a misdemeanour, 9) commits a misdemeanour with the elements of violence.

53 Article 106 prescribes that expulsion measure should be issues always in the case of heightened social threat, that is in the following 4 cases: 1) if pursuant to a legally effective decision, the alien was sentenced to an unconditional sentence of imprisonment in the duration of over one year for having committed a criminal offence with intent, 2) if pursuant to several legally effective decisions issued over a period of five years, the alien was sentenced to imprisonment in the duration of at least three years in total for having committed a criminal offence with intent, 3) the alien was sentenced to an unconditional sentence of imprisonment for having committed a criminal offence against values protected under international law, 4) the alien poses a threat to national security.

Legislation

(Proposals for) amendments to the law and/or policy are reported for: *Denmark*; *Lithuania, the Netherlands, Sweden* and the *United Kingdom*.

Though fees for residence permits were not required if incompatible with EU-law, the preparatory documents to an amendment of the *Danish* Aliens Act now explicitly provide for a general exemption that applies to EU-citizens and other persons enjoying free movement rights, that includes EEA and Swiss citizens as well as Turkish nationals who benefit from Decision No. 1/80 adopted by the EEC-Turkey Association Council.[54]

Amendments have been introduced to the *Lithuanian* Aliens Law (June 2012) and the Order regulating the issuing of residence permits (June 12, 2013). The Order defines the documents that can be requested as evidence, which, so the rapporteur notes, are not all compatible with the Citizens Directive and the Court of Justice's case law. Further amendments to the Order are expected for 2013, but had still to be made public on completion of the national report. The following amendments will affect the position of family members: the introduction of a new provision that enables the Lithuanian authorities to issue a child, born during an EU-citizen's residence in Lithuanian, with a residence certificate, irrespective of the place of birth, if applied for within six months of the birth from the MOI;[55] the introduction of an EU-residence card to be issued to third-country national family members that is defined as a document that confirms the right of temporary or permanent residence;[56] a right of entry for third-country national family members who have been issued a residence permit by another Member State without having to apply for a short-stay visa;[57] applications are to be processed within a period of one month;[58] the inclusion of biometrics, as permitted by Regulation (EC) No. 1030/2002, in permanent residence permits issued to third-country national family members;[59] the validity of a residence card issued to third-country national family members is set at five years;[60] an extension of the grounds that justify the repealing of a residence permit which mirrors the amendment put in place for EU-citizens;[61] and an entitlement to permanent residence for third-country national family members after five years residence.[62]

The amendments reported for *the Netherlands* concern the policy rules in *Vreemdelingencirulaire* 2000, A1/4.10 (facilitated issuing of short-stay visa). A discrepancy between the evidence of a durable relationship in this section of the *Vreemdelingencirculaire* and section B10/2.4 is noted, but should not affect the position of these family members as the general rule is that all evidence can be submitted as proof of a durable relation.

In *Sweden*[63] an amendment has been made in 2013, meaning that visa applications should be dealt with quickly (the (the Aliens Ordinance, ch. 3 § 11). In practice this is already the case. Ann amendment of the Aliens Act ch. 3a § 7 and § 10, though directed

54 Act No. 1604 of 22 December 2010 amending the *Aliens Act*. The fees for applications for family reunification were abolished by Act No. 418 of 12 May 2012 amending the *Aliens Act*, taking effect 15 May 2012 and Bill No. 66/2010-11, general remarks § 2.
55 Article 1054 Lithuanian Aliens Law.
56 Article 2(251) Lithuanian Aliens Law, repealing: Article 2(4(1)) Lithuanian Aliens Law.
57 Article 11(4) Lithuanian Aliens Law
58 Article 100 Lithuanian Aliens Law.
59 Article 99(2) Lithuanian Aliens Law.
60 Article 102 Lithuanian Aliens Law.
61 Articles 106(5) and 1011 Lithuanian Aliens Law.
62 Articles 1011 and 104(2) Lithuanian Aliens Law.
63 Official report Ds 2012:60, p.51, that includes a reference to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ EC 2001, L 81/1.

against third-country national family members in general, will affect third-country national family members of Swedish citizens who will have to register their residence in Sweden with the Migration Board, if the intended stay exceeds a period of three months, where they will also have to lodge their application for a residence card. Further, at the same time the proposal also includes a removal of the requirements for a EEA-national to register with the Swedish Migration Board if he or she intends to stay in Sweden for a period longer than three months.. Further, concerning an application for a residence card from a person belonging to the former category, the Migration Board should – in accordance with the Aliens Ordinance ch. 3a § 10 – immediatly certify the application, and the residence card should be issued within six months (Aliens Ordinance ch. 3a § 7). Further, decisions are to be communicated in writing and motivated and a certificate confirming the application of a residence card is to be issued immediately..[64] In accordance with an official committee's suggestions, it should also be possible to appeal against a decision on residence.[65] The rapporteur notes that if appeal proceedings are not introduced, Swedish law will not be in line with EU-requirements. However, in accordance with the Migration Court in Case *MIG 2008:34* a decision not to have a right to appeal against a decision on residence right should be considered as being contrary to Directive 2004/38.

Two amendments are reported for the *United Kingdom*. The first concerns Regulation 10 of the Immigration (European Economic Area) Regulations that now refers to applicants not only having rights if they were a family member of a person exercising Treaty rights, but also if they were a family member of an EEA-national with permanent residence (Immigration (EEA) (Amendment) Regulations 2012/1547 paragraph 3). The second is the introduction of Regulation 15A that intends to implement the Court of Justice's ruling in the cases *Chen*, *Ibrahim* and *Teixeira* and *Ruiz Zambrano*.[66] The provisions are drawn up to reflect a narrow reading of these judgments. Individuals will only benefit from these provisions while their children are under the age of 18 and will not qualify for permanent residence. The Tribunal, however, has taken a narrow view of the effect of *Ruiz Zambrano* on *Chen*, continuing to uphold pre-*Ruiz Zambrano* findings that the parents of a *Chen* child must be able to support themselves without working illegally or under a time-limited visa.[67] An announcement to start charging fees of £55 for applications for residence cards was made by the Home Office at the same time that an increase of the fees for applications made under domestic law was announced. The rapporteur notes that it is unclear what document has been taken as comparator for the £55 and that the fees cannot be changed without an amendment to the Immigration (European Economic Area) Regulations.

Case law

Case law concerning entry and residence rights is found in the *French, Irish, Italian, Dutch, Spanish, Swedish* and *UK* reports.

The *French* rapporteur relates of a case concerning the partner of a Portuguese national who lives in that Member State with his son and partner who has applied for a permanent residence status as provided for in article L. 122-1 of the CESEDA, which was refused because he was not married as required by Article L. 121.3. The Versailles court finds a breach of Article 8 ECHR and Article L. 313-11, 7° of the CEDESA, as the partner and his son have

64 Official report Ds 2012:60, p. 66 ff.
65 Official report Ds 2012:60, p. 66 f.
66 CJEU (Full Court) cases C-200/02, *Chen* [2004] I-9925; and CJ EU (Grand Chamber) cases C-480/08, *Teixeira* [2010] ECR I-1107 and C-34/09, *Ruiz Zambrano* [2011] ECR I-1177.
67 *Seye (Chen children; employment)* [2013] UKUT 00178 (IAC).

resided in France since at least 2006, the son attends education in France and the Portuguese partner is employed.[68] The Nancy Appeal Court annulled an expulsion decision, granting a right of residence to the spouse of a worker though the work contract was only temporary and did not cover a full year.[69] The Versailles Appeals Court ruled that a third-country national father to a minor Portuguese national did not enjoy a right of residence in France.[70] The Lyon Administrative Court did not feel that a Tunisian mother of three minor Belgium children and spouse to a Belgium national enjoyed a right of residence according to either the *Baumbast* or the *Ruiz Zambrano* ruling.[71] As the children were Belgium nationals resident in France the latter case did not cover their situation. The court ruled that no residence right should have been granted to the mother as France was not to be considered the place of habitual residence of the three children, who were all born in Tunisia and the children had lived in that State prior to their arrival in France.[72]

The *Irish* High Court has referred three questions to the Court of Justice concerning the right of permanent residence of third-country national family members.[73] This case concerns a *Francovich* style action alleging improper transposition of Directive 2004/38/EC. The plaintiff, a Nigerian national was dismissed from his position with An Post (state-owned postal service company) for the sole reason that he had no right to work without a permit, though he had already acquired a permanent right of residence by virtue of Article 16 of the Citizens Directive because of his marriage to a French national. However, after marrying in 1999 the parties separated in 2002 and thus, it was questionable whether the plaintiff could truly be said to be "legally resided with the Union citizen in the host-Member State for a continuous period of five years". The questions referred to the Court of Justice are: 1) can a non-EU national who has separated from his EU-citizen spouse thereafter be said to be "legally residing with that spouse" for the purpose of Article 16(2) of Directive 2004/38/EC, at least where, as here, both spouses have, in any event, commenced living with different partners; 2) if the answer to the first question is in the affirmative, does the fact that during the currency of that putative five year period the EU-citizen left the family home and the third-country national then commenced to reside with another individual in a new family home which was not supplied or provided for by the EU-citizen spouse mean that the requirements of Article 10(3) of Regulation (EEC) No. 1612/68 are not thereby satisfied?; and 3) could the fact that the Irish Court was required to make a reference to the Court of Justice be considered a factor in determining whether the breach of EU-law was, in fact, an obvious one according to the criteria for State liability?

The issuing of a residence card was the subject of a series of judgments by the *Italian* Supreme Court that ruled that a residence card issued to third-country national family members of EU-citizens, including Italian nationals, is constitutive of their right of residence. If not applied for within three months of entry, then the general rules apply to these family members, who – if related to an Italian – are not expelled as long as they live under the same roof as their Italian family member, be it as a spouse or a child.[74] Renewal and revocation of

68 CAA Versailles, October 11, 2012, No. 11VE03952.
69 CAA Nancy, April 4, 2013, No. 12NC01897.
70 Cour administrative d'apple de Versailles, March 26, 2013, No. 12VE01286.
71 CJEU case C-413/99, *Baumbast and R* [2002] ECR I-7091 and CJ EU (Grand Chamber) case C-34/09, *Ruiz Zambrano* [2011] ECR I-1177.
72 Cour administrative de Lyon, January 24, 2013, No. 12LY01534.
73 *Ogieriakhi v. Minister for Justice & Ors* [2013] IEHC 133.
74 Supreme Court Italy, Orders of April 20, 2012 No. 6315; May 10, 2012, No. 7193; idem, No. 7203, July 10, 2012 No. 11593; November 21, 2012, No. 20517; November 22, 2012, No. 20645; and March, 19, 2013, No. 6806 (spouse) and order January 12, 2012, No. 3516, Annex (child). On this case law, see: A Lang, Il

a residence card is, however, not subject to the condition that family members live under the same roof. Thus the police authorities did not enjoy competence to refuse to renew a residence card to a spouse who no longer cohabited with her Italian husband.[75]

The *Dutch* case law concerns an application for reimbursement of procedural costs and the evidence that can be required when making an application under Article 6(2) Directive 2004/38/EC as a family member of an EU-citizen. Requesting evidence substantiating the family relationship and the fact that the family member accompanies or joins an EU-citizen is permitted. Requiring additional documents and an obligation to answer questions regarding the purpose of the intended journey and financial means are not permitted. Likewise it cannot be expected that family members are in the possession of a return ticket. The case was reopened for an assessment of damages.[76]

The *Spanish* rapporteur mentions eight cases concerning entry and residence rights. For the majority of cases the details provided reveal that the application concerned a family member of a Spanish national who was the subject of an expulsion measure. One case concerned an application for family reunion that was not decided on within the prescribed three months and saw the High Court of Justice of the Balearis Islands recognising a right of family reunion for disregarding time limits.[77] On January 16, 2013, the Court of Justice of the Basque Country applied the *Jipa* conditions[78] to a case concerning an Algerian married to a Spanish national. The Court of Justice of the Basque Country cancelled an expulsion order issued to the parent of a minor Spanish child that had been justified by the existence of unfavourable or negative events and irregular stay, on April 9, 2013. The High Court of Castille and Leon confirms an expulsion order issued against the father of a minor Spanish citizen arguing that the irregular nature of his stay is contrary to public order and national security.[79] A writ of the Criminal court of Bilbao dated December 28, 2012, confirming an expulsion measure against a Moroccan national whose partner is in Spain and whose child was born in that Member State that is justified by the absence of family ties, the rapporteur notes, is at odds with both the case law of the Court of Justice and that of the European Court of Human Rights.

The *Swedish* Migration Court of Appeal ruled that to require a minor EU-citizen to be covered by a health insurance is not discriminatory. The fact that the child was not covered for health care justifies a decision to deny its parents a right of residence.[80]

In the *United Kingdom* the decisions in *Teixeira* and *Ibrahim*[81] continue to generate new domestic case law. There has been confusion as to whether the EU-citizen parent must be in employment when the child starts education. A previous Tribunal case found that a worker, for this purpose, did not include a job seeker and that the derived right arises only if the parent is in work when the child begins education. In an appeal from that decision, the Court of Appeal did not make a finding on the latter point and held that the definition of worker, for

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valore giuridico della carta di soggiorno di familiare di cittadino italiano o cittadino UE nella giurisprudenza della Cassazione, *Diritto immigrazione e cittadinanza*, 2012, 4, 105-112.

75 Supreme Court, Order of May 23, 2013, No. 12745.

76 Rechtbank 's-Gravenhage zp Almelo, 28 December 2012, AWB 11/19588, retrieved from: www.Migratieweb nl.

77 Tribunal Superior de Justicia de Islas Baleares, (Sala de lo Contencioso-Administrativo, Sección1ª) Sentencia núm. 257/2013 March 19, 2013, JUR 2013\138711.

78 CJEU (First Chamber) case C-33/07, *Jipa* [2008] I-5157.

79 Tribunal Superior de Justicia de Castilla y León, Valladolid (Sala de lo Contencioso-Administrativo, Se Sentencia núm. 2117/2012 December 10, 2012, JUR 2013\11121.

80 MIG 2012:15.

81 CJ EU (Grand Chamber) cases C-480/08, *Teixeira* [2010] ECR I-1107 and C-310/08, *Ibrahim* [2010] ECR I-1065.

the purpose of Regulation (EU) No. 492/2011,[82] might be more demanding than under Directive 2004/38/EC.[83] In *Ahmed* the Tribunal found that a derivative right existed even if the EU-citizen was not in work when the child started education. The Tribunal considered that the principle could apply even if the child in education was a British citizen (although, in most cases, rights would also apply under *Ruiz Zambrano* and the Supreme Court decision of *ZH (Tanzania)*).[84] Finally, the Tribunal upheld the narrow view taken of evidence that those who are exercising derivative rights (outside the Citizens Directive) are not considered to be entitled to permanent residence. This affects third-country national family members who have retained rights or are separated, but not divorced from spouse or civil partner, who, given the breakdown in their relationship, often experience problems proving they have five years of continuous residence.[85]

Miscellaneous

The following information is taken from the *Austrian, Bulgarian, Czech, Italian, Latvian, Lithuanian, Maltese* and *UK* reports.

The *Austrian* rapporteur notes that according to section 21a SRA third-country nationals have to provide evidence of their knowledge of the German language by submitting a specific certificate in order to obtain a residence title in that Member State which is not one of the criteria listed in Article 7 of Directive 2003/86/EC and, therefore, might be at odds with EU-law.

No new developments are reported concerning the amendments to the *Bulgarian* law on entry and residence which entered into force in March 2012 and were covered in the 2011-2012 European report. The discrepancy between the implementing measures and Articles 12 and 13 of the Citizens Directive remains.

The list of documents to be submitted when applying for a residence card in Section 87(b) of the *Czech* FoRa, which includes documentation that is not found in the Citizens Directive, as reported in previous reports, still needs to be brought in line with Article 7(2) of that Directive. The 14-day period in the Czech law for the issuing of visa at the Czech border to third-country national family members, still remains a point of concern, though there is no knowledge of complaints made concerning the length of this procedure.

A decision bringing the format of a residence card issued to third-country national family members of EU-citizens by the *Italian* authorities in line with EU-standards has never been adopted, so third-country national family members are still being issued residence cards designed to meet the conditions that apply to third-country nationals in general. This has meant that third-country nationals are being required to live under the same roof as the EU-citizen; a condition not found in the Citizens Directive or domestic implementing legislation.

Two points of discrepancy between the text in the Citizens Directive and domestic implementing measures, which have been reported in previous reports by the *Latvian* rapporteur, still remain. The first is the necessity of acquiring consent of both parents before a residence permit is issued to a minor.[86] The second concerns the restriction in Latvian Immigration Law that documents can only be accepted if drawn up in Latvian, Russian, English, German or French. In practice, however, translations of documents drawn up in other lan-

82 Regulation (EU) No. 492/2011 of the European Parliament and of the Council of April 5, 2011 on freedom of movement for workers, *OJ EU* 2011, L141/1.
83 *MDB (Italy) v SSHD* [2013] Civ 1015.
84 *SSWP v RR* [2013] UKUT 021 (AAC).
85 *Bee (permanent/derived rights of residence)* [2013] UKUT 00083.
86 Points 28.3; 34.3; and 37.6 of Regulation No. 675.

guages in any one of these five languages are accepted by the OCMA. Translations do not need to be attested by a notary, but can be written by anybody, including the applicant.

The double stage system that applies to the issuing of residence cards, which has been detailed extensively in previous reports, is still in place in *Lithuania*. In the opinion of the Lithuanian rapporteur the system 'is unnecessary and creates additional bureaucracy in dealing with the migration authorities'.

Concerns regarding incomplete transposition of the Citizens Directive into *Maltese* law relate to, amongst others, Article 5(4) of that Directive; an omission to specify that documents are to be brought within a 'reasonable time'.

The *UK* rapporteur expresses concerns, which were also voiced in previous reports, regarding the forms used for applications for family permits, which still require a large amount of irrelevant information and documents, including the taking of biometrics, as well as the delays in dealing with even very straight forward applications, in particular cases concerning retained rights and extended family members, which start with the back log in opening post. The rapporteur notes that the list of questions to be answered by the applicant has been supplemented with the question to state all ties which the applicant has with the country of birth, any other country whose nationality the applicant holds and any country where the applicant has lived for more than five years. On a final note, it is reported that the express service announced by the Home Office, reported in the previous report, has still to materialize.

3. IMPLICATIONS OF THE METOCK JUDGMENT

The overall picture of compliance with the Court of Justice's ruling in the *Metock* case, as reported in previous European reports, has not changed.

The decision, to the extent that it does not allow Member States to require prior lawful residence of a third-country national family member in another Member State, has no implications for *Croatia* as no such condition is found in Croatia's Aliens Act. Regarding the obligation to recognise as a marriage that brings entitlements as a family member within the meaning of Article 2(2)(a) Directive 2004/38/EC any marriage irrespective of when and where it was convened, the Croatian rapporteur expresses some concerns in relation to third-country nationals who are the subject of an expulsion decision based on public policy considerations as that includes a prohibition to enter that country. If the marriage is treated as a ground for lawful residence and the annulment of an entry ban, then, the rapporteurs feels, there should be no problems. From information communicated to the rapporteur by Croatian officials it appears that in practice cases concerning family reunion are considered favourably. Therefore full compliance with the *Metock* ruling by that Member State is expected to be ensured.

New references to the *Metock* judgment in domestic case law are reported by the *Austrian*, *Italian* and *Spanish* rapporteurs. The *Austrian* rapporteur mentions that the cases in which this ruling is invoked usually concern family ties which have been established after immigration. He explicitly mentions that there is a decline in the number of cases in which *Metock* features which is attributed to the authorities being aware of the implications of this ruling, though he does not know if this awareness can be attributed to a written circular issued by the Federal Ministry for Interior Affairs as circulars are not made public in that Member State.

The *Belgian* and *Danish* rapporteurs note that the *Metock* judgment has seen a shift in focus to the prevention of marriages of convenience.

Miscellaneous

The following information is taken from the *Hungarian, Irish* and *Dutch* reports.

Though previous lawful residence is not required when issuing a residence card, this does not mean that the issuing of a family reunification visa by the *Hungarian* authorities is automatic.

An exemption from the obligation to obtain a short-stay visa was introduced into *Irish* law in April 2011 for third-county national family members of EU-citizens who have been issued a residence card as a family member of an EU-citizen. 2012 saw the introduction of a provision that allows visitors from a number of selected countries to travel to Ireland on their UK short-stay visa with no need to obtain an Irish visa for this purpose.[87]

The entry into force of the *Visumwet* on 1 June 2013 in *the Netherlands* has removed the exemption to obtain a long-stay visa (*machtiging tot voorlopig verblijf*) that applied to third-country national family members of EU-citizens from the *Vreemdelingencirculaire* (policy rules). This exemption is now found in Article 17(1)(b) of the *Vreemdelingenwet*.

4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCE AND FRAUD

Fraud and abuse of the rules on free movement of persons are grounds to refuse, terminate or withdraw a residence permit in most Member States. Most frequently, Member States regulate marriages of convenience through their immigration rules, either through their definition of spouse or by including it as a ground to revoke, terminate or withdraw rights or a combination of both. In *Italy* and *Latvia* the authorities regulate marriages of convenience through their Civil Law and in *Austria* consideration is given whether there is family life within the meaning of Article 8 ECHR. An interesting case, mentioned by the *Italian* rapporteur, concerns the refusal to issue a residence permit to a spouse, who changes sex after marriage, but does not report this to the authorities. An application for a residence permit was turned down by the authorities arguing that the marriage was fictitious. The court of Reggio Emilia found that as not reporting a change in sex of one of the spouses is not a ground to dissolve a marriage according to the European Court of Human Rights' case law and the marriage in this case was real, the decision to refuse a residence permit could no be upheld, though under Italian law a change of sex recorded in the official records is a reason to dissolve the marriage.[88]

A new chapter in the book on abuse of free movement rules is reported by the *Belgium*, *Czech* and *Hungarian* rapporteurs. These Member States have seen own nationals and nationals of other Member States making a formal statement recognising the paternity of a child, born to a third-country national mother with a view to passing on their nationality to the child, who in turn, through the *Ruiz Zambrano* and *Chen* case law,[89] can provide their third-country national mother with a right of residence,. Both the *Belgium* and *Czech* authori-

87 Immigration Act 2004 (Visas) (No. 2) Order 2011,S.I. No. 345; Immigration Act 2004 (Visas) Order 2012, S.I. No. 417.

88 Court of Reggio Emilia, Order of February 9, 2013, No. 8354/12.

89 CJEU (Full Court) case C-200/02, *Chen* [2004] ECR I-9925 and CJ EU (Grand Chamber) C-34/09, *Ruiz Zambrano* v [2011] ECR I-01177.

ties are taking measures to tackle 'false declarations of paternity'. Tackling this problem is proving more challenging in *Hungary* as the OIN lacks competence to deal with such cases.

Croatia has defined marriages of convenience in Article 57 of its Aliens Act. A marriage of convenience can be a justification for an expulsion measure, albeit subject to consideration of the length of stay, age, health, family and economic circumstances, degree of social and cultural integration in the Republic of Croatia and ties with the country of origin at the time the expulsion measure is adopted.[90] Circumstances that may indicate the existence of such a marriage, which also apply to common law marriages, include: 1) the spouses do not maintain their marital union; 2) the spouses do not perform their marital obligations; 3) the spouses never met before the marriage was convened; 4) the spouses fail to provide consistent personal data; 5) the spouses do not speak a language that they both understand; 6) material assets were exchanged before the marriage was convened, unless the assets represent dowry and the spouses come from countries where the presentation of dowry is a custom; and 7) there is proof of previous marriages of convenience on the part of either of the spouses, either in the Republic of Croatia or abroad.

Legislation

Proposals and/or amendments to the law and/or policy rules concerning abuse of rights are reported by the *German, Latvian*, *Lithuanian, Dutch, Swedish* and *UK* rapporteurs.

The *German* amendment concerns section 2 § 7 of its Free Movement Act and introduces a new procedure that authorises the German authorities to formally establish the loss of residence rights if a third-country national family member does not accompany or join an EU-citizen for the purpose of family reunification. This section also introduces a procedure to declare null and void a right derived from free movement rules if false information has been provided or forged or falsified documents have been used. Though strictly speaking the new rules to not explicitly address the issue of marriages of convenience it is clear from the reasons provided that the aforementioned provision intends to implement Article 35 of the Citizens Directive. The rules are based on a presumption of free movement rights, requiring substantial doubts regarding the intention to establish a family relationship in Germany before further examination is permitted.[91] It is for the foreign spouse to establish that family reunification is the true reason to apply for residence permission in Germany. The amendment follows reports made by various German *Länder* of a significant number of cases of marriages with no intention to establish a family relationship.

A proposal to remove the condition in the Civil Status Act Registration Law that marriages can only be convened in *Latvia* if both spouses-to-be enjoy a permanent right of residence in that Member State is pending.[92] The rapporteur notes that though the condition sits uneasily with the principle of equal treatment, removing this condition from the aforementioned act will make it easier to enter into marriages of convenience in that Member State.

In June 2012 marriages of convenience and fraud were introduced as a reason to terminate a right of residence granted under Article 106(1) paragraphs 2 and 4 and Article 106(2) paragraph 2 in the *Lithuanian* Aliens Law, which previously only provided for measures against marriages of convenience in the general Immigration rules. These provisions still await the adoption of implementing measures.

90 Article 105(1)(4) Aliens Act.
91 BT-Drs. 17/10746, at p. 13-14.
92 Telephone interview with Director of Department of Civil Status Acts of Ministry of Justice on June 12, 2012.

Section B10/2.3 of the *Dutch Vreemdelingencirculaire* now sets out the policy rules on abuse of free movement rights and includes a definition of artificial behaviour.

A proposal to amend the *Swedish* Aliens Act ch 3a § 4, to the extent that a marriage or partnership of convenience, fraud or an adoption made for the sole purpose of acquiring residence rights, does not give a right to residence, is pending.[93]

An amendment introduced to the definitions of spouse or civil partner in the *UK* Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) means that a party to a marriage or civil partnership of convenience is not covered by those definitions. Unfortunately it is not defined within the Regulations what a marriage or partnership of convenience is. There is also an exclusion to ensure that polygamous marriages or other multiple relationships are not recognised under the Regulations, as the spouse, civil partner or durable partner of an EEA-national in the United Kingdom are excluded if a spouse, civil partner or a durable partner of the spouse or the EEA national is already present in the United Kingdom.[94]

Case law

Abuse of free movement rights has been addressed by the courts in *Austria,*[95] *France*,[96] *Hungary*,[97] *Italy*,[98] *the Netherlands*,[99] *Spain*,[100] *Poland*[101] and the *UK*.[102]

The information provided by the *Hungarian*, *Italian* and *Dutch* rappoteurs paints a picture in favour of the Member State upholding decisions to terminate residence rights. *Austria* and *France* are the exceptions. In the former Member State the Administrative Court held that even if a marriage of convenience is established and a right of residence refused on this ground the *Dereci* ruling means that there is no obligation for the partner of an Austrian national to leave that country. The *French* court found that as prefet had not provided evidence to support the conclusion that the case involved fraud, this decision could not be upheld as the partners resided together and shared a common household. To not uphold an expulsion decision when a marriage was convened after that decision was executed would 'encourage sham marriages' according to the *Italian* Supreme Court. The *Dutch* Council of State explicitly refers to the European Commission's guidelines that includes conflicting

93 Official report Ds 2012:60, p. 55 ff and p. 85. A reference to the European Commission guidance is included (Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2009) 313/4 final). See also: Case MIG 2009:11 where the court held that EU-law cannot be invoked to legitimize a marriage of convenience.

94 Immigration (EEA) (Amendment) Regulations 2012/1547 and 2012/2560.

95 Austrian Administrative Court, April 24, 2012, 2008/22/0254.

96 CAA Bordeaux, July 5, 2012, No. 12BX00350.

97 EBH 2010:2277 Supreme Court decision 37.256/2010; Kfv.IV.37.090/2010/6, September 8, 2010; Kfv.III.37.854/2009/4, 15 June 2010; Kfv.III.37.076/2010/5., October 5, 2010; Kfv.III.37.194/2010/4, November 2, 2010; and Kfv. III. 37.030/2011. published in: BH 2012/165.

98 Italian Supreme Court, Order 10-7-2012, No. 11582.

99 *Afdeling Bestuursrechtspraak Raad van State* 6 June 2012, No. 201106910/1/V4, LJN BW7878, JV 2012/325; *ibid*., 29 June 2012, No. 201111222/1/V4, LJN BX0615, JV 2012/355; *ibid*, 3 April 2013, No. 201208308/1/V4, LJN BZ8720, JV 2013/188; and *ibid.*, 31 May 2013, No. 201206477/1/V4, retrieved from: www.MigratieWeb.nl.

100 Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia de July 18, 2012; Tribunal Superior de Justicia de Madrid (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia No. 513/2011, May 20, 2012; Audiencia Provincial de Guadalajara (Sección 1ª), sentencia No. 56/2013 April 3, 2013, JUR 2013\178196; Audiencia Provincial de Sevilla (Sección 2ª), sentencia No. 24/2011, January 31, 2012; and Provincial Court of Girona, March 21, 2012.

101 Tribunal Central Administrativo Norte (Second Instance North Administrative Court), February 24, 2012, case No. 02370/08.3BEPRT, available in www.dgsi.pt.

102 *Papajorgi* (*EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038 (IAC).

statements regarding the relationship to justify the presence of a marriage of convenience. In one of the cases handed down by the Dutch Council of State information provided by that Member State's Minsitry of Foreign Affairs regarding unusual patterns of migration (i.e. the increasing number of consular marriages in which one of the partners is an Egyptian national) was used to justify the presence of a marriage of convenience. The *UK* rapporteurs report that though the case law requires the Home Office to provide evidence that the marriage is one of convenience, in practice it is the indiciudal that is being asked to show that his/her marriage is genuine.

Statistical data

Statistical data regarding marriages of convenience has been included by the: *Belgium*, *Estonian*, *Hungarian*, *Latvian* and *Polish* rapporteurs.

In 2012 *Belgium* witnessed a decline in the number of cases in which the public prosecutor advised negatively regarding an intended marriage, from 59 % in 2011 to 52 % in 2012. A press release dated October 5, 2012 providing data over 2011 informs of a recorded 10.728 cases of possible marriages of convenience; 882 visa refusal indicated by a an alleged marriage of convenience; 743 cases in which the Office of the Prosecutor produced a report on investigations into a marriage of convenience; and 116 residence permits being withdrawn following a conviction for convening a marriage of convenience.

In *Estonia* 2011 witnessed 35 cases of marriages of convenience. The rapporteur notes that it is extremely difficult to prove a marriage of convenience as mere doubts regarding the nature of a marriage are insufficient to refuse a right of residence.

The data in the *Hungarian* report is taken from data collected by the UK Border Agency, revealing that in 2009 13 and in 2010 25 Hungarian nationals were arrested for accepting money in exchange of a marriage. The figures for Romanians, Czechs, Slovakians and Poles for 2010 for the same offence reported by the UK Border Agency are: 30, 63, 53 and 91 respectively.

The statistics on marriages of convenience collected in *Poland* do not specify in how many cases such a marriage was entered into for the purpose of benefitting from Directive 2004/38/EC. Data collected by the Polish Border Guard relate of 128 cases for 2011. It is said that 10% of the refusals to grant entry permission are motivated by considerations concerning the sham nature of the marriage.[103]

Miscellaneous

The following information is taken from the *Austrian, Belgium, Danish, Hungarian, Irish, Latvian, Dutch, Swedish* and *UK* reports.

The *Austrian* courts and administrative bodies are obliged by law,[104] to inform the immigration police if they have well-founded suspicions that a marriage qualifies as a marriage of convenience. To adopt immigration measures, it is not required that a marriage that qualifies as a marriage of convenience is declared null and void by the Austrian authorities, including the courts. One of the implications of labelling a marriage one of convenience is that the third-country national parent cannot rely successfully on the *Ruiz Zambrano/Dereci* case law to ensure prolongation of residence in *Austria*. According to that Member State's Ad-

103 Polish National Migration Contact Point, *Report on Abusing Right to Family Reunion* (April 2012).
104 Section 109 APA.

ministrative Court a refusal to issue a residence permit under these circumstances does not amount to an obligation to leave Austrian territory.[105]

In *Belgium* there are plans to strengthen controls on applications for family reunion at the Federal level.

In their fight against abuse of free movement rights the *Danish* Immigration Services reported a Danish national, who had lived and worked in Sweden and wanted to return to Denmark with her spouse, to the police requesting those authorities to instigate a criminal investigation against the spouse before the immigration decision had become final. Subject of these investigations should have been the information provided by the spouse in support of the application for family reunification which was considered insufficient as evidence of genuine and effective residence in Sweden. In this case, at the end of the day, a residence permit was issued and no criminal charges were made against the Danish spouse.

Concerns regarding the lack of clarity concerning competences to address cases concerning abuse of free movement rights are expressed by the *Hungarian* rapporteur. Competences are shared by the consular authorities (issuing visa) and the OIN (issuing residence permits). These concerns also include the lack of professional knowledge with the public administration office allowing them to screen and detect marital status documents. The Hungarian rapporteur also reports of investigations into a marriage mediator network following an increase in the number of applications for family reunion involving Nigerian male spouses, noting that the OIN has no competence to address cases in which profits are made.

The *Irish* rapporteur states that a marriage of convenience is an issue of great complexity in that Member State, with no single remedy, either legislative or administrative available. The issue is complicated by the constitutional protection given to the institution of marriage, as well as the amendments made to the Regulations in the wake of *Metock*, which removed the lawful residence requirement for family members of EU-citizens who are third-country nationals. In setting out his key priorities for 2013, the Irish Minister for Justice announced plans to re-publish and hopefully enact the Immigration, Residence and Protection Bill.[106] The Bill would make it more difficult for persons engaged in marriages of convenience to benefit from the marriage in immigration terms, as Section 138 allows the Minister for Justice and Equality to disregard a particular marriage when determining an immigration issue, if the marriage is deemed to be a marriage of convenience.[107] In this regard, the Minister can request the parties to provide information that proves that the marriage is not a 'sham marriage'. Section 138(5) of the Bill lists a number of factors that will be used to determine whether there is a marriage of convenience. Factors such as the nature of the relationship prior to the marriage, whether there was any fiscal inducement, and the parties' familiarity with each other's personal details will be considered. Section 138 of the Bill does not provide for a right of appeal. The only remedy available would be the possibility of judicial review in the Irish High Court. The Irish Minister for Social Protection has announced plans to amend the Civil Registration Act, 2004 in an effort to deal with marriages of convenience. Speaking in July 2013, the Minister stated that her Department had been considering the issue and "has met with a number of stakeholders with a view to introducing measures to combat marriages of convenience" and that she intended "to introduce legislation shortly that will make such marriages far more difficult to contract in the future". The Minister stated that she hoped to publish the Civil Registration (Amendment) Bill 2013 later this year, not-

105 Austrian Administrative Court, April 24, 2012, 2008/22/0254.

106 http://www.inis.gov.ie/en/INIS/Pages/Immigration%20in%20Ireland%20%E2%80%93%202012%20in%20Review

107 http://www.nascireland.org/parliamentary-questions/pq-marriages-of-convenience/

ing, on the same occasion, that there are guidelines in force instructing registrars for marriage notifications on the requirements for notification procedures, including the verification of identity and marital status which are designed to assist the authorities to prevent marriages of convenience.[108]

The concerns expressed by the *Latvian* rapporteur in previous reports, regarding *Latvian* women who are recruited to work in the UK and Ireland, but who, upon arrival in those Member States are locked up and threatened to be abused if they do not enter into a marriage with a third-country national that will provide the latter with a right of residence, are voiced once again.[109] Notwithstanding the introduction of information campaigns, for 2012 NGOs providing rehabilitation services to victims of human trafficking have reported 30 cases in which they have provided assistance, of which 16 cases concerned forced marriages (compared to 14 cases of which 8 concerned forced marriages for 2011).[110] The cases which have to be dealt with in Latvia, as they concern suspicions of marriages of convenience in Latvia, mainly concern men from Turkey and Egypt. Finally, reports in the media reveal that Latvian women are frequently approached by male third-country nationals on Internet social (meeting) sites.[111]

The discussions on the *Wet electronische dienstverlening burgerlijke stand* [Act on online services for the Registrar Office] as discussed in the 2011-2012 *Dutch* report are still ongoing. In October 2012 the Secretary of State for Security and Justice and the Home Minister addressed the concerns regarding this Act voiced by members of the First Chamber. They argued that careful consideration whether an intended marriage should qualify as a marriage of convenience does not affect the free choice of partners – as the Greens had feared – as the Act will merely simplify, accelerate and tightened up procedures.[112] In response to the concerns expressed by the CDA, regarding fraud and marriages of convenience, they point out that a number of measures have been adopted to prevent fraud and abuse.

In *Sweden* forced marriages and child marriages (meaning that one of the spouses is younger than 18 years) are criminalized. Suggested amendments include the removal from the law of a possible exemption for marriages under the age of 18 if the marriage has been

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108 http://www.nascireland.org/campaign-for-change/immigration-residence-protection-bill/residency-immigration-residence-protection-bill/pq-proposed-legislation-marriages-of-convenience/.

109 Cilvēktiesību komisijā meklēs risinājums fiktīvo laulību izskaušanai, http://www.delfi.lv/archive/print.php?id=42429304 (accessed on June 22, 2013). On June 13, 2012 Committee of Human Rights and Social Affairs organized meeting with institutions of Interior Affairs and non-governmental organisations to discuss problem of marriages of convenience with Latvian citizens especially in Ireland where Latvian Embassy has provided assistance to 89 possible victims of human trafficking. Latvian Embassy in Ireland has a data showing that during last five years at least 1000 Latvian women have registered marriage with third country nationals in that Member State.

110 *Cīņa ar cilvēktirdzniecību: upuru skaits turpina pieaugt* (The fight against trafficking in human beings: the number continues to increase), www.delfi.lv, February 4, 2013, available in Latvian on http://www.delfi.lv/news/national/politics/cina-ar-cilvektirdzniecibu-upuru-skaits-turpina-pieaugt.d?id=43027262 (accessed on June 22, 2013).

111 *Vai sievietes tik tiešām ir kļuvušas par viltus laulību upuriem vai pašas piekritušas «iziet pie vīra»* (Does really women have become victims of fraud marriages or they have agreed to marry?), www.AngloBalticNews.co.uk, September 11, 2012, available in Latvian on http://www.anglobalticnews.co.uk/profiles/blogs/vai-sievietes-tik-tiesam-ir-kluvusas-par-viltus-laulibu-upuriem-v (accessed on: June 22, 2013).

112 *Kamerstukken I* 2012-2013, 32 444, C, Wijziging van Boek 1 van het Burgerlijk Wetboek en enige andere wetten in verband met de vereenvoudiging van en de invoering van een elektronische dienstverlening bij de burgerlijke stand (Wet elektronische dienstverlening burgerlijke stand), Amendment of Book 1 of the Civil Code and some other Acts as regards the Simplification of and the Introduction Electronic Services by the Registrar Office (Act on Electronic Services provided by the Registrar Office)] Memorie van Antwoord, p. 8.

convened in a country that allows spouses to be under 18 at the time of the marriage ceremony. [113] The age limit in Swedish law will thus also apply to Swedish marriages entered into abroad (e.g. at embassies). The suggestions concerning the amendment has been debated. Critics have argued that it will be very difficult to prove intent where there is no force and that victims might not dare to relate on the facts. However, disregarding this, the Government is expected to present a proposal on the matter in 2014.

The *United Kingdom* has witnessed an increased emphasis of tackling abuse relating to sham marriages over and above what we were seeing in years before. Guidance issued by the Home Office to immigration officers and entry clearance posts make it clear that the possibility of abuse should be considered in all applications. Given the tightening of rules for domestic immigration applications which rely on marriages to British or settled nationals, it appears that the Home Office is more concerned than ever about sham marriages with EU-citizens. The obligation on registrars in section 24 of the Immigration and Asylum Act 1999, to inform the Home Office if they suspect that a sham marriage or civil partnership is about to take place is still in place and anecdotal evidence suggests that registrars are making use of it with immigration officials turning up at ceremonies to interview third-country nationals intending to marry EEA-nationals. The UK's efforts to tackle sham marriages has resulted in an increasing number of marriage interviews conducted in line with announcements made by the Home Office.[114] The rapporteur notes that the quality of decisions where marriages of convenience have been alleged is, at times, very poor. One problem is that, in conformity with the government's obligations under the Citizens Directive, the application form for a family permit does not ask for evidence that the relationship is genuine, but applicants who do not spontaneously provide such evidence may have their applications refused. So, for example, despite the fact that a marriage certificate of an Irish national and his civil partner was submitted and no further questions were asked by the Home Office, the Home Office refused the application stating that they were not satisfied that the civil partnership was genuine and subsisting, a phrase borrowed from domestic immigration control. As the applicant had not submitted his divorce certificate which had never been requested, it was queried whether he was free to enter into a civil partnership and it was also stated that, given the different cultural backgrounds of the two individuals, they believed that it was a civil partnership of convenience. Concerns have been expressed regarding the fact that the Home Office believes that the burden of proof should be on the applicant to show that he or she is in a genuine marriage rather than for the Home Office to prove the shame marriage. As mentioned in last year's report, this approach has been criticised judicially, but administrative practice does not seem to have changed.[115]

5. ACCESS TO WORK

The right to take up an economical activity in Article 23 of Directive 2004/38/EC, as a rule, is not subject to prior authorization by the national authorities, i.e. the issuing of a work permit. Exceptions are: *Estonia* (no right to take up employment if one is a family member until they qualify for a right of temporary residence, i.e. after three months), *Ireland* (third-country national family members only enjoy a right of access to the labour market upon

113 Official report SOU 2012:35 Stärkt skydd mot tvångsäktenskap och barnäktenskap.
114 http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/november/30-17-arrests1
115 *Papajorgi (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038 (IAC).

receipt of a letter acknowledging a valid application for a residence permit[116]) and *Lithuania* (third-country national family members are only exempted from the obligation to obtain a work permit if they belong to one of the categories of persons on a special list provided for by law). Concerns are expressed by the *Latvian* rapporteur regarding the rules on the right to take up an economical activity in that Member State if one is a third-country national family member of an EU-citizen before the acquisition of their residence permit. Though these family members do not need a work permit to take up employment as a worker or self-employed person,[117] in practice employers may not be aware of this exemption for third-country national family members of EU-citizens and may therefore revert to the general rule in the Latvian Labour Law that requires a work permit when employing a third-country national. In practice this could mean that third-country national family members of EU-citizens cannot pursue an economical activity until they are issued their residence card, which officially takes 30 days,[118] but in practice two weeks.

No prior authorisation is required in *Croatia* where Article 153(1) and (2) of the 2011 *Croatian* Aliens Act provides an exemption from the obligation to obtain a work permit or registration certificate for either an employed or self-employed economical activity for those who derive their right of residence from the Citizens Directive.

Legislation

Amendments to the law relevant to the right to take up an economical activity are reported for *the Netherlands*, *Poland*, *Slovenia* and *Sweden*. The amendment of the *Slovenian* Labour Market Regulation Act, which entered into force in March 2013 has had no implications for family members of an EU-citizen's family members. The same holds true for the amendment of Article 87 of the *Polish* Act on the Promotion of the Employment and Labour Institutions.

The *Dutch* policy rules now explicitly spell out that family members of EU-workers in a cross-border situation and resident in an adjacent Member State need a work permit to pursue lawful employment in the Netherlands, unless the *Wet Arbeid Vreemdelingen* (Law on the Employment of Foreigners) provides otherwise.[119]

The proposal of the *Swedish* government to preclude persons who have been convicted of sexual offences against children in another Member State from seeking employment involving contact with children, for instance in a nursery, entered into force on January 1, 2013. The rapporteur notes that the amendment is compatible with Council Framework Decision 2009/315/JHA on the Organization of the Exchange of Information Extracted from Criminal Records between Member States.[120]

Miscellaneous

The following comments are taken from the *Bulgarian, Estonian, German, Hungarian, Italian, Luxembourg, Dutch* and *UK* reports.

Until family members have acquired a right to permanent residence in *Bulgaria*, their employer has to register their employment with the Local Employment Office within a 7 day-period after employment is started.[121]

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116 *Decsi and Zhao* v *Minister for Justice, Equality and Law Reform* (2010) JR 858.
117 Regulations No. 675.
118 Article 50 Regulations No. 675.
119 *Vreemdelingencirculaire* 2000, B10/2.2.
120 *OJ EC* 2009, L 93/23.
121 Article 4(1) point 11 and (6) of the Ordinance on the Conditions and Procedure for Issuance, Rejection and Withdrawal of Work Permits of Foreigners in the Republic of Bulgaria.

In the *Czech Republic* there is a duty to inform the labour office.[122]

The principle of non-discrimination on the grounds of race, sex, colour or other circumstances applies in *Estonia* once family members enjoy a right to take up employment in their capacity of an EU-citizen's family member. This right is, however, subject to language requirements.

In *Germany* third-country national family members of German nationals only have access to that Member State's labour market if they are in a cross-border situation.

The principle of equal treatment in Article 59(1)-(4) of the *Hungarian* UnemplA not only applies to measures governed by that Act, (for example, registration as a job-seeker), but also to benefits. Access to labour market facilities is governed by the principle of equal treatment with own nationals and ensured through the operation of Article 58(9)b of that Act.

Concerns relating to employment in the public sector are expressed by both the *Hungarian* and *Italian* rapporteurs. Access to the public sector for EU-citizens and their family members has been preserved in the new Act CXCIX that regulates the public sector in *Hungary*. Like its predecessor, employment in the public sector is limited to lower ranked positions at all levels of government and is subject to language requirements. The *Italian* rapporteur notes that competitions for posts in the public sector in that Member State are restricted to Italian nationals and EU-citizens, hereby excluding third-country national family members of EU-citizens from participating in these competitions. See also Chapter III. The *Luxembourg* rapporteur discusses a case concerning a Turkish national whose application for a residence permit has been refused because of the Union preference principle that applies to workers of the EU's Member States. Both the court in first instance[123] and the appeal court[124] ruled that there is no legal basis in national or EU-law that justified a rejection on the basis of the Union preference principle.

The *Dutch* courts are mixed on the question whether pending an application for residence permission under the *Ruiz Zambrano* rules[125] there is a right to take up paid employment. The issue is pending before the Judicial Division of the Council of State.[126]

The difficulties reported in previous reports which are being experienced by family members of Union citizens in the *UK*, before they have been able to secure a certificate of application, which are caused by the delays in issuing documentation and employer sanctions for employers employing third-country national workers without a right to work, have not been solved adequately in the reporting period. The hotline operated by the Home Office that enables employers to check the immigration status of a particular employer does not provide up to date information which is, therefore, not accurate. The guidance for caseworkers is, however, still generous towards applicants in the sense that it accommodates for possible delays within the Home Office and court system.

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

The position of the family members of EU job-seekers remains very much the same. The majority of Member States have no rules concerning the position of job-seekers; in most

122 Sec. 87, 102 of the EA.
123 Judgment No. 27602.
124 Judgment No. 29416C.
125 CJ EU (Grand Chamber) case C-34/09, *Ruiz Zambrano* [2011] ECR I-1177.
126 Judicial Division of the Council of State, 201207385, oral proceedings: January 29, 2013, www.Migratieweb.nl.

Member States family members of job-seekers appear to derive their right of residence up to three months from Article 6 Directive 2004/38/EC. In the national reports that specify the duration of the residence right as a family member of a job seeker, a three months period which can be extended is the rule. Exceptions are *Denmark* and *Latvia* which both allow job seekers a 6 month residence period. In *Denmark* this period can be extended beyond this period of six months. [127]

In *Croatia* EU job-seekers can reside in that Member State for the purpose of seeking employment for a period of three months. To qualify they must satisfy the conditions set out in Article 155 of the 2011 Croatian Aliens Act, meaning that they either have to satisfy the conditions for residence as an economically inactive person or must be enrolled at an institute for higher education.[128] Family members derive their right of residence from the job-seeker when the accompany or join the EU-citizen job-seeker.[129] The right of residence enjoyed by the family members of job-seekers is not lost as long as the job-seeker provides evidence that work is actively being sought and there is a reasonable chance of being employed.

Legislation

Legislative amendments have been reported for *Denmark* and *Lithuania*.

The restriction which limited family members eligible to accompany a job-seeker that applied in *Denmark* has been lifted, which means that all family members defined in Section 2(1) of the EU Residence Order can accompany a job-seeker, if the job-seeker has sufficient financial means to support his family without becoming a burden on the social assistance scheme.[130]

Following an amendment to the *Lithuanian* Aliens Act in June 2012, being a job-seeker is now recognized as a reason to be granted residence permission. This right, however, does not cover first time job seekers, whose position and that of their family members remains unclear. The rapporteur argues that the rules in the Lithuanian Aliens Act can be read as including a right of residence during a period of three months without registration for first time job -seekers. In the alternative, they could enjoy a right of residence as an economically inactive person, if they have sufficient financial resources and have obtained a health insurance. As there are no rules stating that EU-citizens and their family members need a work permit to take up employment in Lithuania, the rapporteur argues that they are thus exempted from the general obligation to acquire this document prior to taking up employment. Regarding third-country national family members of EU-citizens the rapporteur notes that unless they have entered Lithuania as a family member, an intern or for the purpose of vocational training for a period not exceeding three months within a year, they will have to obtain a work permit if they want to pursue an economical activity in that Member State.

Miscellaneous

The following information is taken from the *Belgian, Bulgarian, Danish, Estonian, German. Irish, Lithuanian, Maltese* and *Polish* reports.

Residence permits are issued under the same conditions to family members of job-seekers as those that apply to the job-seeker him/herself in both *Belgium* and *the Czech Republic.*

127 Section 3(4) Danish EU Residence Order.
128 Article 156(1)-(3) Croatian Aliens Act.
129 Articles 156(1), (4) or 168 Croatian Aliens Act.
130 Section 8 Danish EU Residence Order

In *Bulgaria* and *the Czech Republic* job-seekers who are family members of EU-citizens enjoy the same treatment as own nationals. In the *Czech Republic* family members of job-seekers can, but are not obliged to, register with the official labour authorities. Registration means the inclusion in the register of job-seekers and gives a right to unemployment benefits, if a job-seekers work record satisfies the condition of twelve months of employment in the past two years, and social assistance, subject to the unreasonable burden test, which is performed when benefits are applied for.

In *Estonia*, third-country national family members of a job-seeker need a visa to reside in that Member State during the three month period, unless exempted from this obligation by a mutual agreement signed by that Member State.

The extensive debates in *Germany,* regarding the exclusion of job-seekers from social assistance in section 7 of the Social Code II (SGB II), also concern family members of job-seekers.

The lack of transparency concerning the position of job-seekers, which has been reported by the *Irish* rapporteur in previous reports, remains a point of concern.

The precarious position of family members of job-seekers in *Latvia* means that their rights are limited to the right to reside with the EU-citizen job-seeker for at least six months. Problems are envisaged regarding exportable benefits until and for as long as the family member has not registered as unemployed with the State Employment Agency, which can only record them as unemployed if they can present a residence document.[131]

In *Malta* job-seekers must register with the Employment and Training Corporation.

Job-seekers, both Polish and nationals of other Member States alike, and their family members are not entitled to material support in *Poland*. Entitlements enjoyed by job-seekers in this Member State are limited to the right to be assisted to find a job and the right to attend specialized training sessions, seminars, workshops and vocational training.

In *Sweden* job-seekers from other Member States enjoy the right to equal treatment by the employment office. To be eligible for benefits, job-seekers must have registered with these authorities.

7. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES)

Information concerning other issues related to equal treatment has been provided by the *Belgian, Danish, Greek, Latvian, Luxembourg* and *Swedish* rapporteurs.

In *Belgium*, the Brussels Labour Court now needs to decide on the national case in which it made a preliminary reference to the Court of Justice in what is now known as the *Ahmed* decision.[132]

The issues concerning equal treatment which are reported for *Denmark* in Chapter IV do not concern family members as such, with the exception of the right of residence which third-country national family members are experiencing in general.

Two points of concern are mentioned by the *Greek* rapporteur regarding equal treatment and social advantages, both of which concern pensioners. The first of these concerns relates to Article 34(1) Law 3996/2011 that includes a residence clause as a qualifying condition for

131 Article 2(2)(2) of the Law on the Support of Unemployed and Job seekers, OG No. 80, May 202.

132 CJ EU case C-45/12, *Office national d'allocations familiales pour travailleurs salariés (ONAFTS)* v *Radia Hadj Ahmed*, June 13, 2013, n.y.r.

a social solidarity allowance for pensioners which is only paid to those who reside permanently in Greece. The Greek rapporteur notes that this residence condition could be at odds with the rules on free movement of persons. The second point of concern expressed by this rapporteur is the specification in section 11 of the aforementioned provision in Law 3996/2011 that the minimum pension benefit within the meaning of Article 58 of Regulation (EC) No. 833/2004 is € 360 a month as, until January 1, 2015, the sum of € 480 a month will apply to non-migrant workers.

The condition that social benefits are only paid to those who have been issued a permanent residence permit found in the *Latvian* Social Assistance and Social Services Law and the Law on State Social Allowances[133] applies indiscriminately to EU-citizens and their family member, irrespective of their nationality. As a consequence the only entitlements for which they are eligible prior to acquiring the status of permanent resident are those covered by Regulation (EC) No. 883/2004. Access to education is subject to having been issued a residence permit if one is not a Union citizen. Latvian law does not provide for an exemption for the third-country national family members of Union citizens. Like Union citizens, family members have to be legally employed in Latvia to be eligible for tax exemptions.[134]

Information provided to the *Luxembourg* rapporteur by the *Luxembourg* Association of Support of Foreigners (CLAE) reveals that it is becoming increasingly difficult to access social benefits in that Member State for EU-citizens. For example, an entitlement to financial housing assistance and the social housing benefit are subject to three years lawful residence.[135]

A proposal to approve the Nordic Convention on Social Security of June 12, 2012, was presented by the *Swedish* government in December 2012.[136]

8. CONCLUDING REMARKS

The overall picture regarding compliance with European rules on admission, residence and access to the employment market which apply to family members of EU-citizens is positive. The position of the family members who are listed in Article 3(2) Directive 2004/38/EC is addressed by a number of rapporteurs revealing that this is an issue that still requires further clarification.

The reading given to the Court of Justice's decision in the *Ruiz Zambrano*-case in those Member States that exclude their own nationals from the free movement rules, where permitted, is – as a rule – restrictive. The Austrian Administrative Court, however, has taken a liberal stance, arguing that free movement rights are always at stake if family members have no right of residence. In this Member State, an Article 8 ECHR-test is compulsory when applications are made for family reunification by immobile EU-citizens. The position of own nationals is also key to the issue of abuse of free movement rules.. As signalled in the 2011-2012 Member States are increasingly concerned with and engaged in the tackling of abuse of free movement rights. In doing this, they are struggling with the issue of 'intent with which free movement rules are being used'. A new development is the recognition of paternity by own nationals or nationals of other Member States of a child born to a third-country national mother, for the sole purpose of giving the child the nationality of a Member State and thus,

133 OG No. 168, 19 November 2002.
134 OG No. 26, 18 May 1995.
135 Horizon, No. 115, November 2012, p. 5.
136 Government proposal 2012/13:31, Nordisk convention om social trygghet.

along the lines of *Ruiz Zambrano* and *Chen*, the third-country national mother a right of residence in the European Union.

CHAPTER III
ACCESS TO EMPLOYMENT

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

In all Member States equal treatment of EU citizens as regards access to employment is guaranteed by general legislation on equality and non-discrimination or by specific labour law. The *Finnish* report explicitly draws attention to the fact that, although in Finland access to employment in the private sector does not lead to problems, the position of posted workers is, in this regard, worse than that of directly employed workers. It is not uncommon that posted workers (from other EU Member States) are treated less favourably than directly employed workers as it concerns *e.g.* wages and overtime pay. Some other reports (*the Netherlands, Ireland* and *the UK*) raise this topic as well. Regarding *Ireland* the Council of Europe Committee of Social Rights, in a report issued in January 2013, found a lack of equality regarding access to vocational training and guidance for nationals of other State Parties in Ireland.[1] The report states that the length of residence condition which applies to access to vocational training and guidance amounts to indirect discrimination, as nationals of other States Parties lawfully residing or working in Ireland are potentially more often affected by this condition than Irish nationals.

In *Croatia* the equal treatment of EU citizens as regards access to employment is secured in the Constitution, the Anti-Discrimination Act, the Aliens Act and the Labour Act.

1.1 Equal treatment in access to employment (e.g. assistance of employment agencies).

In *Croatia* the Act on Employment Mediation and Unemployment Rights defines the activities carried out by the Croatian Employment Service (CES) in the Republic of Croatia and abroad, which are as follows: employment mediation, career orientation, education with the goal of rendering the workforce more employable, unemployment insurance, active participation on the labour market with the purpose to stimulate territorial and professional mobility of the labour force, as well as to stimulate new employment and self-employment. All activities falling under the competence of the CES, except for unemployment insurance, can be carried out in the Republic of Croatia by other legal entities and private persons. There are several private employment mediation services, amongst which the most popular is "Moj posao" ("My job"). The Act on Employment Mediation and Unemployment Rights differentiates between two types of job seekers: 1) "unemployed persons" fulfilling prescribed conditions by law, and 2) "other job-seekers".[2] Pursuant to Article 8 EEA nationals enjoy the same rights and obligations as Croatian nationals, thus also the right to

1 European Committee of Social Rights, Conclusions 2012 (IRELAND) Articles 1, 9, 10, 15, 18, 20, 24 and 25 of the Revised Charter (January 2013) available at http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/Ireland2012_en.pdf

2 The *Act on Employment Mediation and Unemployment Rights* uses the international definition of an unemployed person. An unemployed person is defined as a person capable or partially capable to work, aged 15 to 65, who is not employed, who actively seeks a job and is available for work, and who fulfils some other criteria (e.g. does not possess a registered company or other legal entity, does not hold more than 25% share in a company or other legal entity, does not engage in a registered trade, a freelance activity or activity in agriculture and forestry, etc). Other job seekers are those persons who are looking for a job, but do not fulfil the criteria to acquire the status of unemployed person.

various types of assistance in seeking employment provided by the Act. More rights in assisting to find a job are linked to the persons with the unemployed status than to other job-seekers.

1.2 Language requirements

This subject will be dealt with extensively in a separate report this year.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

2.1 Nationality condition for access to positions in the public sector

This section is largely based on the *Report on Posts in the Public Sector Reserved for Nationals: Developments in the 27 Member States in 2009-2012*, which was prepared for the European Commission by the Network on Free Movement of Workers in July 2013.[3]

An overall assessment of the developments reported in the Member States during the period 2009-2012 indicates some legislative reform. However, limited information is available on administrative practices concerning access of non-nationals to posts in the public service, in particular with respect to monitoring of administrative practices and statistical information.

Changes in Legislation

Legislative changes, which have a direct impact on the right of workers to be employed in the public sector under EU free movement rules, have only been made by a few Member States following the publication of the 2010 Ziller Report on this issue.[4] In *Austria*, access to public service posts which are not reserved for Austrian nationals was considerably simplified in 2011 following an amendment to the Public Service Act. The legal situation in respect to public service posts which are reserved for Austrian nationals, however, remains unchanged as posts in the field of the sovereign administration of the Republic of Austria are still reserved for Austrians: e.g. police and customs, armed forces, diplomatic service, judiciary and external representation of the State. There is neither an exhaustive list nor a list of examples of the posts concerned. Decisions on reserved posts are taken on a case by case level.

Although in *Belgium* there have been no legislative changes at the federal level concerning posts reserved for Belgian nationals, at the regional level Ordinances have been adopted which allow EU citizens, citizens of other EEA Member States and Switzerland to accept positions in the public service if they do not involve participation in the exercise of public authority and the safeguarding of the general interests of those authorities.

In *Cyprus* two additional Ministerial Decrees (Order No. 338/2009 and Order No. 177/2010) which identify posts reserved for nationals have been issued since 2009.

In the *Czech Republic*, the full effect of Act No. 218/2002, on the *Service of Public Servants in Administrative Authorities and on the Remuneration of Such Servants and Other Employees in Administrative Authorities*, as amended, has been deferred to 1 January 2015.

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3 The report provides an overview of the development in each Member State. http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=25&subCategory=475&country=0&year=0&advSearchKey=FMWthematic&mode=advancedSubmit&langId=en

4 http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=956&furtherNews=yes

In June 2012, the *Estonian* Parliament adopted a new *Public Service Act* which entered into force in April 2013. The general principles regarding the requirements of appointing citizens of other EU Member States in the public service remain the same. Only Estonian citizens may be appointed to positions which involve the exercise of public authority and the protection of public interest.

The *Italian Law on recognition of professional experience, professional and academic diplomas for access to posts in the public sector* has been amended. Access to public service is regulated by Article 38 paragraph 3, of Legislative Decree No. 165 of 2001, which was amended by Article 8 of Decree-Law 9-2-2012 No. 5, turned into Law 4-4-2012 No. 35. Following this amendment to the law, professional experience or a professional diploma acquired by EU citizens is necessary to participate in an open competition or to be appointed in the public sector. This is recognized by a Decree of the President of the Council of Ministers – Department for the Civil Service, after the positive opinion of the Ministry for Education, University and Research. The same procedure applies in procedures to recognize academic diplomas and establishing seniority for the purpose of participating in an open competition or to be appointed in the public sector.

In *Hungary*, the uniform rules concerning civil service in the former *Act XXIII of 1992 on the Civil Service* was revoked by *Act LVIII of 2010 on the Legal Status of Government Officials* which entered into force in July 2010. The dual system was abolished by the *Act on the Legal Status of Public Officials CXCIX of 2011* that entered into force on 1 March 2012. The new Act regulates both the employment of civil servants and government officials. It has not introduced any changes concerning the legal conditions for civil service. . With the exception of administrators in important and sensitive functions and heads of unit, the criteria to enter civil service as an administrator are: beneficiary of the right to *free movement and residence* or a *national of a contracting party to the European Social Charter* and possession of *sufficient knowledge of Hungarian* to be able to perform the function in which one is appointed.

Nationals of other EU/EEA Member States are now eligible to join *An Garda Síochánáa*, the national police service in *Ireland*. On 13 March 2012, the Government approved new regulations which will allow senior positions within *An Garda Síochána* to be filled by officers of the Police Service of Northern Ireland ('PSNI') on a permanent basis. Prior to this, PSNI officers could only be seconded to *An Garda Síochána*.

In *Luxembourg*, the regulation of 27 February 2011 opens positions as 'communal' employees (*employé communal)* to EU citizens, hereby also abolishing the former nationality requirement at the municipality level. *Employé communal* can include both direct and indirect participation in the exercise of public authority.

The *Swedish* constitution was amended, taking effect on January 1, 2011. This amendment has abolished the general rule that a head of an agency within the government sector (i.e. Director General) must be a Swedish citizen. It is now up to the Swedish Government to decide in which cases Swedish citizenship can be required.

Appointment as a notary

In many Member States notaries are self-employed, but in some Member States they are employed in the public service.[5] In 2008 the European Commission brought infringement

5 In Denmark and the UK a notary can be employed as a worker. In Bulgaria, Czech Republic, the Netherlands, Poland, Romania, Slovakia and Slovenia a candidate notary can be employed as a worker.

procedures before the Court of Justice against six Member States (*Austria*, *Belgium*, *France*, *Germany*, *Greece* and *Luxembourg*) concerning the nationality requirement for appointment as a notary.[6] On 24 May 2011 the Court of Justcie ruled that Member States may not reserve access to the profession of notary to their own nationals. Even if the activities of notaries pursue objectives in the public interest, these activities are not connected with the exercise of official authority within the meaning of the Treaty on the Functioning of the European Union.

As a consequence of this judgment in *Austria*, the *Notaries Code* was amended to the extent that access to the profession of notary is now open not only for Austrian citizens but also for citizens of the Member States of the EU/EEA and the Swiss Confederation.[7] In *Belgium*, the law on the organisation of the notary profession was also amended with a view to ensure compliance with the Court of Justice's judgment. In accordance with the revised rules, to be appointed as a Candidate notary, a person must, in particular, be a Belgian national *or* a national of an EU Member State. Following the ruling of the Court of Justice in the infringement proceeding, a parliamentary question was addressed to the Minister of Justice, asking if Belgium had invoked Article 95, § 4, indent 3, 4° of the *Electoral Code*, which provides that the chair of election office are designated *inter alia* to notaries. The Minister replied that Belgium did not rely on its Electoral Code as the aforementioned provision would not have changed the Court of Justice's views as chairing a election office is not, as such, related to the professional activities of notaries.

In *Bulgaria* the *Law on the Notaries and Notarial Practice* was amended in December 2012 to enable EU/EEA and Swiss citizens to take up employment as a notary.[8] The amendment also provides for recognition of time in the legal service of another Member State for the purposes of qualifying for a position as notary.

Regarding the position of notaries in *Croatia*, the *Notaries Public Act* still includes Croatian nationality as a requirement for the appointment as a notary public (self-employed persons) or for the employment as assisting notary public or notary public's trainee.[9] Amendments to this Act are planned for last quarter of 2013.[10]

The relevant legislation in the *Czech Republic* still requires Czech citizenship not only for notaries (who work as self-employed persons), but also for notary candidates and notary trainees, who both have the status of worker (the law requires explicitly that they are employed by a notary).[11]

In *Luxembourg* the Court of Justice's findings meant that the rules regulating access to the profession of notary had to be modified. In order to guarantee a satisfactory level of notary services, language requirements which a candidate notary must satisfy seemed appropriate. Following Luxembourg's amendment to the *Grand-Ducal Regulation of 10 June 2009 on the Organization of Legal Internships and Regulating Access to the Notary Profession*, the European Commission closed its case against Luxembourg on 22 March 2012. The

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6 See: CJEU (Grand Chamber) cases C-47/08, *Commission* v *Belgium* [2011] ECR I-4105; C-50/08, *Commission* v *France* [2011] ECR I-4195; C-51/08, *Commission* v *Luxembourg* [2011] ECR I-4231; C-53/08, *Commission* v *Austria* [2011] ECR I-4309; C-54/08, *Commission* v *Germany* [2011] ECR I-4355 and C-61/08, *Commission* v *Greece* [2011] ECR I-4399.

7 Federal Law Gazette I No. 104/2011. But there is still the requirement to have studied Austrian law and to do an exam at the Austrian Notary chamber.

8 State Gazette No. 95 of 4 December 2012.

9 Articles 13(1)(1), 122(3) 123(2).

10 According to the Government's Annual Normative Plan for 2013 adopted on 20th December 2012, http://www.vlada.hr/hr/uredi/ured_za_zakonodavstvo/novosti_i_dogadanja/godisnji_plan_normativnih_aktivnosti_za_2013.

11 Law No. 358/1992 Coll., Notary Code

amendment to the Grand-Ducal Regulation means that now one of the requirements to be admitted to the profession of notary is the completion of a professional internship by interns and candidates from a EU Member State and that candidates for the exam to complete the internship have to submit a copy of their identification card proving Luxembourg citizenship, or citizenship of another EU Member State.

For *Germany*, the judgment of the Court of Justice establishes beyond doubt that the requirement of German nationality in the Federal Regulation does not apply with regard to applicants from other EU Member States. It is less clear to what extent the judgment, which is based upon Article 51 TFEU, is to be applied with regard to regulations of the *Länder* requiring three-year-employment as assisting notary public in order to be eligible for a post as a notary public. There are also questions on the implications of the judgment with regard to the exercise of a profession as a notary public in the framework of an employment relationship rather than as a self-employed activity. As the Court of Justice assumes that the activities of a notary public are not connected with the exercise of public authority it must be assumed that the requirement of German nationality cannot be upheld whether in the context of an employment relationship or as a self-employed activity.

In *Greece*, the *Code on the Organisation of the Notary Profession* was amended so as to comply with the Court of Justice's judgment. In accordance with the revised rules, to be appointed as a notary, a person must be a Greek citizen *or* a national of a EU Member State.

In *Portugal*, the opinion of the Advocate-General was received as a threat of an adverse judgment of the Court of Justice which was enough for the Parliament to authorise the Government to change the *Notary Statute* in order to grant notaries already working in a EU Member State the right to establish and provide services in Portugal without having to successfully complete an admission exam and, after that, a period of training in Portugal.[12] Article 1-A(1)(c) of the *Notary Statute* (approved by Decree-Law 15/2011, of 15 January 2011) now states that notaries registered in another EU Member State may work in Portugal as long as they fulfil the conditions in the Statute.

In *the Netherlands*, a Bill abolishing the Dutch nationality requirement for the appointment as a notary was adopted in June 2012. The government has, however, introduced a new Act that re-establishes the nationality requirement for third-country nationals, effectively restricting the exemption to nationals of EU Member States only.

In *Poland* there is still a requirement to possess Polish nationality for notaries, which does not apply to legal counsellors and advocates, but a reform proposal is pending.

In *Romania* the nationality requirement for the appointment as a notary was abolished on 1 January 2013, but there is still a residence and language requirement.

An explicit statutory language requirement for notaries is also mentioned in the reports on *Croatia*, *Estonia, Luxembourg* and *the Netherlands.* The new Dutch act mentioned above includes a provision requiring knowledge of the Dutch language as an explicit condition for appointment as a notary.

Statistical information and monitoring

Less than a handful of the Member States gather statistical information on posts reserved for nationals and/or the number of non-nationals employed in civil service.

In *Cyprus* around 18% of all public posts are reserved for nationals and these mostly concern posts that are high up in the hierarchical rank.

12 See Law 45/2010, of 3 September 2010.

In the *United Kingdom* approximately 90% - 95% of the posts in the civil service are open to EU citizens; 5% - 10% are reserved for UK citizens. The types of posts reserved are typically those involving matters of national security.

From statistics available in *Estonia* it transpires that the number of officials who are citizens of another EU Member State employed in that Member State's civil service was 9 in 2009 (including State and local government administrative agencies) and 7 in 2010 (including state administrative agencies). There are no statistics available for 2011.

In *Hungary*, there is a central personal database for the central administration. According to the data in this database there are no non-Hungarian citizens employed in the Hungarian central administration. There are, however, approximately 10 persons with dual nationality employed in that Member State's civil service.

The total number of positions in *Sweden* that require Swedish citizenship is 35.000, which is 14.9% of the total number of 235.000 employees in the Government sector.

In *Malta* there were 79 vacancies for reserved posts (32 of them concerned the position of Correctional Officer) in 2012.

In *Poland* since the civil service has been opened to those who do not have Polish citizenship only eight candidates have submitted an application in response to advertisements directed to foreigners pursuant to Article 5 of the *Act on Civil Service* offers. Only one person has been employed following recruitment procedures in which non-Polish citizens participated.

None of the Member States have set up a specific monitoring system to systematically and regularly monitor issues that arise regarding access of non-nationals to the civil service and employment in the public sector. In several Member States there is a temporary halt in recruitment to the public sector.

In *Cyprus* there is a general freeze in the creation of new posts in the public service. It is also noted that there is a general freeze in the recruitment of first entry posts and, as a result, access to the public sector is currently restricted for both nationals and non-nationals.

As a consequence of the global financial crisis, the *Latvian* government to slash public spending, made 24% of its civil servants redundant and reduced the salaries of those remaining in service.

In 2012 and 2013, budget cuts severely restricted access to the public sector in *Portugal*. During this period, the vast majority of competitions were open only to applicants who already have a permanent work relation with the Portuguese State. These internal competitions do not include applications made by public servants based in other EU Member States.

Case law

In *Italy* the Regional Administrative Court of Puglia quashed the appointment of the Chairman of the Brindisi Port Authority made by the Ministry of Infrastructures and Transport, because he was not an Italian national.[13] Eventhough the law setting up the Port Authority makes no provision as to the nationality of the Chairman, the court stated that s the Port Authority si a public body and the functions of the Chairman entail the exercise of public powers, the position had to be reserved to an Italian citizen. In a commentary on the decision it was stated that not only is the judgment consistent with European Union law but it is European Union law itself which imposes the requirement of natinal citizenship for

13 Regional Administrative Court of Puglia, judgment No. 1138 of 26 June 2012

functions in public employment entailing the exercise of public powers.[14] The Consiglio di Stato, which is the appeal court, is less convinced and has asked for a preliminary ruling, which is now pending before the Court of Justice.[15]

Overall assessment

Legislation that was identified in the 2010 Ziller Report as 'problematic' in several Member States as regards compliance with Article 45(4) TFEU has not been amended in 2013.

In *Bulgaria* the criteria for the application of Article 45(4) TFEU are not complied with as all posts in the Ministry of Interior are reserved for Bulgarian citizens. With the adoption of the new *Public Service Act* in *Estonia*, the conditions which apply to appointments of citizens of other EU Member States remain unchanged and are determined by the nature of the agency in which the person will be employed. Such an arrangement does not correspond with the criteria for the application of Article 45(4) TFEU. The new law in *Hungary* on the legal status of public officials maintains the criterion that Hungarian citizenship is required to be employed in 'important and sensitive functions'. This criterion allows for more discretion than the criterion which follow from Article 45(4) TFEU. In *Italy* competitions for posts in the public sector in that Member State are restricted to Italian nationals and EU-citizens, hereby excluding third-country national family members of EU-citizens from participating in these competitions. A complaint, made by a Croatian family member of an EU-citizen who had not been allowed to participate in the competitive exam for the recruitment of school teachers at all levels which was held in 2012, saw the Ministry being ordered to allow the complainant to participate in the recruitment procedure.[16]

The *Civil Service Act* in *the Netherlands* stipulates that 'functions of confidence' can be reserved for nationals. This provision, which does not coincide with the criteria for the application of Article 45(4) TFEU, remains unchanged. In *Slovakia*, the definition of posts reserved for nationals is still based on the 'legitimate interest of the Slovak Republic' and the sector in which the person will be working. This does not correspond with the criteria for application of Article 45(4) TFEU. The practice of reserving access to particular career groups in *Spain* may result in non-compliance with Article 45(4) of the TFEU. In some Member States, such as *Belgium* and *Germany,* vaguely worded legislation or unclear wording combined with limited information on administrative practices make it difficult to assess whether the law is compatible with Article 45(4) TFEU. The absence of a comprehensive list of posts reserved for nationals in *Austria* and *Slovenia* impedes an assessment to establish whether non-nationals who want to be employed in the public sector are experiencing obstacles in achieving this goal.[17] The criteria used in *Finland* for establishing the list of positions reserved to nationals have not been made public which makes it difficult to assess whether EU law is complied with when post are reserved for nationals. In *Romania*, the law in force requires a person to have legal domicile in that country to become a civil servant. This requirement is a potential obstacle for non-nationals who wish to take up employment in the public sector.

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14 Vigliotti, Cittadinanza italiana: requisito essenziale per gli alti funzionari, *Corriere del merito*, 2013, 103 et seq.

15 Case C-270/13 *Haralambidis*. See for the questions asked by the Consiglio di Stato: OJ C 207, p. 30, from 20.07.2013.

16 Rome Court, Order of 14 December 2012.

17 The kinds of posts reserved to Austrian nationals result from § 42a Civil Servants` Service Act 1979 and from the Communication from the Commission "Free movement of workers: achieving the full benefits and potential" (COM/2002/0694 final), p. 20ff.

The lack of statistical information on the number of non-nationals employed in the public sector as well as the fact that no Member State appears to have a comprehensive system to monitor access of non-nationals to employment in the public sector, makes it difficult to gain an overview of the situation and assess whether there is discrimination or there are obstacles to free movement due to the practices pursued by Member States. To remedy this, Member States are encouraged to start monitoring their administrative practices governing access to employment in the public sector and regularly collect statistical information on the number of non-nationals who apply for employment in the public sector and the number non-nationals who are employed in the public sector.

2.2 Language requirements

This subject will be dealt with extensively in a separate report this year.

2.3 Recognition of professional experience for access to the public sector

In *Croatia,* the *Civil Servants Act* and *Act on Civil Servants and Employees in Local and Regional Self-Government* do not contain provisions that imply different treatment of candidates regarding sector (private or public) or country where relevant professional experience has been acquired. Such differential treatment would be at odds with equal treatment provisions in several laws.[18]

In *Italy*, the Minister for Education, University and Research asked the Council of State for an opinion on a request submitted by an Italian national to have his German title as *Lehrbefügnis* recognised as equivalent to an Italian qualification of full professor. The applicant had made a similar request in the past, invoking Directive 2005/36/EC,[19] and that case reached the Court of Justice.[20] That Court held that the case did not fall within the scope of application of Directive 2005/36/EC, but that "nevertheless, Articles 39 EC and 43 EC require qualifications obtained in other Member States to be accorded their proper value and to be duly taken into account in such a procedure". The judgment was of no help to Mr. Rubino. Subsequently, the law on the recruitment of University professors was amended. Contrary to the previous system, under the new rules a national commission is established in order to grant the qualification as full professor or associate professors to candidates. The qualification lasts four years. Universities can only hire as a full or associate professor those who have obtained this qualification and can recruit them by calling an open competition. Mr. Rubino made an application for his German qualification to be declared equivalent to the Italian one under the new rules. The Council of State held that in its opinion the Ministry should grant the request of the applicant, but should limit the validity of the qualification in time, in order to avoid any reverse discrimination to the detriment of those holding an Italian qualification. According to the Council of State, the duration of the validity of the qualifica-

18 Article 10 and 11 of the Civil Servants Act; Article 5(4) of the Labour Act as *lex generalis* for all employment relationships; Articles 1 and 8 of the Anti-Discrimination Act.

19 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, O*J EU* 2005, L 255/22.

20 CJEU (Eighth Chamber) case C-586/08, *Rubino* [2009] ECR I-12013.

tion should be the same for Italian and German qualifications, namely four years, starting from the date that the German qualification was acquired.[21]

A *Luxembourg* Administrative Court's decision of 9 January 2013[22] concerned the recognition of equivalence of a degree. In this case, the complainant had applied for the recognition of his "*Master of arts in Celtic civilization – language & linguistics*" delivered by the University of Aberdeen in Scotland in order to become a teacher (in the public sector). The Ministry of Higher Education and Scientific Research refused the application on the grounds that the subjects studied by the applicant only corresponded for 45% with the teaching of English language, as taught in Luxembourg. The Ministry held that the other courses taken by the applicant were related to the Gaelic language, which is irrelevant for the purpose of teaching English in Luxembourg. The Administrative Court decided that the Minister's decision was well-founded and that neither the fact that the applicant studied in an English speaking environment, nor the fact that there were no doubts about his competences were sufficient to compensate the lack of studied subjects in order to qualify for recognition of equivalence of the Scottish degree. The Administrative Court held, on the one hand, that the decision is not contrary to the principle of free movement of workers in the European Union because the applicant is not in a situation where he wants to pursue an activity on the basis of a professional qualification obtained in another EU Member State in Luxembourg. On the other hand, the court held that the decision did not amount to an infringement of the principle of free movement of students, because the applicant did not want to pursue further university studies in Luxembourg on basis of his degree obtained in Scotland.

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

In *Germany* sector the opportunities to have foreign professional qualifications recognized in the private have improved significantly. Against the background of a political debate on about the absence of qualified workers in some German regions, the Federal Government introduced the *Recognition Act* which entered into the force on 1 April 2012 and which establishes a legal right to have qualifications acauired abroad assessed in comparison to the equivalent profession in Germany. The Recognition Act includes a new Federal Law, the *Professional Qualifications Assessment Act* (*Berufsqualifikationsfeststellungsgeset* - BQFG), as well as regulations for the recognition of vocational qualifications in around 60 professions under federal legislation, such as healthcare professionals and master craftsmen.[23] Crucially, the law does not only concern EU nationals, but alos applies to third-country nationals.

The *Danish* rapporteur reports that job applications for jobs abroad do not count towards meeting the requirement concerning a certain number of applications. To become a beneficiary of an unemployment fund in Denmark, a certain number of job applications must be submitted by the unemployed in order to be regarded as an active job seeker and thus to be entitled to benefits. In her reply of 12 October 2012 to a question from the Parliament, the Minister of Employment stated that job applications for employment relationships abroad do

21 Opinion 10-7-2012 n. 05107/2012.
22 Tribunal Administratif, 3e Chambre, 9 janvier 2013, n°29894 du rôle.
23 Gesetz über die Feststellung der Gleichwertigkeit von Berufsqualifikationen und Anerkennung im Ausland erworbener Berufsqualifikationen (Berufsqualifikationsfeststellungsgesetz - BQFG) of 6 Dec 2011 (BGBl. 2011 I 2515), available online at http://www.gesetze-im-internet.de/bqfg/.

not count towards the requirements as the unemployed must be available for the Danish labour market.[24]

24 Beskæftigelsesudvalget 2011-12, BEU alm. del, endeligt svar på spørgsmål 432, 12 October 2012.

CHAPTER IV
EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

This chapter deals with the implementation of the principle of non-discrimination on the basis of nationality in the field of free movement of EU workers. It looks at direct and indirect discrimination on the basis of nationality in respect of working conditions, and pays attention to employment in the public sector. Secondly, the chapter deals with social and tax advantages and the implementation of Article 7(2) of Regulation 492/2011 (former Regulation 1612/68). In this context, the situation of job-seekers in relation to access to social assistance is examined in more detail.

As a general remark, several national reports mention that as result of the economic crisis and austerity measures, national authorities are increasingly interested in curbing what they see as the exploitation of EU rules regarding social and tax advantages and limiting access to social assistance and benefits, more generally (*Belgium*, *the Czech Republic, Denmark, Finland, Greece, Malta, the Netherlands, Portugal* and *the UK*). The Dutch and UK governments have announced their intention to monitor closely foreigner's access to social benefits and assistance.

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

For the period under consideration in this report (2012-2013), the majority of national rapporteurs assessed the situation in their Member State to be, overall, in compliance with EU requirements regarding the implementation of the principle of non-discrimination on the basis of nationality. No new developments regarding discrimination in respect of working conditions have been reported by the following states: *Belgium*, *Croatia*, *the Czech Republic, Germany, Estonia, Finland, Greece, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Slovenia, Slovakia, Spain* and *Sweden*.

For example, in *Belgium*, the reports of the special body created to monitor and fight against discrimination, the "*Centre pour l'égalité des chances et la lutte contre le racisme*" (Centre for Equal Opportunities and Fight against Racism - CEOOR), confirm that there are few cases of discrimination on the basis of nationality.[1] In addition, previous CEOOR reports suggest that a very low percentage of EU citizens face discrimination problems in relation to employment as newcomers. In some Member States, the small number of EU citizens present is given as an explanation for the lack of evidence of cases of discrimination (*Latvia*, *Romania* and *Slovenia*).

Direct discrimination based on nationality is rare and most cases in which discrimination occurs relate to indirect discrimination. Only the *UK* report mentions cases of discrimination based on nationality. These cases concern three benefits, which continue to be reserved for British citizens: i) residential accommodation for adults who, by reason of age, illness, disability or any other circumstances, are in need of care and attention; ii) services for children

1 http://www.diversite.be/

and their families and children leaving care as adults; and iii) accommodation provided for the promotion of well-being under the *Local Government Act 2000*. EEA nationals (other than British citizens) and their dependents are expressly excluded as beneficiaries of these benefits. However, these benefits may be extended to EEA nationals if the performance is necessary to avoid a breach of a person's rights under EU law. The difficulty here is that the individual must show that he or she has EU rights, which is complicated as the UK Border Agency takes the view that unless the individual comes within one of the specified categories mentioned in Articles 6 and 7 of Directive 2004/38/EC they are not exercising Treaty rights, and that the individual must show that it is *necessary* in order to avoid a breach of the rights to exercise a power favourably for the individual. Thus, UK local authorities may require the individual not only to be a worker, but also to show why providing residential accommodation is necessary to avoid a breach of EU rights.[2]

Concerns relating to the treatment of EU workers in several Member States mentioned in the 2011-2012 European report remain. In *Cyprus*, the working conditions in the hotel industry remain under investigation by the Cypriot Equality Body. In *Denmark*, concerns relating to the treatment of EU workers are still relevant. According to reports published by the Economic Council of the Labour Movement[3] in 2013, the salary of temporary foreign workers is low (between DKK 9,000-14,000 a month), and the number of Eastern European workers, which now constitutes the largest group of foreign workers in Denmark, increased from 35,000 to almost 56,000 persons in a period of four years.[4] In 2013, the Danish Centre against Human Trafficking published a report that brings together findings from three separate fields: cleaning, agriculture and nurseries, and au pair work. The authors of the report conclude that there are '[...] many examples of exploitation of labour, and in some cases there are indicators of human trafficking for forced labour, although not to an extent where it is possible to identify actual cases of human trafficking.'[5] On a positive note, Denmark has implemented Directive 2008/104/EC on temporary agency work[6] via Act No. 595 of 12 June 2013, entering into force on 1 July 2013. The Act provides for temporary agency workers to be covered by collective agreements entered into by the user business when the temporary worker performs work falling within the scope of the collective agreement, or by collective agreements entered into by the temporary employment agency.[7] The Minister of Employment has stated that the Act lays down a principle of equal treatment of temporary workers with the user business' own employees. The Minister expects more temporary employment agencies to enter into collective agreements and hence that the possibility of running temporary agency business with salaries below the typical Danish level will thus be circumscribed.[8]

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2 The application of the rules on residential accommodation were considered in detail in *R (on the application of de Almeida) v. Kensington and Chelsea RLBC*[2012] EWHC 1082 (Admin) 2012 WL 1358031.

3 Official website http://ae.dk/english.

4 *Udenlandsk arbejdskraft i Danmark: Lav løn blandt midlertidig udenlandsk arbejdskraft*, Jonas Schytz Juul, Arbejderbevægelsens Erhvervsråd, 18 March 2013, and *Udenlandsk arbejdskraft i Danmark: Stigning i Østeuropæiske arbejdskraft i Danmark*, Jonas Schytz Juul, Arbejderbevægelsens Erhvervsråd, 21 April 2013.

5 *Menneskehandel til tvangsarbejde i Danmark? Migrations- og arbejdsvilkår for en gruppe migrantarbejdere beskæftiget i rengøringsbranchen, i den grønne sektor eller som au pair. En opsummeringsrapport,* by Anders Lisborg, Socialstyrelsen, 2012. p. 18, and the English version: *Human Trafficking for forced labour in Denmark? Migration and working conditions for a group of migrant workers employed in the cleaning industry, in the green sector and as au pairs,* p. 18.

6 *OJ EU* 2008, L 327/9.

7 Cf. Bill No. L 209, 2012/1 of 17 April 2013.

8 Beskæftigelsesudvalget 2012-2013, L 209, endeligt svar på spørgsmål 21, 28 May 2013.

In 2012, *Ireland* also transposed Directive 2008/104/EC on temporary agency work.[9] The national legislation secures the rights of agency workers, defined as a person who has an agreement with an agency to work for another person, including the right to equal treatment regarding basic working and employment conditions. The Act provides for equal treatment for such workers in relation to action taken to combat discrimination on a number of listed grounds, including ethnic origin and race. The Irish Equality Authority published a report in 2012 entitled "*Analysing the Experience of Discrimination in Ireland: Evidence from the QNHS Equality Module 2010*" which establishes that non-nationals experience higher rates of discrimination than Irish nationals in the labour market.[10] The Equality Authority also found that people of a minor ethnicity were more likely to have experienced serious work-related discrimination. In addition, the report suggests a strong correlation between knowledge of rights and the likelihood of taking action in response to discrimination. In connection to this the Equality Authority found that knowledge of rights was lower among vulnerable groups, including people of minority ethnicities and non-nationals. Efforts have been made by Trade Unions and others to increase awareness of rights among vulnerable groups through publication of handbooks in various languages and conferences. Furthermore, the Social Partnership Framework Agreement "Towards 2016" contains an express commitment to an effective employment rights compliance system, which includes the "education of vulnerable workers".[11]

In *the Netherlands*, issues mentioned in previous reports relating to unequal pay, sub-standard working and housing conditions or exploitation of EU-8 and EU-2 workers remain topical. In April 2013, the new Board of Human Rights published a report, entitled *Polish labour migrants in a human rights perspective,* based on a literature study and interviews with stakeholders and Polish labour migrants. In 2013, the Dutch government published an action plan to combat so called fake constructions.[12] The action plan describes specific problems and existing and proposed measures relating to issues such as fake self-employment relations, evasion of minimum wages, abuse of payment of premiums (including A1 forms), evasion of collective agreements, as well as fake employment agreements and migration constructions. Together with the municipalities, the Dutch government are taking measures to realise better registration, prevention of exploitation, better housing conditions and voluntary return to the country of origin if no work is being pursued. The government also announced measures to deal more firmly with existing problems such as exploitation. The main measures are:

- Employers who withoul too high a percentage of the wages to cover e.g. housing expenses or transport costs, will be fined by the Inspection Social Affairs and Employment.
- Non-nationals, including EU citizens, will only be eligible for social assistance benefits after their right of residence has been established by the Immigration and Naturalisation Service.
- Anyone who does not speak Dutch and applies for social assistance must take a course in Dutch and complete it finish successfully. If the applicant does not meet this requirement, the social benefit will be reduced or stopped.(see Chapter V).
- As of 1 July 2013 the language requirement will also apply to foreign employees who are working temporarily in risky occupations..

9 The Protection of Employees (Temporary Agency Work) Act, 2012
10 http://www.equality.ie/Files/Analysing-the-Experience-of-discrimination-in-Ireland.pdf
11 http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf
12 *Tweede Kamer* 2012-2013, 17050, No. 428.

In the *UK*, indirect discrimination against EU workers has been the subject of some concern.[13] The UK's Trade Union Congress has expressed concerns regarding the treatment of EU-8 workers and other migrants. It has continued its campaign to ensure that these workers are aware of their rights under UK labour law.[14] It has also produced a booklet on the rights of migrant workers, translated into various EU-8 languages.

Case law

In *Hungary* the National Labour Authority informed the Hungarian Ombudsman about cases of minor EU citizens employed in agriculture or the building industry. The conditions of their employment were incompatible with the Hungarian Labour Code that requires that the employee be at least 16 years of age and at least 15 years old if s/he is employed during the summer holidays. If below 16 employment is only permitted in the field of culture, sport, arts or advertisement if the guardian authority has given permission.[15] Two incidents were reportedin this repsec. One in the Győr-Sopron county regarding 479 unlawfully employed Romanian citizens in agriculture. Six workers were below the age of 14, which resulted in the imposition of a fine. The second incident was reported in the Fejér county and involved a Romanian minor younger than 16 years, who was employed in the building trade albeit without parental consent. Because of these cases, the Labour authority introduced a *Guideline on Checking Methods of Child Labour* in October 2012 which als aims at preventing labour accidents involving minors.[16]

The case law of the *Irish* Equality Tribunal shows cases of discrimination against EU workers, also in relation to conditions of employment.[17] The Equality Officer found discrimination on grounds of race in the working conditions of two Latvian truck drivers. The complainants were made to drive older fashioned trucks than their Irish counterparts, work Saturdays and night shifts where their Irish colleagues had to do neither and were offered no help with unloading their trucks which was offered to the Irish drivers. In the same case, discrimination was established regarding the right of equal remuneration of one of the drivers as he earned significantly less than an Irish driver (€ 10.50 per hour compared to € 19.73). This difference could not be explained by seniority, but rather was "obviously connected to the worker's nationality".[18] Discrimination in relation to working conditions was also found in a 2012 case involving a group of Polish workers who were provided with accommodation as part of their employment contracts. However, when the workers wanted to leave the accommodation owing to its inadequate facilities and isolated location, they were threatened with dismissal.[19] Discrimination with respect to access to employment has also arisen. In a 2012 case, discrimination was found in the case of a Polish lifeguard where the criteria for the relevant recruitment process were applied inconsistently in such a way as to favour Irish candidates over non-Irish candidates.[20] This included requiring the three non-

13 See also: *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11 (16 March 2011) z.
14 http://www.tuc.org.uk/international/index.cfm?mins=232&minors=28&majorsubjectID=7
15 Art 34(2)-(3) Hungarian Labour Code.
16 In 2010-2012 87 labour accidents of labourers below 18 were registered and from those 3 minors injured seriously and 1 minor died www.nmh.hu
17 The Equality Tribunal is an impartial and independent quasi-judicial body charged with hearing or mediating claims of alleged discrimination under the Employment Equality Acts and other legislation. See, http://www.equalitytribunal.ie/
18 *Pilups, Vasiljevs and Gorsa* (DEC-E2013-037, 9 May 2013).
19 *Pawelec & Ors* (DEC-E2012-122, 11 September 2012).
20 *Jurczewski* (DEC-E2012-115, 14 September 2012).

Irish candidates to do an extra test and granting higher marks to the Irish candidates despite the complainant's superior level of experience. However, it has been held that the non-discrimination provisions do not apply where an employer decides to employ only non-Irish nationals.[21]

In *the Netherlands*, the Board of Human Rights (former Equal Treatment Commission) issued an opinion regarding the application of the Equal Treatment Act to a Romanian national. It held that a building company had violated that law when it prohibited a Romanian national to enter a building site because of his nationality.[22] The Romanian was self-employed, which meant he did not need a labour permit. The policy of the building company was to prohibit all Romanian, Bulgarian and third-country nationals from the building site when they did not possess a labour permit, in order to prevent financial risks connected to irregular labour.

Specific issue: Working conditions in the public sector

No new developments are mentioned by the following states: *Belgium, Czech Republic, Germany, Denmark, Finland, Ireland, Hungary, Italy, Luxembourg, the Netherlands, Slovenia, Romania, Slovakia, Spain, Sweden* and *the UK*.

For example, in *Germany*, the recognition of professional experience is assessed to have become standardised practice. As a matter of legal principle, the recognition of work experience and diplomas in the public sector is guaranteed. The policy and practice to recognise professional experience which a worker has obtained elsewhere extends to promotion and compensation. The *Bundeslaufbahnverordnung*, for example, fully recognizes periods of employment in other EU Member States with regard to the probation period for a full time occupation in the public service.[23] Similar rules exist for the purpose of promotion and exceptional recruitment of highly qualified applicants.[24] Some of these rules may create difficulties in application when transposed to professional experience acquired in another EU Member State with a completely different civil service structure.

In *Ireland*, the question of incremental credit for previous public service is dealt with through agreements between the Minister for Finance and Trade Unions. For example, an April 2006 agreement provides for incremental credit for previous service for entry levels at Tax Officer and Higher Tax Officer grades and a December 2007 agreement covers entry levels at Clerical Officer and Executive Officer grades. The agreements apply to those who have been previously employed in the public service in Ireland or equivalent bodies in other EU Member States. Employment in the public service in EFTA countries and the European Commission are also taken into account. The agreements apply only to adjust pay and do not affect seniority. In general, experience in the private sector is not recognised.

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21 *Braslis* (DEC-E2009-098, 28 October 2009).

22 Opinion no. 2013-37 of 21 March 2013.

23 Section 29 BLV Verordnung über die Laufbahnen der Bundesbeamtinnen und Bundesbeamten (Bundeslaufbahnverordnung - BLV), http://www.gesetze-im-internet.de/blv_2009/BJNR028400009.html.

24 See for instance: Art. 27 (1) BLV *ibid*.: abweichend von § 17 Abs. 3 bis 5 des Bundesbeamtengesetzes können geeignete Dienstposten mit Beamtinnen und Beamten besetzt werden, die
1. sich in einer Dienstzeit von mindestens 20 Jahren in mind. 2 Verwendungen bewährt haben.
2. seit mindestens 5 Jahren das Endamt ihrer bisherigen Laufbahn erreicht haben
3. in den letzten zwei Beurteilungen mit der höchsten oder zweithöchsten Note ihrer Besoldungsgruppe oder Funktionsebene beurteilt worden sind und
4. ein Auswahlverfahren erfolgreich durchlaufen haben.

In *Poland*, although the *Act on Civil Service* provides that EU citizens have access to public posts which are not connected with the exercise of public authority, the provision is practically never applied as there are very few vacancies open to foreigners. In 2012, for example, only one foreigner was employed in the public service. For self-governing bodies there is no data available.

Some issues mentioned in previous reports in respect of employment in the public sector have not been yet fully addressed. In *Austria,* in respect of former working periods that should be taken into account for the calculation of wages, issues were raised in relation to working periods completed in Turkey and Switzerland.[25] Following the *Hütter*-judgment,[26] the Austrian Administrative Court[27] decided that Sect. 8 § 1 of the Salary Act amounts to discrimination and is an inadequate implementation of Directive 2009/78/EC.[28] The legal provision in question was therefore set aside. The Federal Parliament now needs to make sure that Directive 2009/78/EC is implemented correctly, but as yet has failed to take any action. There are (at least) two Austrian preliminary rulings pending on this issue which should bring more clarity.[29]

In *Greece*, knowledge of the Greek language is necessary to be employed in the public sector. A Bachelor certificate from a Greek High School or a special language certificate granted by the Center of Greek Language are usually required as proof of language knowledge. The European Commission has formally requested that Greece amends its legislation to the extent that it requires qualified EU teachers to have an excellent knowledge of the Greek language. Professional experience for determining working conditions is also recognized. To establish seniority of those who have previously been employed in the public sector of another EU Member State, the Greek authorities take a maximum of seven years into consideration, which may be problematic in light of EU law.

Latvian legislation does not contain express norms on the prohibition of unequal treatment of migrant EU citizens regarding working conditions in the public sector. However, according to the Regulation No. 1651 only professional experience in the public sector in Latvia is taken into account when establishing the qualification grade and corresponding salary level.[30] In the public sector, education is the determining factor to award a qualification grade and normative acts do not contain any specific requirements with regard to diplomas obtained in particular educational establishments or countries for the purpose of determining the qualification grade, salary or any other working conditions.[31]

In *Lithuania* and *Romania*, the public service is restricted to own nationals. In *Lithuania*, the *Methodology on Description and Evaluation of Public Servants' Functions* (approved by

25 Sect. 12 Salary Act / Sect. 26 Contractual Employed Civil Servants Act (as regards Turkey) and Sect. 50a § 4 Salary Act for university professors (as regards Turkey and Switzerland).

26 CJ EU (Third Chamber) case C-88/08 [2009] ECR I-5325.

27 Austrian Administrative Court 4 September 2012, 2012/12/0007.

28 Directive 2009/78/EC of the European Parliament and of the Council of 13 July 2009 on stands for two-wheel motor vehicles (codified version), *OJ EU* 2009, L231/8.

29 Cases C-429/12, *Pohl,* C-417/13, *Starjakob,* and C-530/13*, Schmitzer*. In the case C-514/12, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH*, the European Court ruled in December 2013 that a provision stating that only times in the service of the province Salzburg are fully taken into account for the advancement in wages, whereas any other service times are only partially taken into account, is incompatible with the right to free movement in the Union. The reaction of the provincial parliament to this judgment is pending

30 Regulations on remuneration, qualification grades and their determination for officials and employees of state and municipal institutions (*Noteikumi par valsts un pašvaldību institūciju amatpersonu un darbinieku darba samaksu, kvalifikācijas pakāpēm un to noteikšanas kārtību*) OG No.206, 31 December 2009.

31 Law on remuneration of officials and employees of state and municipal institutions *(Valsts un pašvaldību institūciju amatpersonu un darbinieku atlīdzības likums)*, OG No.199, 18 December 2009.

the Government on 20 May 2002) does not mention the place of acquiring professional experience, suggesting that professional experience acquired in other EU Member States is recognised. Potential problems concern the calculation of years of service for the purpose of grades and categories of public servants, because according to current legislation, service supplements are paid on the basis of service performed for the Lithuanian State only (up to 30% supplement).

In *Malta*, previous periods of comparable employment acquired by teachers in another Member State are not always taken into account when determining working conditions. This also affects Maltese teachers who have worked in a public school in another Member States, as their experience abroad is not taken into account when returning to Malta.

In the *Czech Republic* the *Act on Public Services*, which was adopted in 2002, has not yet entered into force. This area of law continues to be covered by provisions in the Labour Code and antidiscrimination legislation. Despite the lack of a clear legal basis, there do not seem to be any complaints made by EU citizens in the area of public service employment.

New developments in the field of employment in the public sector are mentioned by some Member States. In *Bulgaria*, at the end of 2012, the Law *on Notaries and Notarial Practice*[32] was amended in order to provide access to the profession of notary to EU/EEA and Swiss citizens. Furthermore, their time in legal service in another Member State is recognized for the purpose of qualification for the position.[33] See: Chapter III.

In *Portugal*, as a result of the severe economic crisis experienced by this country, the vast majority of competitions were opened only to applicants already employed by the Portuguese state. As a result of these internal competitions the public service is virtually closed to EU citizens. Another issue connected with the possibility of EU citizens to work in the public service concerns correct information about this right. There is still no reference to EU citizens in the laws and regulations governing access to jobs in Portugal's public service sector. Nevertheless, the interpretation of these laws and regulations is that EU citizens should only be excluded from public service posts implying the exercise of public authority or sovereignty powers. However, in most sectors of the public service, competitions are initiated with the sole reference to Article 8 of Law 12-A/2008, of 27 of February 2008, which sets as a qualifying condition that the applicant is a Portuguese national, unless provided otherwise in the Constitution, by specific legislation or international convention. These are competitions that should be open to any EU citizens, but where the announcement only expressly refers to Portuguese nationality. The omission to refer to EU citizens may make the administration think the post is reserved to Portuguese nationals only.

2. SOCIAL AND TAX ADVANTAGES

2.1 General situation as laid down in Art. 7(2) Regulation (EEC) No. 492/2011

The national reports suggest that EU workers continue to experience problems when accessing social and tax advantages to which they are entitled under EU law. During the reporting period several questions have been referred to the Court of Justice for clarification in this particular field. Equally important, the implementation of some Court of Justice decisions at the national level seems questionable as to the compatibility with EU law.

32 State Gazette No.95 of 4 December 2012.
33 Article 8, Paragraphs 1 and 3 of the Law on the Notaries and Notarial Practice.

In *Ireland*, the High Court referred two questions to the Court of Justice under Article 267 TFEU concerning the claim to illness benefit made by an Irish national working in Northern Ireland, but resident in the Republic.[34] The Minister for Social Protection argued that the applicant's claim was to be paid by the UK authorities. However, if this was to be the case, the applicant would receive no payment as she did not satisfy the criteria for determining illness benefit in the UK as she had only been working there for six months and three years of contributions were required in order to claim in that Member State. The first question referred concerned which rules, the Irish or UK, govern the applicant's claim, whilst the second question asked whether it was relevant to the consideration of this question that if UK law is held to be the governing law then the applicant would be ineligible for any social security questions, whereas this would not be the case if Irish law is held to apply. As the High Court noted, the consequence of not allowing the applicant to claim illness benefits in Ireland is that the applicant would have been disadvantaged by exercising her free movement rights compared to if she had chosen to continue working in Ireland. However, that court felt that the "complexity and relative novelty of this issue, coupled with the fact that it involves an inter-action of the social security laws of two Member States" necessitated referral of the question to the Court of Justice.

In the *Czech Republic*, the decision of the Court of Justice in *Landtova*[35] has led to a difference in opinion between the Czech Supreme Administrative Court and the Constitutional Court. The *Landtova* case dealt with the interpretation of Regulation (EEC) No. 1408/71 in relation to special enhancement pensions payable to Czech citizens affected by Czechoslovakia's dissolution in 1992 (the issue of the so-called Slovak pensions). The Czech Supreme Administrative Court followed the decision of the Court of Justice in its case law, but the Constitutional Court declared the decision of the Court of Justice an *ultra vires* act of an EU organ and upheld its own case law. This issue is bound to have further implications since similar cases have been launched before the Supreme Administrative Court. The difficulty stems from the fact that according to Czech law all courts are bound by the decisions of the Constitutional Court, which suggests a conflict regarding the supremacy of EU law.

In *Denmark*, as a result of the decision of the Court of Justice in the *L.N.* case,[36] a system was introduced where the administrative authority checks with the help of input from the eIncome registry whether non-national EU students who receive study grants in Denmark on the basis of their status as a worker, continue to retain their status as worker and their entitlement to grants. This monitoring takes place systematically, automatically and on a monthly basis. The compatibility of this system with Article 14(2) of Directive 2004/38/EC is questioned.

The decision of the Court of Justice in the *Giersch* case, has led to changes to the *Luxembourg* law applicable to the payment of study grants. The law included a residence clause which excluded the children of frontier workers from this benefit. The Court of Justice decided that the residence clause amounted to prohibited indirect discrimination on the basis of nationality. The law was therefore amended in July 2013 and now requires a period of 5 years of employment in Luxembourg by one of the parents of a student who applies for a student grant.

In the *Netherlands*, the decision of the Court of Justice in the infringement procedure C-542/09[37] has also led to amendments of the rules on study grants. The Dutch government has

34 *Kelly v. Minister for Social Protection* [2013] IEHC 260. See case C-403/13 *Kelly*.
35 CJ EU (Forth Chamber) case C-399/09 [2011] ECR I-5573.
36 CJ EU (Third Chamber) case C-46/12, 21 February 2013, n.y.r.
37 CJ EU case C-542/09, *Commission* v *the Netherlands*, 14 June 2012, n.y.r.

withdrawn the so-called "three out of six rule" regarding the exportability of study grants but has put a maximum to the number of students who can request a study grant that will be exported to another Member State. The Dutch government will also adjust, as of 1 January 2014, the number of hours a person must work per month in order to be considered a worker. At the moment the threshold is set at 32 hours per month, but taking effect in January 2014 this number will be increased to 56 hours. Thus, a student who works a minimum of 56 hours per month will be considered a worker and, therefore, entitled to full access to study grants in the Netherlands. The compatibility of the 56 hours threshold with the definition of EU worker given by the Court of Justice that emphasizes the genuine and effective character of the activity performed remains to be seen.

In *Portugal* as a result of the intervention of the European Commission, the Government has amended its decision to toll certain highways that were previously free of charge. This decision has created some exemptions (for the first ten utilizations in any given month) and discounts (15%) for residents of the area in which a highway is located (Resolution of the Council of Ministers No. 75/2010, of 9 September 2010). The decision was much criticized in the media because it created a burdensome payment method for non-residents in Portugal. The European Commission opened an infringement procedure against Portugal because it considered that the exemptions, as well as the payment methods, were discriminatory against non-residents in Portugal and violated the "Eurovignette" Directive.[38] On 1 October 2012, the Portuguese government revoked the exemptions for residents and created new electronic toll payment methods for non-residents in Portugal. For that reason, on 21 March 2013, the European Commission announced that it would close the infringement procedure because it considered these measures to be non-discriminatory.

Social advantages

In general, the Member States are in compliance with the applicable provisions in the field of social advantages. For example, in *Bulgaria*, EU citizens and their family members are entitled to social security rights and (unemployment) benefits under the same conditions as Bulgarian nationals according to the *Code on Social Security*. In *Croatia*, EU workers are treated equally with the citizens of the Republic of Croatia, if they are legally residing and working in Croatia. Provisions in the *Income Tax Act* apply to them on equal terms. Contributions for mandatory pension and health insurance and unemployment insurance schemes are calculated for workers from the EEA countries in the same manner as for Croatian citizens. Pursuant to the *Act on Employment Mediation and Unemployment Rights*, EEA nationals have same rights and obligations as Croatian nationals. EEA workers also have a right to social assistance as the *Social Welfare Act* provides that non-nationals with approved temporary residence are also eligible for benefits paid out unde the Croatian social assistance system n accordance with the conditions specified in the Social Welfare Act and other laws.

The *Hungarian* report mentions that despite the fact that Hungary has extended equal treatment to all EU citizens, regardless of them being economically active or not, this fact is not well known. Also, access to all sorts of social advantages depends upon being lawfully resident and having complied with registration requirements. Thus, social advantages depend

38 Directive 2006/38/EC of the European Parliament and of the Council of 17 May 2006, on the charging of heavy goods vehicles for the use of certain infrastructures, *OJ EU* 2006, L 157/8.

upon being able to prove one's lawful residence, which contradicts the Court of Justice's settled case law that the registration certificate does not have constitutive effect, only declaratory.

In *Italy*, nationality is rarely used as a condition for access to social benefits or tax advantages, as benefits are generally awarded to workers. Problems may arise where they address low income workers or persons because the ISEE index (*Indicatore della situazione economica equivalente* – Equivalent Economic Situation Indicator) is used as evidence of need. The ISEE index is calculated from the taxable income declared for the previous-year IRPEF (*imposta sul reddito delle persone fisiche* – personal income tax) and from the movable and immovable property owned by the applicant.[39] The ISEE index is objective, but can only be calculated if during the previous year, the applicant's income was taxed in Italy. Therefore, during his/her first year in Italy, an EU worker could face difficulties in obtaining social benefits for low income people, because calculating his/her ISEE index would prove quite difficult. During the reporting period, discussions have been afoot to amend the index so that it will represent the real situation of the person concerned more accurately and to avoid abuse. In 2012, Italy introduced for a period of one year and on an experimental basis the "Social Card".[40] This is an economic benefit for households living in poverty in 12 Italian cities. The amount ranges from a minimum of € 231 for a household of two people to a maximum of € 404 for households of five or more people, with payments every two months. Beneficiaries are selected according to their income (less than € 3,000 per year), without discrimination based on nationality. Unlike the "purchases card" benefit which is reserved for Italian nationals in economic need only, EU citizens are expressly identified as beneficiaries of the 2012 Social Card.[41]

Residence requirements pose problems in several Member States. In *Ireland*, for example, the habitual residence condition (HRC) is complicated to apply, making access to social welfare including job-seekers' allowance difficult for migrants. This condition was introduced in 2004 for obtaining certain social assistance/welfare payments. Operation Guidelines on the HRC (updated in September 2012) specifically state that a person who has a right to enter and reside in the State under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 shall be taken to have a right to reside in the State.[42] The Guidelines also make it clear that those entitled to social advantages under Article 7(2) of Regulation (EU) No. 492/2011 – which includes Supplementary Welfare Allowance - cannot be subject to the HRC. However, the authorities will need to be satisfied that the person concerned qualifies as a "worker" in EU law (applying the tests laid down by the European Court of Justice). It is, therefore, considered that "an EEA national who is engaged in genuine and effective employment in Ireland is regarded as a migrant worker under EC law and does not need to satisfy HRC for the purpose of any claim to Supplementary Welfare Allowance". The HRC has become an issue for returning emigrants to Ireland who are often refused social welfare assistance on the basis that they have 'lost' their habitual residence in the State. This could be perceived as impeding the right to move freely within the EU. This issue has been raised in the Dáil (Irish parliament) on a number of occasions, most recently

39 See Legislative Decree no. 109 of 1998.
40 Article 60 of Decree-Law 9-2-2012 no. 5 (converted into law by Law 4-4-2012 no. 35).
41 Italian Ministry of Employment, Decree 10-4-2013. However, in a case concerning the withdrawal of the purchases card from a Romanian national married to a worker due to her nationality, the court of Trieste has decided that the decision to revoke the benefit was illegitimate because it discriminated on the basis of nationality (Order of 19-9-2012).
42 http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#app3.

in July 2013 where the Minister for Social Protection stated that before a decision can be made regarding a person's habitual residence it must be established whether the person has a legal right to reside in the State and all Irish nationals have this right.[43] The Minister also emphasised that the HRC guidelines contain comprehensive information on the material to be provided by returning Irish emigrants.

The *UK* also uses a habitual residence test. The UK has a complex system of social benefits, which are sometimes administered through tax relief. As regards tax advantages, *Regulation 3(5) Tax Credits (Residence) Regulations 2003* provides that Child Tax Credits and Working Tax Credits, which are social benefits administered under the tax system, are only available to EEA nationals who have a right to reside. The same applies to child benefits. This means that unless the EEA national has permanent residence or otherwise satisfies the right to reside test (employed or self-employed or registered with JobCentre Plus and seeking work) they will not be eligible for this benefit. The UK authorities accept that both types of credit are social advantages within the meaning of Article 7(2) Regulation (EU No. 492/2011. While the UK authorities accept that tax credits constitute benefits under Article 7(2) of the Regulation, it is less clear how the UK authorities are dealing with the relationship between social advantages under Article7(2) and social assistance under Directive 2004/38/EC and considered in the Court of Justice's decision in *Vatsouras.* The general situation as regards Article 7(2) Regulation (EU) No. 492/2011 is that it is claimed by EEA nationals primarily in respect of social benefits. In so far as tax benefits are types of social benefits (such as Child Tax Credits, and Working Tax Credits) the effect is the same – it is the social aspect which is disputed. On 1 May 2004 the UK introduced a test of the 'right to reside' which EEA nationals must pass before they can claim social benefits.[44] For workers and the self-employed and those that retain this status this is all they need to show. However, for others they must also show habitual residence,[45] namely an intention to settle in the UK, the Isle of Man, the Channel Islands or Ireland and make it home for the time being. The combined effect of these tests is that EEA nationals may be excluded from benefits when they are unable to work because of illness, disability or childcare responsibilities. The UK courts have held that lawful presence in the UK is not the same as a right to reside.[46] The courts have also rejected the principle that EEA nationals can acquire a right to reside directly from EU law as citizens of the Union. What this means is that EEA nationals seeking social benefits in the UK are likely to be refused unless they can show that they have a positive qualifying right to reside within the terms of the relevant benefit regulation.[47] The UK's right to reside test has now been challenged by the European Commission as contravening the EU's Social Security Coordination Rules (Regulation (EU) No. 987/2009) which require habitual residence only, namely that a persons' habitual centre of interest is located in the host state.[48]

In *Denmark*, following the European Commission's enquiry to the Danish Government in April 2013 under the EU Pilot Project Case No. 4873/13/EMPL about the application of the accumulation principle in relation to child benefits etc., the Danish Government will institute an amendment of practice with regard to persons comprised by EU law and envis-

43 http://www.nascireland.org/campaign-for-change/social-protection/pq-social-welfare-code-hrc/.
44 http://www.dwp.gov.uk/docs/hbgm-c4-people-from-abroad.pdf.
45 This applies to the following benefits: income support, income –based job seekers allowance, income related Employment and Support allowance, pension credit, housing benefit and council tax benefit.
46 *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657.
47 I Macdonald QC & R Toal, *Macdonald's Immigration Law and Practice* LexisNexis London 2009, pp. 312-313.
48 IP/13/475.

ages the introduction a Bill in the autumn of 2013 for the purpose of ensuring full compliance of the Danish rules with EU law. Furthermore, for the purpose of reopening cases, the Danish authorities will select cases in which the previous application of the accumulation principle resulted in persons being entitled to the benefits concerned not having been granted the benefits. Information on the possibility of having cases reopened will be disseminated publically.

In *Greece*, the entitlement to the benefit "social solidarity allowance for pensioners" is dependent on a residence clause. The *Polish* report also mentions that residence clauses apply to a variety of social benefits (study grant, social rent, social assistance, social pension and benefits for the blind or for war victims). Polish courts hold different views on whether certain financial benefits should be qualified as social assistance or as social benefits. In *Slovakia*, some social benefits (child allowance and parental allowance) are subject to a permanent residence permit and family benefits (designed for families with three or more children or where twins are born in the course of two consecutive years) are limited to family members resident in Slovakia with the EU worker.

In *Latvia*, issues of equal treatment are signalled in relation to two pieces of legislation: State social allowances provided under the *Law on State Social Allowances*[49] and social assistance and social services provided under *Social Assistance and Social Services Law*.[50] Both laws make eligibility dependent on permanent residence.[51] Based on information provided by the State Social Insurance Agency, EU citizens are only entitled to State social allowances which qualify as family allowances within the meaning of Regulation (EC) No. 883/2004. Other State social allowances, for example, the child-birth allowance, State subsistence allowance and remuneration for the performance of the duties as a guardian of a minor, are not available to EU citizens and their family members who have temporary residence certificates, irrespective of the fact whether they are or not economically active.[52]

In *Malta*, issues have been raised regarding access to reduced water and electricity tariffs for EU citizens. In order to benefit from reduced tariffs, EU citizens residing in Malta need to present a specific set of documents, whereas Maltese citizens only have to submit a copy of their identity card. The European Commission considers that this amounts to discriminatory treatment that poses obstacles to the exercise of the right to free movement. It has sent a letter of formal notice to the Maltese authorities. The Maltese transport system uses a differential bus fare system that differentiates between residents and tourists, including EU citizens. Those not in possession of a Maltese ID card are charged an extra 40% for the same bus service. The compatibility of the new fare system with EU law has not been challenged.

The *Dutch* government presented its Coalition Agreement in late 2012. The document has several implications for the free movement of workers, including their social rights. The possibilities of introducing a language requirement for social assistance, the limitation of the work search period for EU citizens to three months and the ban on the export of social assistance benefits for frontier workers are still under discussion with the European Commission.

Several national rapporteurs comment on the importance of being fully informed about one's rights in the host-Member State. The *Hungarian* rapporteur suggests that information

49 OG No.168, 19 November 2002.
50 OG No.168, 19 November 2002.
51 Article 4(2) of the Law on State Social Allowances, OG No.168, 19 November 2001; Article 3(1) of the Social Assistance and Social Services Law, OG No.168, 19 November 2002.
52 Telephone interview with an official of the Union of Methodological Management of the Allowances of the State Social Insurance Agency, 25 June 2013.

campaigns and providing information more generally in foreign languages would improve an EU worker's understanding of his/her rights in Hungary. The *Polish* government intends to set up a special programme called "Returns" that will provide information regarding problems connected to returns to Polish citizens who return to their home-Member State after having exercised free movement rights. In the *UK*, in response to the difficulties which EEA nationals (in particular EU-8 and EU02 nationals) have been encountering, a UK professional organisation, the Chartered Institute for Housing (constituted as a charity in English law) has established a website providing detailed information on access to all types of housing for EEA nationals generally,[53] EU-8 and EU-2 nationals specifically.[54]

Tax advantages

Issues relating to tax advantages have taken central stage in several Member States as evidenced by a series of opinions issued by the European Commission and questions referred by national courts to the Court of Justice. The European Commission has sent out three reasoned opinion regarding the *Belgian* system of taxation. Firstly, Belgium has been requested to amend property transfer tax in the Brussels Capital region (IP/12/178). The legislation at stake allows for a tax base reduction of the property transfer tax when buying a primary residence in the Brussels Capital Region on the condition of staying resident in the Region during the next 5 years. The second opinion issued by the European Commission focuses on discriminatory venture capital tax incentives (IP/12/176). Belgian legislation grants a personal income tax credit to individuals investing in shares and units of ARKimedes funds. This tax credit is only granted on the condition that these investors are resident in the Flemish region. Residents of other Member States cannot benefit from the mentioned tax credit even if they are fully taxable in Belgium because they derive all or almost all of their personal income in Belgium. Finally, the European Commission has requested Belgium to remove discriminatory rules on personal income tax that discriminate against non-resident tax payers whose income is entirely or almost entirely generated in Belgium (IP/12/281). The regional law allows for a reduction in personal income tax when citizens buy shares or bonds from investment funds in Wallonia. Residing in the Walloon region is a condition to benefit from this reduction. The European Commission considers that excluding non-residents who earn all or almost all of their income in the Walloon Region from the benefit of the reduction is discriminatory. The federal law grants a tax credit for resident taxpayers whose yearly income does not exceed € 18,730. Non-residents generating all or almost all of their income in Belgium and satisfying the same low income earnings condition are excluded from the benefit of the tax credit.

Two preliminary questions in the field of taxation have been asked by *Czech* courts. In the first case referred[55] where an undertaking supplying workers to another undertaking (the supplier) has its seat in the territory of another Member State, national law imposes the obligation to deduct income tax in respect of those workers and pay it into the State budget on the undertaking using the workers, whereas if the supplier has its seat in the territory of the Czech Republic that obligation is imposed on the supplier. The second referral[56] deals with

53 http://www.housing-rights.info/02_4_EEA_workers.html.
54 http://www.housing-rights.info/index.html.
55 Case C-53/13, *Strojírny Prostějov*.
56 Case C-80/13, *ACO Industries Tábor*.

taxation issues in the case of temporary workers employed through a temporary work agency.

In the fights against social dumping, *Denmark* has taken the following measures, which include tax related issues:

- the reduction of tax relief on travel expenses;
- the taxation in Denmark under the rules on limited tax liability of hiring-out of labour when foreign workers with a foreign employer perform work that is an integrated part of the work of a Danish business[57] (this does not apply to performing artists, musicians, performers or sportspersons);[58] and
- the taxation in Denmark under the rules on limited tax liability of foreign workers' income from work performed in Denmark for a foreign business when the workers stay in Denmark for one or more periods of a total of 183 days within a 12 months' period.[59]

As mentioned in the 2011-2012 European report, Denmark operates an experimental scheme allowing for tax deduction of expenses to salaries paid for assistance in permanent residences defrayed by persons subject to unlimited tax liability in Denmark and frontier workers, the so-called *Home Job Scheme*.[60] This scheme will be in force until 31 December 2012, but it is expected to be re-introduced and extended to comprise summer and holiday houses in Denmark and abroad taking effect in 2013 and 2014. For summer and holiday houses located abroad, there is no requirement that the work has to be performed by businesses registered for VAT in Denmark or by persons subject to unlimited tax liability in Denmark. This corresponds to the rules applicable to frontier workers with regard to permanent residence and is based on considerations of EU law on free movement of capital, cf. the *Jäger* case.[61] As noted in 2011-2012 European report, other than the exemption concerning frontier workers, the *Home Job Scheme* is claimed to have no implications in terms of EU law. Likewise, other than the exemption concerning frontier workers and the summer and holiday houses situated abroad, the new 2013-Bill is equally claimed to have no implications in terms of EU law. Given the differential fiscal treatment of salary paid for assistance, raising

57 Two recent binding answers from the National Tax Board deals with the concept of hiring-out of labour and work being an integrated part of the work of a Danish business respectively in relation to a consultant hired to perform a project independently and having professional qualifications the business does not have (SKM2013.432.SR), and substitutes working for a maximum of half a year for a concern in connection with transferring a specific task from the concern's Swedish business to the concern's business in Denmark (SKM2013.433.SR). In the first case the National Tax Board held that the employment relationship constituted hiring-out of labour (and hence the consultant was subject to taxation in Denmark pursuant to the rules on hiring-out of labour), and in the second case the National Tax Board held that the employment relationship did not constitute hiring-out of labour (and hence the temporary workers were not subject to taxation in Denmark under the rules on hiring-out of labour).

58 The Danish Government presented a plea in Case C-53/13 regarding a request for a preliminary ruling on whether Articles 56 and 57 prevent national rules requiring a business hiring labour from a business based in another Member State (the supplier) to withhold and pay income tax for the workers, when the obligation to withhold and pay tax is otherwise imposed on suppliers based in the Member Stated concerned. According to the Danish Ministry of Taxation, the ruling of the case is of importance to the Danish rules on taxation in Denmark of the hiring-out of labour, cf. Notat til Folketingets Europaudvalg og Folketingets Skatteudvalg om afgivelse af indlæg i EU-Domstolens sag C-53/13 Strojírny Prostějov, a.s. mod Odvolací finanční ředitelství, Europaudvalget 2012-13, EUU Alm.del Bilag 401, 17 May 2013.

59 *Lov om ændring af ligningsloven, kildeskatteloven og personskatteloven* ('Act on Amendment of the Tax Assessment Act, the Withholding of Tax Act and the Act on Income Tax'), Act No. 921 of 18 September 2012, cf. Bill No. L 195, 2011/1. Also, taxation in Denmark of the foreign income of persons who are fully liable to pay tax in Denmark was introduced by the repeal of the *Withholding of Tax Act* Section 33A. However, this provision was later re-introduced; see more below Chapter VI.1.

60 Act No. 572 of 7 June 2011 amending i.a. the Tax Assessment Act.

61 CJ EU (Second Chamber) Case C-256/06 [2008] ECR I-123.

issues on obstacles to free movement under Article 45 as well as Article 56 TFEU, this remains a rather questionable assumption.

Finland also operates a similar scheme, the "home-work deduction". In the Finnish system, a person liable to pay income tax in Finland could deduce from income tax certain costs for the care, cleaning, construction, and other work which is performed at her home or at the home of her spouse or parents regardless of the country in which the property is located. The condition establishing eligibility for this tax deduction was that the company that performs the work was enrolled in the preliminary taxation register in Finland and covered cases where the property was located abroad. In 2012, the law was amended to the extent that the so-called 'home-work deduction' can be made in cases in which the property where the work is performed is located abroad when the company, which performed the work, is registered in the preliminary taxation register – or other similar registers – in the country where the work was performed. This reform has had particular impact on the position of frontier workers who may now make better use of the home-work deduction scheme. Nevertheless, based on the Supreme Administrative Court's case law from, in cases in which property is situated in Finland, the deduction operates only if the company undertaking the work is registered in the Finnish register, even if it is not based in Finland.[62]

In *Italy*, the *Codified Law on Income Tax* allows for costs incurred for student rent to be deducted from tax. The deduction amounts to 19% of the costs incurred with a maximum of € 2,633. From 2012 the deduction applies to rent paid in the European Union Member State where the student is registered for a course of study (Article 16, paragraph 1, of Law no. 217 of 15-12-2011).

The *Latvian* report mentions problems in relation to tax deductions for medical services, which may affect negatively frontier workers. *Regulation No. 336* includes tax deductions for medical services received in Latvia and health insurance policies obtained from insurance companies registered in Latvia only.

Lithuania continues to apply different conditions with regard to registration as VAT payers, as foreign nationals are required to register as VAT payers immediately after commencing economic activities. EU citizens are not exempted from this requirement. In addition, in order to prove payment of taxes abroad excessive documentation is required.

In *Luxembourg* the conditions for the award of tax relief in connection with the child bonus system are seen as problematic. Child bonus is paid monthly and automatically to the beneficiary by the *National Family Benefits Fund* for each child eligible for child benefit, that is to say children under the age of 18. For resident students over the age of 18 and in higher education (as well as young volunteers aged over 18 years), who also receive financial assistance from the State in the form of grants or loans, the bonus is considered an integral part of the amount which is paid to them. Frontier workers for their part, who do not benefit from the child bonus, can ask for a reduction of taxes in the form of tax relief that will be deducted from the amount of tax payable by the taxpayer but however in the limit of the tax due. Thus, frontier workers do seem to benefit from a less favourable tax treatment to the extent that they are required first of all to make a request for a reduction of taxes, and more specifically of relief, where resident workers automatically receive the bonus as it is included in the financial aid granted by the State to their children. In addition, tax relief will be granted at the end of the tax year whereas the child bonus that is included in the financial

62 Finnish Administrative Court, decision of 28 December 2012. The company that performed the work was based in Sweden and not registered in the Finnish registry.

State aid is paid directly to the student over the course of the year; once in the winter semester and once during the summer semester.

At that moment employers in the *Netherlands* can get a discount for 1 to 3 years on the payment of the contributions for employees they hire, who enjoy a Dutch unemployment or disability benefit. It is questionable whether this is an obstacle to free movement of workers. The Dutch tax authority's reply was negative. The purpose of this discount is to reduce the burden on the Dutch social security system and, therefore, is justified in their eyes. During the reporting period changes have been made to the so-called "30% rule". Foreign workers can profit from tax benefits: 30 per cent of the wage can be paid to the employee untaxed. The regulation was introduced to enable Dutch companies to compete with companies in countries such as the USA and the UK, which generally pay higher salaries. As of 1 January 2012, restrictions to the 30% ruling took effect. A salary criterion was introduced, stating that only those employees who have a taxable income of at least € 35.000 a year can profit from the rules. Furthermore, only those who live more than 150 kilometres from the Dutch border prior to moving to the Netherlands in order to work there will be able to benefit from the rule. In his Opinion of 1 May 2013 the Advocate General of the Supreme Court argued that this restriction is not an obstacle on free movement of workers, although it affects workers from Belgium, Luxembourg and parts of France and Germany. The Supreme Court referred the case to the Court of Justice for a preliminary ruling in August 2013.[63]

In 2013, because of the economic crisis, *Spain* has increased it tax rates and this change affects the income tax paid by non-residents.[64]

Regarding the tax paid by non-resident nationals, the *French* Council of State has upheld a decision of a lower administrative court and found that EU free movement law does not prevent the French legislator from excluding non-resident nationals who exercise their professional activity in France from the fiscal advantages it reserves for national residents.[65]

2.2 Specific issue: the situation of jobseekers

Access to social assistance

The *Belgian* report mentions two legislative changes that have an impact upon the situation of job-seekers. Until recently, the Belgian system was generous towards job-seekers as they could ask for social assistance as soon as they had obtained a certificate of registration. The *Law of 19 January 2012* modifying the legislation concerning the reception of asylum seekers in Belgium[66] has implemented Article 24(2) of the Citizens Directive by inserting Article 57 *quinquies* in the Law that organizes the CPASs. By way of derogation from the Law as it stands, the center is now obliged to refuse an entitlement to social assistance to EU citizens and their family members during the first three months of residence or, where

63 ECLI:NL:HR:2013:474. See case C-512/13 *X*.

64 The Royal Decree-Law 20/2011, of December 30th, on urgent budgetary, tax and financial deficit correction adds a third additional provision in the revised text of the Law on Income Tax for Non-Residents, approved by Royal Legislative Decree 5/2004, of 5 March, which shall read as follows:"*From January 1, 2012 and until December 31, 2013, inclusive, the tax rates of 19 per cent referred to Articles 19.2 and 25.1 f) of this Act shall rise to 21 per 100.Also, during the period referred to in the preceding paragraph, the tax rate of 24 percent under Article 25.1 a) of this Act amounts to 24.75 percent*."

65 Arrêt du 26 septembre 2012, req. n° 346556 (Conseil d'Etat). The decision of the lower court in question is: Cour administrative d'appel de Versailles, 11 septembre 2012, n° 11VE00348.

66 *M.B.*, 17 February 2012, p. 11422.

appropriate, during the longer period during which EU citizens are seeking employment in Belgium, nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid. A circular of the Ministry for social integration of 28 March 2012 clarifies that the three-month period runs from the moment the 'certificate of registration application' is issued.[67] When this period expires or if EU citizens acquire the right to stay for more than three months on Belgian territory before that date, social assistance can be claimed by EU citizens. *A contrario*, job-seekers are refused the right to social assistance for the entire period in which they seek employment in Belgium, although they can still fall back on the right to social integration once they have received their certificate of registration. The circular also defines maintenance aid, by referring to the preparatory work of the Parliament and the Citizens Directive, as any social assistance in the form of maintenance aid for studies, including vocational training, consisting in student grants or student loans, that the CPAS might grant as a complement to the '*revenu d'intégration sociale'* or its equivalent. Maintenance aid so defined will be refused to EU citizens until they acquire the right of permanent residence. Nevertheless, in order to comply with the Citizens Directive, the circular specifies that the restriction regarding maintenance aid only concerns persons other than workers, self-employed persons and the members of their family. The second legislative change was made in 2013 by the *Law of 28 June 2013*.[68] It reflects the decision that the *Revenu d'intégration sociale* (RIS, social integration income) will be open to EU citizens only if they have a right of residence for more than 3 months and only after 3 months of residence. A circular of the Ministry for social integration dated 29 June 2011 invites the CPASs to regularly check the status of their beneficiaries and inform them that claiming social assistance might jeopardize their right to stay on Belgian territory.[69] In this regard, a data exchange system has been set up between the Ministry for social integration and the Alien's office, in particular regarding EU job-seekers claiming social support so that the Alien's office can use such data as a basis for further investigation which may eventually lead to an order to leave Belgian territory.

In theory, *Danish* legislation in this field is in line with EU law provisions, but there are reports that EU-10 workers used to encounter difficulties in cases where, upon dismissal from jobs in which they had been working a for a longer period of time, they applied for social assistance while seeking a new job in Denmark. This is explained as relating to the unfamiliarity of some municipalities with the applicable rules. The National Directorate of Labour has promised clearer general guidelines, but they have not yet been adopted. There is also evidence to suggest that EU job-seekers are not offered the same support as Danish citizens by municipal job centres. In 2013, the relief organisation *Kirkens Korshær* has received more than 400 requests for assistance in relation to counselling and support for homeless and/or job-seeking migrants in Copenhagen. Most of these requests are recorded to be about job-seeking due to the fact that EU citizens in practice are reported *not* to be provided with assistance from the municipal job centres. Apparently, many of the migrants seeking the advice of *Kompasset* have already requested assistance from the job centre but were merely provided with a post card enumerating web addresses (among others www.workindenmark.dk) and informed that they could use the available computers to search for work. The application of this procedure by a specific job centre has been confirmed by *Kompasset's* manager and the employees themselves when inquiring at the specific job cen-

67 http://www.mi-is.be/be-fr/cpas/les-etrangers.
68 *M.B.*, 1 July 2013, Loi Programme.
69 http://www.mi-is.be/be-fr/cpas/les-etrangers.

tre for information on behalf of EU citizens.[70] However, the extent of the application of this procedure, i.e. whether all job centres apply this procedure, is not known. In so far as job-seeking EU citizens are not offered assistance by employment agencies corresponding to that offered to Danish nationals, this raises issues on unequal treatment issues relating to access to employment. The capacity of EU job-seekers to access a variety of services depends on them being recorded in the National Register of Persons and whether they have been issued a Civil Registration System Number (CPR), which requires, as a rule, a stay longer than three months. However, they are not obliged to report to the immigration authorities if their stay does not exceed six months. Once they have obtained a CPR they are also issued with a National Health Card and are entitled to medical assistance (otherwise, they are entitled to emergency assistance only). In practice, some job centres require EU citizens to be issued a CPR before being entitled to courses, internships, employment with subsidy pursuant to the *Act on Integration*. Some employers are reluctant to employ EU job-seekers who do not have a CPR, where employment is a precondition for an EU citizen to obtain a CPR.

The *Finnish* rapporteur equally mentions that in practice the treatment enjoyed by EU job-seekers may vary due to different municipal practices, notwithstanding the fact that EU job-seekers are covered by the general prohibition of discrimination and the right to equal treatment. For instance, only children whose right of residence is registered in practice have access to public day care in the area of Helsinki. Hence, children of job-seekers do not have, or only have limited access to public day care. Public schools accept children whose right of residence is not registered, but no systematic information on this issue exists.

In *Latvia*, issues mentioned in previous reports regarding car registration continue to exist. The Latvian law on traffic requires that any person who has obtained a residence permit/registration card is obliged to immediately register his/her car in Latvia. For a job-seeker, the registration of his residence in Latvia means the obligation to re-register his car. This issue was contested before the Constitutional Court in 2012. That court's verdict was that the obligation is compatible with the Latvian Constitution despite the fact that the EU has launched a legislative proposal to remove obstacles in this field.[71]

In *Ireland*, job-seekers must satisfy the habitual residence condition (HRC) in order to be eligible for social welfare payments including a Job Seeker's Allowance. The *Operational Guidelines on the Habitual Residence Condition* issued by the Department of Social Protection state that a Job Seeker's Allowance is subject to the condition and, in contrast to specified payments such as Supplementary Welfare Allowance and Child Benefit, the requirement is not stated to be overridden by EU law. Irish legislation (Section 246 of the *Social Welfare Consolidation Act 2005*, as amended in 2009) provides that a person who does not have a right to reside cannot be habitually resident for social welfare purposes. This right to reside test was the subject of a recent High Court case involving two nationals from Romania and Bulgaria who were refused a job-seekers allowance for failure to satisfy the condition.[72] The court noted that the right of an EU citizen to reside in another Member State is subject to restrictions by that other Member State, including the condition that nationals of other Member States do not become a burden on the social assistance system of their host-Member State. Here, the applicants did not satisfy the right to reside test and thus the HRC because they were both found to be non-self sustaining and to lack comprehensive health insurance.

70 Cf. e-mails of 7 and 19 June 2013 from an employee within *Kompasset.*

71 Case No.2011-09-01, press release of the Constitutional Court, 30 January 2012, available in English at http://www.satv.tiesa.gov.lv/upload/2011-09-01%20PR%20par%20spriedumu_ENG.pdf (accessed on 25 June 2013).

72 *Genov and Gusa v. Minister for Social Protection & Ors* [2013] IEHC 340

The court then considered the question whether the test was discriminatory. Referring to a UK Supreme Court decision, the court held that while the test was indirectly discriminatory it was objectively justifiable on grounds other than just the applicant's nationality, which is, to prevent exploitation of the social welfare system.[73] The court held that this is a "logical and reasonable rationale" "one that stands independent of the applicants herein because it applies to all citizens of Member States other than Ireland regardless of their nationality and seems proportionate to the legitimate aim of best using the limited resources of the State."[74]

As mentioned before, the *UK* also uses a habitual residence condition to determine entitlement to social benefits generally. This has led to a series of judicial cases and references to the Court of Justice. At the moment, the UK executive is consolidating several social benefits into one universal benefit, which is described as social assistance outside the scope of Regulation (EC) No. 883/2004. This is considered problematic in the light of the fact that many of the benefits being replaced fall within the material scope of the Regulation.

The *Swedish* report highlights that in practice access to social assistance from the local municipality is important. The general rule is that the municipality in which the individual "stays" is responsible for the support and help to individuals in need for social assistance. In order to be entitled to full assistance, a person must be staying at least a year in the municipality. Hence, persons who are not registered in a municipality are only entitled to emergency or acute assistance.[75] EU citizens and their family members who are not economically active do not have a right to social assistance other than in emergencies. Assistance is then normally granted as means for food and travel to their country of residence. EU citizens who are economically active for instance workers or jobseekers in principle should have the same right to social assistance as other residents in Sweden.

Follow-up on the Vatsouras judgment

The *Vatsouras* judgment concerns two issues: i) the criteria for the status of worker and ii) the character of benefits which are intended to facilitate access to the labour market. Financial benefits equivalent to the one which was contested in the *Vatsouras* case do not exist in *Italy*, *Latvia* and *Poland*. In *Romania* and *Croatia* the judgment has only a theoretical importance. As Article 24 of Directive 2004/38/EC has not been transposed in *Slovakia,* the *Vatsouras* judgment is not relevant to the situation in Slovakia either.

In *Austria, the Czech Republic, Finland, Hungary, Lithuania* and *Sweden* the legislation seems to be in conformity with the *Vatsouras* case. According to the *Czech* rapporteur EU citizens and their family members are in general treated on equal footing with Czech nationals and the provision stipulating the conditions to qualify for unemployment benefits do not contain any restrictions in this regard. The same applies for *Austria*; EU job seekers are treated as Austrians and have access to the same benefits. The *Finnish* system is also in line with the *Vatsouras* judgment. *Hungarian* law makes no distinction as regards the receipt of unemployment benefits based on the legal status of the migrant. In *Lithuania* unemployment benefits are available to nationals of other EU Member States as well, although there might

73 *Patmalniece v. Secretary of State for Work and Pensions* [2011] UK SC 11
74 *Genov and Gusa v. Minister for Social Protection & Ors* [2013] IEHC 340.
75 See: Case RÅ 1995 ref. 70.

be a problem as the applicant should have a work record of 18 months within the last 36 months (but insured periods acquired in other Member States are taken into account).

Bulgaria has not yet transposed Article 14(2) of the Directive and there is no reference to the right of residence over three months for job-seekers in the appropriate legislation. According to the *Law on Social Assistance*, allowances for job-seekers are considered 'social assistance', irrespective of the interpretation of the Court of Justice in the *Vatsouras* case that "benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24 (2) of Directive 2004/38". There is no case law relating to this issue.

In *Germany* the Vatsouras decision continues to raise discussions. The question has repeatedly come up, particularly in the context of EU citizens from Bulgaria and Romania applying for social benefits. Section 7(1) of the *Social Code II (SGB II)* continues to exclude the provision of social assistance to job-seekers. More specifically § 2 of the second sentence reads: 'Social Assistance shall not be granted to … 2. Foreigners whose right to reside within Germany is based only on the fact that they are looking for employment within Germany and their family members' (German: '*Ausgenommen sind ... 2. Ausländerinnen und Ausländer, deren Aufenthaltsrecht sich allein aus dem Zweck der Arbeitsuche ergibt, und ihre Familienangehörigen*'[76]). In 2012/13 diverging conclusions of German social courts have not yet provided a clear answer as to the compatibility of section 7(1) of the Social Code II (SGB II) with EU rules on free movement of workers and equal treatment. A growing number of social courts tend to leave this provision inapplicable, especially in decisions on interim relief. The Federal Social Court (BSG) decided in a judgment of 25 January 2012 that section 7(1) Social Code II (SGB II) should be interpreted narrowly insofar as the provision states that 'Social Assistance shall not be granted to … 2. Foreigners whose right to reside within Germany is based *only* on the fact that they are looking for employment within Germany and their family members'.[77] In the case decided, a Polish national had initially entered Germany as the child of Polish parents. Although she did not reside with her parents in one flat, the court does not rule the residence status of the parents, with regard to whom it was unclear whether they were workers/self-employed/residents with sufficient resources of their own, since the applicant would, in all three cases, have a residence right as a family member). The applicant only became an (unemployed) jobseeker after having lived in German for four years. The court concluded that she was, therefore, not covered by the exception in section 7(1) of the *Social Code II (SGB II)*, as she had entered Germany as a family member so that her residence in Germany was not only based on the fact that she was looking for employment. In short: section 7 is interpreted narrowly on the basis of national legal considerations, which, in effect, grant more EU citizens access to social assistance. Various other German courts have followed that latter line of argument, thereby accepting that EU citizens, including Romanian and Bulgarian nationals, are entitled to social benefits, if their residence right is based upon other reasons than the exclusive purpose to seek employment in Germany. If EU citizens possess a right of entry and residence on another legal basis, irrespective whether such reason existed at the time of entry or subsequently, the exclusion provisions of the Social Code II have to be interpreted restrictively and access to social benefits granted.[78]

76 See online at http://www.gesetze-im-internet.de/sgb_2/__7.html. In German: 'Aufenthaltsrecht sich *allein* aus dem Zweck der Arbeitsuche'.

77 BSG, Urteil vom 25.01.2012, B 14 AS 138/11 R.

78 See for instance Social Appeal Court of Baden-Württemberg of 16 May 2012, L 3 AS 1477/11, marginal note 55; Social Appeal Court Niedersachsen-Bremen of 11 March 2011, 13 AS 52/11 B.

However, there are also regional social appeals courts that in a number of cases have confirmed the compatibility of section 7(1) of the *Social Code II (SGB II)* with primary and secondary EU law, including Regulation (EC) No. 883/2004. It should be noted that these courts cover most of the larger regions.[79]

In *Ireland*, the effects of the *Vatsouras* case are still unclear. Although the Job Seeker's Allowance falls within the ambit of "benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market", the position of the Department of Social Protection continues to be unclear in this regard.

CONCLUSIONS

Not being discriminated against on the basis of one's nationality while exercising free movement rights as a worker is one of the fundamental principles of EU law. Based on the issues addressed in this chapter we can conclude that direct discrimination on the basis of nationality is extremely rare, and most issues brought to light by the national reports refer to indirect discrimination. Residence requirements are the most used criteria for restricting access to EU rights. Regarding working conditions, based on this report and previous ones, it is fair to say that most cases of discrimination concern EU-10 workers. The main issues identified in some national reports suggest that these workers enjoy worse working conditions and lower pay. A further point of concern is the issue of being properly informed about one's rights, which is mentioned as an area where more efforts could be made by Member State authorities. According to several national reports, assistance with understanding one's rights and accessing services in the host – Member State is being provided by charities (e.g., *Denmark*, *Ireland* and the *UK*). Although progress has been made in the area of employment in the public sector, there are still pending issues as some Member States have not opened their public service to EU workers.

The economic crisis has had an impact upon social rights more generally. In the context of EU workers and/or job-seekers and their capacity to access social benefits, including social assistance, the trend is towards stricter scrutiny by national authorities with a view to end residence. In many Member States, the administration of social protection is a competence of the municipalities. Several reports mention that sometimes this leads to problems for EU workers attempting to access social rights as not all municipalities are familiar with the applicable rules. Sometimes permanent residence in the municipality is required as a condition of access to benefits, which may limit the right of EU workers to access some benefits (e.g. *Finland, Hungary* and *Italy*). Finally, there is a notable increase in the number of questions referred by national courts to the Court of Justice in this area of law. This is a positive development, suggesting that EU law is engaged with and made use of by migrants and national authorities alike.

79 LSG Berlin-Brandenburg, Beschluss vom 27.04.2012, L 14 AS 763/12 B ER; LSG Berlin-Brandenburg, Beschluss vom 02.08.2012, L 5 AS 1297/12 B ER.; LSG Berlin-Brandenburg, Urteil vom 19.07.2012, L 5 AS 511/11; LSG Berlin-Brandenburg, Beschluss vom 10.05.2012, L 20 AS 802/12 B ER; LSG Berlin-Brandenburg, Beschluss vom 29.02.2012, L 20 AS 2347/11 B ER; LSG Berlin-Brandenburg, Beschluss vom 06.06.2012, L 29 AS 639/12 B ER, L 29 AS 640/12 B PKH; LSG Baden-Württemberg, Urteil vom 26.05.2012, L 3 AS 1477/11; LSG Baden-Württemberg, Beschluss vom 27.08.2012, L 13 AS 2352/12 ER-B; LSG Niedersachsen-Bremen, Beschluss vom 23.05.2012, L 9 LSG Rheinland-Pfalz, Beschluss vom 21.08.2012, L 3 AS 250/12 B ERAS 347/12 B ER; LSG Niedersachsen-Bremen, Beschluss vom 20.07.2012, L 9 AS 563/12 B ER; LSG Rheinland-Pfalz, Beschluss vom 21.08.2012, L 3 AS 250/12 B ER; Social Appeals Court (LSG) Niedersachsen-Bremen, Decision of 23.05.2012, L 9 AS 47-12 ; Social Appeals Court (LSG) Berlin-Brandenburg, Decision of 27.04.2012, L 14 AS 763-12.

CHAPTER V
OTHER OBSTACLES

Very few comments were made by national raporteurs under this heading in 2012-2013. Unless otherwise indicated, nothing was reported for Member States not mentioned in this chapter.

In *Finland* two legislation acts, the *Act on Unemployment Security* and the *Act on Job Alternation Leave* were singled out for comment. The first requires a disproportionate period of employment before the aggregation of periods worked and contributions made in another Member State for the purpose of calculating entitlement to unemployment benefits in Finland. The second includes very long qualifying periods and an uncertain legal nature.

In *Hungary* driving issues continue to be problematic. Where an EU citizen is temporarily resident in Hungary but maintains residence in another Member State and works partially outside Hungary, but elsewhere in the EU, the Hungarian authorities require the car to be registered in Hungary. There is a very fine distinction between this situation and the ones which have been considered inconsistent with EU free movement law by the Court of Justice. The police check in particular cars with number plates from other Member States to apply the national rules. There have been numerous complaints to the Ombudsman about this problem in recent years. Another problem in this country relates to the registration of addresses which is a legal requirement of anyone living in Hungary and is the gateway to social benefits. There appear to be problems in some municipalities which refuse to register nationals of other Member States on the basis of municipal decrees that the housing is inadequate. The consequence seems to be that EU workers from other Member States encounter obstacles to the exercise their right to equal treatment in housing. Once again complaints have been made to the Ombudsman.

In *Italy* the Constitutional Court has struck down a number of provisions of provincial law which discriminated against non-Italian nationals regarding residence requirement for support in language training. There has also been a successful challenge to discrimination against EU citizens in municipal fair rent arrangements. The transposition of Directive 2009/52/EC on sanctions and measures against employers of illegally staying third country nationals[1] does not appear to be fully consistent with Directive 2004/38/EC as third country national family members of EU citizens are not correctly protected. Finally, in Italy the new taxes on real estate and income from it continue to be contentious.

In *Malta*, there is no change to the derogation on the purchase of immovable property in that Member State which prohibits EU citizens from equality with Maltese nationals. However, this derogation is permissible under the TFEU.[2] The nationality condition for the exercise of the profession of notary has been removed. Following a legal challenge by the European Commission, Malta has changed the legal provisions which constituted a discriminatory calculation of work experience for teachers.

1 *OJ EU* 2009, L 168/24

2 There is a requirement of five years residence within the territory before an EU national may purchase property in Malta. This permanent arrangement was obtained by the Maltese government during the negotiation of its accession to the EU and is reflected in a Protocol annexed to Malta's EU Accession Treaty.

In the *Netherlands*, a legislative proposal is still pending which would require, i*nter alia*, EU citizens to have enough knowledge of Dutch for social assistance purposes where necessary to improve employability. Two decisions of the Dutch Board of Human Rights have upheld the right of EU citizens to non-discrimination in a consumer contract and in housing.

In the *UK* an extensive report on obstacles to free movement of EU workers and their families was published in 2013. The main problem area according to the research is a structural one – the continuing application of UK national law to EU citizens entitled to better treatment required by EU law.[3]

3 http://www.frictionandoverlap.ed.ac.uk/files/1692_executivesummarylowres.pdf. The executive summary can be found here with links to the full report.

CHAPTER VI
SPECIFIC ISSUES

FRONTIER WORKERS

The complex taxation issues of frontier workers in *Belgium* described in last report have not changed. Some parliamentary debate on the cost to Belgian society for workers taxed in a different state but using public services in Belgium took place during 2012. In a 2012 judgment[1] the Belgian Supreme Court ruled that EU law does not imply that, where the income of a taxpayer is partly taxed in the state of residence and partly taxed in the state where the salary is earned, on the basis of a convention aimed at preventing double taxation such as in the agreement between Belgium and the Netherlands, the tax deductions for child-care and "titres-services" may always be entirely set off against the tax due in the state of residence as if the income tax had been entirely imposed in the state of residence. An amendment of the tax legislation in *Finland* from 2012 has an impact on frontier workers. It permits tax deductions for work carried out in the person's home and workers in Finland are entitled to these deductions independent of where the home is located or in which country the company carrying out the deductable home work is registered. Frontier workers in *Ireland* are required to pay income tax in the country where they earn their income, but their ultimate tax responsibility is with the country where they live and an annual self-assessment of tax liabilities is required. Ireland has double-taxation agreements with all EU Member States, including Croatia. Generally, a person who is resident in Ireland and commutes daily or weekly to a work place in another country where tax is deducted may qualify for 'Trans-border Workers Relief'. This reduces the tax liability in Ireland, taking account of the tax the person has paid abroad. Where 'Trans-Border Workers Relief' applies, the 'Universal Social Charge' is not charged on their foreign employment income. During 2011 the Irish Revenue capped the USC at 4% for cross-border workers holding a Northern Ireland Medical Card, however, following an investigation of the relevant EU legislation and discussions with the Health Service Executive, this cap is no longer in place. As of January 2012, cross-border workers living in Northern Ireland, as holders of Northern Ireland Medical cards, will no longer have their rate of Universal Social Charge capped at 4%, instead, if their income is high enough, they will be charged the full rate of 7% in line with Irish residents.[2]

Non-permanent residents who receive income from employment in *Lithuania* have to pay income tax in Lithuania irrespective of whether they return daily to the country of residence or not. Income tax for income received in Lithuania could be paid in the country of residence only when there is an agreement between the two countries to avoid double taxation. In *Latvia* the tax law is unclear on whether frontier workers enjoy the same tax advantages as workers residing in Latvia. Frontier workers are considered resident taxpayers and their income subject to deductions for themselves and their dependents. The Law on Income Tax does however not specify if an employee has a right to income tax relief if his/her dependants reside in another EU Member State and regulations on tax deductions do not encompass frontier workers. In the UK, frontier workers from other countries are entitled to a Working Tax Credit under the conditions that they live in another country and perform their actual work in the UK or they live in the UK, but travel abroad to work and return to the UK

1 Case n° F.10.0115.N/1.
2 http://www.revenue.ie/en/practitioner/ebrief/archive/2011/no-812011.html.

regularly. If frontier workers are away in the country of work for more than eight weeks at a time, their Working Credit will stop.

In *Austria* there is a residence requirement for social assistance benefits for frontier workers.. There is no special law on frontier workers in *Bulgaria* and it is unclear from existing case law whether there is a residence requirement for claiming social benefits. So far the *Hartmann* case has not been referred to in Bulgarian courts. In *Croatia* there is no specific law on frontier workers. In the *Czech Republic* access to social assistance and social services depend on residence in the country. EU citizens are however entitled to social benefits pursuant to Regulations (EEC) No. 1612/68 (492/2011) and (EEC) No. 1408/71 (883/2004). Provisions of the State Social Support Act refer to the directly applicable Regulations, therefore the question of granting a social benefit to a family member of a frontier worker would probably be resolved in conformity with the *Hartmann* judgement. There are no special regulations concerning frontier workers in *Estonia*. To be entitled to social assistance a person has to have the right of residence (permanent or fixed term). In *Finland* issues concerning frontier workers arise primarily with Sweden and Estonia. As regards frontier workers from Sweden, they are covered by arrangements concerning the free movement of labour in the Nordic countries that address social security and taxation issues. No such arrangements exist with Estonia. In *Germany* residence is required for access to social benefits with very limited exceptions. According to the Social Code II, a person who has previously worked in Germany may export their social benefits, including job seeking benefits, to other EU Member States. In 2012 the Saxonian Administrative Appeals Tribunal decided that an EU citizen who does not qualify as a worker within Germany but worked in the Netherlands for a while cannot claim a residence status under the German Free Movement Act. He could however apply for a residence permit as a job-seeker in Germany or as an economically inactive EU citizen with sufficient resources provided he meets the criteria which the German law require for either category in line with EU law.[3] In *Greece* frontier workers are entitled to social allowances depending on employment with one exception. A law on pension schemes from 2011 contains a residence clause. Pensions are only paid to those who have permanent residence in Greece. The main issue of frontier work arises in relation to Bulgaria and there are no specific administrative or legal schemes in addition to the EU rules to address the situation.

In *Italy* there is a residence requirement for access to social assistance benefits provided for by regional and municipal authorities. Social assistance laws in *Latvia* require permanent residency thus EU citizens and their family members are not entitled to many state flat-rate allowances, social assistance and social services even if they are employed in Latvia which runs contrary to Article 24 of Directive 2004/38/EC and Article 7(2) of the Regulation 492/2011. In *Lithuania* family benefits may be paid to a frontier worker based on the place of work and not residence, an issue, such as in the *Hartmann* case, should not arise there. The Council of State in *Luxembourg* has issued an opinion on the system of *chèques-service.* This system allows residents to apply with these cheques for services for their children, such as sports or places in kindergarten at a low cost, because of public subsidies. A residence clause in order to benefit from these subsidized services could possibly be held to be discrimination, but they are being granted not by the national government, but municipalities. The main issue regarding frontier workers in *Luxembourg* is access to study grants. It will be addressed in the section below on study grants. The Dutch Social Assistance system does not provide the possibility of additional social assistance benefits for frontier workers who work

3 Sächsisches Oberverwaltungsgericht (OVG), Decision of 20.08.2012, 3 B 202/12.

in the *Netherlands*, but earn less than the social minimum. According to the Commission this is not in line with the equal treatment provision of article 7 Regulation 492/2011. As a follow up to the *Renneberg* judgement outlined in last report, the State Secretary of Financial Affairs published a new decision in June 2012 that those EU citizens, who earn more than 90 % of their income in the Netherlands, can deduct the mortgage interest they pay for the house they own in another Member State.[4] The above mentioned decision of the Appeal Court is being challenged at the moment before the Supreme Court. The Advocate General holds the opinion that the right of choice for foreign taxpayers is acceptable.[5]

There has not been any change in *Poland* where social benefits are residence related. According to the Voivode Administrative Court in Wroclaw in a judgement from 2009, it is not sufficient for an applicant for social benefits under the Act on Social Assistance from 2004 to be only resident in Poland. Poland shall also be the place where his/her center of vital interests is located.[6] For access to higher education residence is required. However a non economically active family member of a frontier worker could access higher education without the right to financial benefits. In *Romania* EU citizens who are frontier workers are assigned a personal identification number without having to prove that they are resident in Romania and have access to social benefits. The requirement for residence in social security legislation is only applied to third-country nationals. In *Slovakia*, tax benefits for children are not connected with residence any more but an income criterion is applied where 90 % of the income of the person claiming tax benefits has to come from Slovakia. Almost all social benefits provided for in Slovak legislation are conditioned on permanent residency, individuals in similar position as in the Hartmann case would therefore not be entitled to them in Slovakia. In *Slovenia* there are no specific administrative or legal rules concerning frontier workers, in addition to the EU rules and no information on practical problems. All frontier workers living in France or Portugal and working in *Spain* are excluded from the social assistance measures outlined in the Spanish Social Assistance Guide 2012 because they are not registered as residents in Spanish territory or in the Autonomous Community territory.

In a seminar held in 2012 which focused on cross-border work between *Sweden* and *Denmark*, situations where living in one state and working in the other could cause difficulties with access to social entitlements and labour market support were identified. The most obvious problems are coordination problems when a person is living in one state and is employed part-time in a neighbouring state. Furthermore, if the possibility of financial support for participation in activation measures for unemployed people in Sweden is linked to how long a person has been out of work and has been participating in other activities, problems may arise if a person has been a worker or is a job-seeker in Denmark but not in Sweden. Hence, there may be a number of "combined" situations of residence, working periods, periods of unemployment etc. where the right to access to social entitlements may be unclear.

A 2010 decision of the Portuguese government to toll some highways which affected Spanish frontier workers was criticized in the media in *Portugal* and the European Commission opened an infringement procedure against Portugal while it considered that the exemptions, as well as the payment methods, were discriminatory against non-residents in Portugal and violated the "Eurovignette" Directive (2006/38/EC). On October 2012, the Portuguese government revoked the exemptions for residents and created new electronic toll payment methods for non-residents in Portugal. For that reason, on 21 March 2013, the Commission

4 *Staatscourant* 2012 nr. 11800, 14 June 2012.
5 Opinion Advocate-General 6 March 2013, LJN: BZ5779, Hoge Raad , CPG 12/02201.
6 Judgment of Voivode Administrative Court in Wrocław of November 5, 2009, file no. IV SA/Wr 283/09.

declared that it was closing the infringement procedure because it considered those measures as non-discriminatory.

SPORTSMEN AND WOMEN

The imposition of transfer fees and quotas for foreign players continues to be applied in many states. Different trends are notable, while some states are abolishing quotas for home grown players other states are moving towards restricting the number of foreign players further, in most cases with a reference to preserving the national team.

In *Austria* and *Estonia*, there are no legal rules on sporting frameworks. In *Bulgaria* the rules on nationality quotas are adopted by each sports federation individually and approved by a government agency. In *Croatia*, the Sports Act gives sports federations the power to regulate the status of professional athletes. In the *Czech Republic*, *Latvia* and *Slovakia* the organization of sporting activities is generally left to the clubs with little state intervention, even in professional sports

In *Belgium* there were two court cases during 2012 that concerned rules of transfer between clubs. In one of the cases a club in the Belgian Football Federation prevented a player from changing clubs while his request was filed after the deadline stipulated for such a request. Relying on the *Lehtonen* judgement[7],the player and his new team claimed that the transfer rule applied creates an obstacle to the free movement of workers. On 12 September 2012, an interim judge granted the player an interim order on the grounds that there is a *prima facie* violation of free movement rules with regard to the *Lehtonen* case.[8]

As regards transfer fees, in *Bulgaria*, new rules were adopted in 2012 for transfer of basketball players that do not discriminate against players with regards to nationality. The rules of the football association in the *Czech Republic* regarding transfer of players prevent a young player (15-18 years of age) from signing a contract with a club other than the one that trained him, unless the club that trained him does not offer such a contract. No changes have occurred regarding transfer fees in football and basketball in *Denmark* since 2010. A possible equivalent of transfer fees are classified as training or solidarity compensation in football and basketball. There is a fixed fee for transfer in Danish volleyball and education compensation in handball which can be as high as €24,000. In *Hungary* the transfer of players in various sport areas depends on the consent of stakeholders.. The problems described in depth in the 2010 report in *Italy* are still occurring in football, basketball, volleyball, handball and rugby. The discriminatory transfer fees in ice-hockey in *Latvia* that were described in last year's report are still in place but similar fees in volleyball have been abolished in 2012. In football participation fees depend on the number of foreign players with an ascending scale the larger the number of non-Latvian players per club. In *Lithuania* potential transfer fee equivalents occur in basketball in the form of training fees which are substantial and differential if the players are not Lithuanian. There are also very substantial transfer fees in place. In *Portugal* differential and disadvantageous registration fees apply depending on whether the transfer is international or national in football. In *Sweden* reimbursement of training costs forms part of the transfer arrangements in football with a very substantial hike in the costs as players become adults.

7 CJEU, 13 April 2000, C-176/96.
8 Reported in J.L.M.B., 2012, n°38, p. 1818.

As regards the issue of quotas, in *Belgium* the "Ethias League" in Basketball applies a quota; at least five out of 12 players must be Belgian. In *Bulgaria* there are quotas on EU nationals (other than Bulgarians) in basketball. There are also problems in ice hockey where only Bulgarians or foreigners with permanent residence may compete with no exception for EU nationals. In *Croatia*, EU nationals are not considered foreign players in hockey, basketball and football, therefore the quota for foreign players does not apply to them. In volleyball and handball there are no quotas for foreign players. A quota for home grown players is applied for the football premier league competition; at least four must play with a team in matches. A player is considered home grown if fulfilling certain requirements regardless of nationality. In the *Czech Republic* quotas are applied in matches in ice-hockey and football, they limit the number of non citizens that can take part. No changes have occurred regarding quotas for home grown players in football and ice-hockey in *Denmark*. The plans to introduce a quota in handball have not materialized yet, probably due to awareness of the limitations of such rules due to EU rules on free movement. In *Finland* the informal quota system in basketball, limiting the number of foreign players season by season through a 'gentlemen's agreement' continues. The quota for foreign players in volleyball includes EU citizens but not in football. In *France* a quota is applied in Rugby and the French handball association is reported to be considering the option of taking up a quota to maintain a strong national team. A law on ethics in sport and the rights of athletes passed in France in 2012 includes provisions for the establishment of quotas of locally trained players as well as the introduction of a salary cap in all sports.[9]

In *Hungary* the notion of a national player is now reported to include EU citizens although it is not explicitly stated in the statutes of the various sports federations. In *Ireland* a strategy that was introduced by the Irish Rugby Football Union in 2011 sets a quota of one foreign player per team, furthermore, from the 2013/14 season clubs will not be permitted to renew a contract of a foreign player or recruit a foreign player to replace one whose contract has ended. In *Italy* quotas on the number of foreign players are in place in most sports, in handball the number of foreign players not trained in Italy is decided on an annual basis and a decision has been made that only one player will be allowed in 2013/14. In ice-hockey, the categorization of players into A and B groups in respect of which quotas apply results in discrimination against EU workers. In *Latvia*, new rules for the 2012/13 seasons in football and from the 2014 season in ice-hockey abolish quotas for foreign players. New regulations for 2013 have not eliminated the quotas for foreign players in football in *Lithuania*. Restrictions on foreign players in handball have however been abolished. A complaint concerning the use of two Serbian players by a team in *Luxembourg* brought to light the sensitivity of the issue of home grown players. There was doubt about whether the players were still licensed to play in Luxembourg. In *Malta* there are ongoing quotas in football based on the 'home grown' rule. The changes in rules of the basketball authority to permit more EU national players to compete mentioned in last year's report do not seem to have occurred yet. In the *Netherlands*, *Poland* and *Portugal*, there have been no changes from last year regarding quotas in various sports. In *Slovakia*, the number of players who are EU citizens is not restricted in football, handball and volleyball. In ice-hockey there is a quota of two players with citizenship other than Slovakian in games. In *Slovenia* there are no restrictions on foreign players in football but in handball, basketball volleyball and ice-hockey there is requirement of a certain number of home grown players. In *Spain* quotas are still in existence in basketball, handball and volleyball. Quotas apply in some areas of basketball in the *UK*

9 C. sport, Article. L. 131-16, 3 created; Law no. 2012-158, Article 2.

while home grown requirements carry out a similar role in football. In rugby there are quotas which affect EU citizens.

The issue of residence arises in a few states. In *Bulgaria* while there has been a change in the volleyball rules on quotas this has been to make them even more exclusive and there is no exception for nationals of other Member States unless they have permanent residence. In *Denmark* there is a two year residence requirement for some volleyball tournaments. In *Greece* only nationals can be employed as coaches for most sports teams, in the case of football, a permission of the General Secretary for Sport is needed before a non national can be employed. The rules in force for Basketball coaches also provide that a non Greek who is dismissed from a club cannot be employed by another team during that sports season. In *Romania* the statutes of sports organizations restrict membership in the managing boards of sports organisations to Romanian citizens.

MARITIME SECTOR

As outlined in last years' report, there is no nationality discrimination in the maritime sector in *Austria*, *Belgium*, *Cyprus*, *Estonia*, *Germany*, *Hungary*. Bulgaria, *Malta*, *Poland*, *Portugal and Romania* also belong to that group of countries. As a follow up to the abolition of the nationality requirement for captains and chief engineers on ships *Bulgaria* adopted an ordinance in 2012 which regulates the procedure for recognition of the right of EU citizens, acquired in those Member States, to occupy positions in ships flying under the Bulgarian flag.

Access to Posts:

Due to numerous public powers assigned by law to the ship masters, the Maritime Code in *Croatia* stipulates that the ship master of a Croatian ship has to be of Croatian citizenship. The Croatian nationality requirement does not apply to other crew members (e.g. chief mate). The Act on Sea Navigation in the *Czech Republic* provides that a captain of a Czech ship must be either a Czech citizen or a citizen of an EU countries. He/she must however prove certain knowledge of the Czech language so that he/she can exercise the relevant powers given to him/her by the relevant law. In *Finland* labour legislation and collective bargaining agreements apply to all persons working on ships flying under the Finnish flag regardless of nationality, discrimination is reported to occur in practice. In fear of harmful consequences, the victims of discrimination reportedly only rarely instigate legal proceedings against their employers. Although *de jure* nationality requirements are not applied in Finland, in practice higher positions are often reserved for the nationals of the state under whose flag the vessel flies. In *Greece* posts are open to EU citizens and Greek nationals equally but a condition of 'sufficient knowledge' of the Greek language as a condition for employment in the posts of master and his substitute (chief mate) in order to communicate with Greek authorities and to understand the Greek maritime legislation amount to an obstacle to equal access. Although there is no nationality requirement in *Latvia*, knowledge of the Latvian language is required for captains, navigators, mechanics and pilots. The requirement of knowledge of the Lithuanian language continues to apply to seafarers (captains or at least one of the ship's officers) in *Lithuania*. In *Spain* a Royal Decree in force since 2011 stipulates that the captain and first mate of domestic vessels must be nationals of a Member State of the European Economic Area, except in cases where it is

established by the Maritime Administration that positions that "involve routinely effective exercise of public powers that do not represent a very small part of their activities" must be held by persons with Spanish nationality. There is a concern that there is no clear definition of what the public powers referred to are.

Tax and Working Conditions

Croatian legislation such as the Constitution, the Anti-Discrimination Act and the Labour Act, apply on Croatian ships and prohibit different treatment of crew members on the basis of nationality. Furthermore, national collective agreements apply to all crew members independent of nationality. Pursuant to Article 128 of the Maritime Code, a crew member in international navigation, regardless of the ship's nationality, who has a permanent residence or a temporary residence in Croatia is liable to pay income tax in Croatia based on earnings from work aboard a ship in international navigation. They are also liable for compulsory social insurance contributions. The issue concerning discrimination in taxation and compulsory health insurance of seafarers in *Lithuania* outlined in the 2012 report persists. Seafarers working on Lithuanian/EU/EEA flagged ships are not subject to personal income tax, while those sailors who work in ships of third countries have to pay income tax in the amount of 15%. The issues concerning Lithuanian workers being treated as third-country nationals on ships flagged in Norway and Germany also remain unsolved. A new collective agreement on the wage levels of seamen was concluded in May 2013 in *Sweden*. The agreement does not contain any discrimination based on nationality.

With regard to the Implementation of the ILO Maritime Labour Convention 2006, the Department of Transport in *Ireland* launched a consultation with stakeholders on the implementation of the Convention into Irish law. The Convention has not yet been ratified but legislation to enable its ratification is reportedly being prepared by the Ministry for Transport, Tourism and Sport. *Lithuania* has ratified the ILO Maritime Labour Convention in June 2013.. In June 2012 the Commission requested the *United Kingdom* to fulfil their obligations under EU law by implementing fully into national law a 2009 Directive on protecting workers from hazardous chemicals in the maritime sector. At the time of writing not information is publically available on the UK government's response.

The trade unions that brought forth the court case concerning discrimination against Polish seafarers in *Denmark* (see 2012 report) withdrew the case from the Supreme Court after the court found that there was no requirement for submission of the questions to the CJEU for a preliminary ruling.

RESEARCHERS AND ARTISTS

In the Flemish Community in *Belgium* financial aid for film production is conditioned on the company having their headquarters or a permanent agency in Belgium. Individuals must be residents or working in an EU country, irrespective of nationality, to be eligible. In the French Community recognition and funding for corporations and individuals working in the field of performing arts, is made conditional upon, *inter alia*, their residence in the French speaking region or bilingual region of Brussels capital and undertaking activities which are significantly aimed at the public of the French Community. In *Bulgaria*, the 2010 law concerning academic staff only refers to access to PhD studies when addressing equal treatment between Bulgarian and other EU nationals. In *Croatia* foreign EEA researches and

artist are considered to have the same legal status as Croatian researchers if affiliated with a Croatian research institution or university and then they are considered workers and have equal social rights. If they are affiliated with a foreign institution (and stay there employed) they can be treated as posted workers. If a foreign researcher wants to get employed he/she must apply for professional recognition of higher education and if she/he wants to continue education he/she must apply for academic recognition of higher education. To gain the status of a scientist and get a chance of permanent employment in the research or university institutions it is also important to enter the register of researchers and be assigned an academic title. No issues on equal treatment of researcher or artists have been reported in the *Czech Republic*. In *Denmark* there are no rules on the interpretation of the concept of a worker that apply specifically to researchers and artists.

In *Finland* the legal status of researchers is determined by their affiliation, if he/she has a contract with a Finish institution, they are considered a worker, if the contract is with a foreign institution they are treated as a posted worker. Nationality conditions are not applied when allocating research funding in Finland. In *Hungary* artists with EEA nationality have free access to the labour market but taking up occupation as an artist is dependent on providing a diploma.

In *Ireland* researchers from any country have access to various post graduate scholarships as long as they maintain their principle residence there. In *Italy* an "employment bonus" programme was initiated in 2012. It encourages employment of highly qualified people in the research sector by offering a 35% tax credit to the employer. Eligibility requirements are that the researcher has a degree obtained either in Italy or abroad and there are no nationality restrictions. A EU citizen who wishes to perform academic or scientific activities in *Latvia* must have his/her diploma recognised. For permanent posts at the University of Latvia knowledge of the official language is reported to be a potential obstacle for other than Latvian nationals. The preferential treatment given to national academics in *Lithuania* outlined in last report continues to be seen as an obstacle to access to posts for researchers from other EU countries. In *Portugal* and *Slovakia* there are no specific regulations regarding artists and researchers. In the *United Kingdom,* access to research funding is primarily determined by affiliation with a UK based or recognised institution.

Little change has occurred concerning taxation of researchers and artists in the Member States during the reporting period. Artists are subjected to payment of Withholding Tax in *Denmark* and the *United Kingdom* but no such tax is applied in the *Netherlands* for artists from countries with which the Netherlands have concluded a bilateral tax agreement. In 2013 the Performing Arts Employers Associations League Europe (Pearle) began a campaign to put a stop to double taxation of artists working within the EU, claiming it is a "major hindrance" for the arts sector. The problem for UK artists is that although performers can offset the income tax collected when working in a foreign country by applying for a tax credit against their tax bill in the UK, this is often a very complicated procedure. This tax credit is also only available up to the rate of income tax in the UK. UK artists who seek to establish their expenses and net income earned in other Member States have trouble in the UK, according to the Association, because of difficulties in communicating with foreign tax offices and the availability of translated documents. The tax scheme in place in *Ireland* that allows for exemption of income tax for sale of work for artists for up to 40.000 Euros per year and requires the artists to be resident in Ireland is being reviewed by the Revenue Commissioners with regards to giving an advanced opinions regarding work of prospective claimant's resident abroad. In *Lithuania* one of the main problems concerning foreign artists is reported to

be taxation. They are subject to standard VAT rates after reduced VAT rates were abolished and this change is considered to reduce the possibility of companies to attract foreign artists. An "expert tax" was introduced in *Sweden* in 2012. The exception on tax payments for foreigners who come to Sweden to work as experts could have an impact on the taxation of researchers, for example if they earn more than around 9,500 Euros per month.

ACCESS TO STUDY GRANTS

Some significant developments have occurred during 2012 and 2013 regarding access to study grants as a follow up to the CJEU judgment in *Commission* v. *Netherlands* (C-542/09).

The Danish Agency for Higher Education and Educational Support informed of the fact that previous cases resulting in refusal of study grants on grounds of the EU citizen not having *consecutive registered stay* in Denmark, or on grounds of a spouse or registered partner *not being a spouse of an EU citizen being a worker or self-employed in Denmark* may be reopened. The same is true for cases resulting in refusal of study grants to EU citizens engaged in *real and genuine employment* of a minimum of 10-12 weekly working hours or being self-employed. Furthermore, the applications on study grants suspended since January 2012 during the Court of Justices processing of the *L.N. case* (C-46/12) will now be processed by the Agency. The Danish government decided in September 2013 on the consequences for Danish legislation on study grants for study programmes abroad of the recent judgments from the CJEU about the application of affiliation criteria in relation to study grants in *Commission v. Kingdom of the Netherlands* (C-542/09), *Giersch* (C-20/12) and joint cases *Prinz and Seeberger* (C-523/11 and C-585/11).[10] The government informed the Danish Parliamentary European Committee that as it is the assessment of the Danish government that the 2-out-of-the-past-10-years' residence criterion cannot stand alone, the government introduced additional affiliation criteria, such as family members, school, work and financial ties; supplementing the 2 years' residence criteria in practice – apparently based on the Court of Justice's suggestions to the Member States in the abovementioned judgments.[11]

The *Dutch* government has recently withdrawn its 'three out of six' residence rule as a condition for access to study grants. At the same time it opened the possibility to put a maximum on the amount of students who can apply for a study grant to study abroad. Furthermore, the minimum threshold to be classified as a migrant worker will be altered on 1 January 2014 from 32 hours worked in a month to 56 hours worked in the month. If a student works 56 hours or more per month the Department of Education will assume that he is a migrant worker himself and thereby entitled to full study grants in the Netherlands. It is doubtful whether this 56 hours requirement (as the corresponding 40% requirement in the Alien Circular 2000) is in conformity with the "genuine and effective" jurisprudence of the CJEU.

Case C-542/09 is seen to be likely to affect the requirements of the *Swedish* student aid system targeting EU citizens' family members when the primary person is a frontier worker having residence in another Member State but working in Sweden. The Swedish State authority in charge (CSN) has changed the procedures for examination of the residence re-

10 CJEU judgments of 14 June 2012, 20 June 2013 and 18 July 2013.

11 Redegørelse, Konsekvenserne af EU-domme om ret til uddannelser i udlandet, 12 September 2013, Europaudvalget 2012-13, EEU Alm. del, Bilag 561.

quirement in the context of studying abroad. So far there is no administrative practice confirming the concrete rules that apply.

In response to the residence criteria for granting study grants to students having been found discriminatory to frontier workers and their family members, the government of *Luxembourg* voted on new legislation in July 2013. The law abolishes the residence criteria but imposes instead a requirement of minimum 5 years of work in Luxembourg by one parent of a student in order to be a beneficiary of such grant.

In relation to the joined Cases C-523/11 and C-585/11, *Prinz*, on financial support for studies abroad that was pending before the CJEU at the time of the writing of the report, *Germany* argued that the rule of requiring residence of three years out of six before applying for such a grant was imposed for two reasons. Firstly, to address the risk of an unreasonable financial burden which might have effects on the overall level of assistance available ('the economic objective'), secondly, to identify those who are integrated into German society and to ensure that funding is awarded to those students who are most likely to return to Germany following their studies and contribute to German society ('the social objective'). In her opinion published in February 2013, Advocate General Sharpston rejected the claim of the German government, that these rules are justified under Art 18 TFEU.

In the French community in *Belgium* students need to be resident in the country or one of their parents needs to be or have been employed there in order to access study grants. In the Flemish community access is dependent on the EU national having worked there for two years and on 31 December of the relevant academic year have worked for at least 12 months for at least 32 hours per month. In *Bulgaria* EEA nationals are not excluded from state subsidized scholarships according to the Law on Higher Education, a Government decree on study grants however sets residence as a prerequisite for the award of study grants. In *Croatia* a tender for study grants published in 2012 sets Croatian citizenship as a condition, this practice is expected to be changed soon to include EEA nationals. In the *Czech Republic* all students, including EU nationals and their family members and TCN students, have equal access to study grants and have the right to scholarships granted to students for outstanding achievements or based on a strenuous social situation and in other cases worth special consideration. In *Estonia* EU citizens have equal access to study grants to Estonians. In *Finland* no changes have occurred in 2012-2013 and study grants for EU citizens and their family members are still conditioned on residence. EEA and Switzerland citizens have equal access to study grants on the basis of social situation in *France*. There are however some specific requirements for family members of EU workers who are not resident in France regarding amount of work, minimum stay and integration into French society. In *Germany* EU workers and their children can claim study grants on the same footing as nationals but other EU citizens are requested to obtain permanent residence in order to be eligible. The issue was addressed by the Administrative Appeals Court of North Rhine Westphalia in 2012.[12] The Court admitted an appeal against a decision by an administrative court rejecting a claim for a study grant of a German national who did not have residence in Germany. The Appeals Court noted however that a residence requirement may be a legitimate ground for rejecting access to social benefits in order to avoid an undue overburdening of the system. In *Greece* permanent residence is required for other than workers to access study grants. The Greek Scholarship Foundation requires Greek nationality for access to scholarships. The Greek Ombudsman expressed in February 2008 the opinion that the conditions should be abolished to include

12 OVG NRW, Decision of 28.02.2012, 12 A 1510-11.

EU citizens who are workers, self-employed persons and long term residents but no change has occurred as a result of that yet.

In *Ireland* a Student Grant Scheme was put in place in 2011 to replace the existing four main support schemes. To qualify a student must be ordinarily resident there (for at least three years out of five prior to the commencement of study) and have been accepted to pursue or be pursuing, an approved course at an approved institution. Furthermore, in order to qualify for a grant, they must be an EU/EEA or Swiss national, or a family member of any of the foregoing. In *Latvia* residence is required for access to study grants. In *Lithuania* a scheme for study grants in the form of state backed loans was introduced in 2009, EEA nationals who are workers and self employed and their family members have equal access to the scheme. EU citizens and their family members who have been resident in Lithuania for three months have access to scholarships granted on the basis of social circumstances. In *Malta* the requirement to access maintenance grants for post-secondary, vocational and university studies is to be a Maltese citizen, having at least one parent with Maltese citizenship or having resided in Malta for a period of not less than five years before the starting to study. In *Poland* access to study grants for EEA and Swiss nationals and their family members is conditioned on that they both reside in Poland. In *Portugal* permanent resident status is one of the eligibility requirements for access to study grants and social study grants. The right to receive a social scholarship in *Slovakia* is conditioned on the applicant, an EU worker or his/her family member, having permanent residence in Slovakia. The new Scholarship Act that will enter into force in *Slovenia* on January 1st 2014, proposes to retain a five year residence requirement for EU nationals. Groups that will have access without residence are EU workers and frontier workers, employed or self-employed and their family members. To access study grants in *Spain* there is a requirement of residence of between 2-4 years or that the parents of the student are workers in Spain.

In *Lithuania* the practice of 'study grant agreements' that contain an obligation for a recipient of such a grant to work for a specific employer for a period of three years after graduation has been introduced. These programs are based on the Law of Higher Education and Research and on Order No. V-2487 of 20 December 2011 of the Minister of Education which entered into force on 1 January 2012. The order provides for special state funding for study programmes, usually in areas where Lithuania lacks specialists. In 2012, a total of 140 study places in programmes specially funded by the state were allocated to Lithuanian higher education institutions. In 2013, a total of 276 such study places were distributed to universities (around 100 of these places are for preparation of police officers, 32 for public health specialists, 24 for agriculture sector, 12 for sports, 6 for textile and additional 125 grants for arts. These types of programs have been in place for arts studies for four years already. The above mentioned Order provides that a student who receives funding based on this grants scheme and fails to fulfil her/his working obligation shall return the funds spent for the studies to the state budget. For students of the Lithuanian War Academy the work obligation is 5 years after graduation and they may need to compensate the academy for the studies funded if they terminate their studies or refuse to sign a professional contract after graduation without serious reasons or circumstances that are beyond the student's control. The then Minister of Education stated in 2008 when a discussions about introducing such schemes arose that Lithuania belonged to the EU and that it was out of the question to introduce such limitations.

YOUNG WORKERS

Although unequal access on basis of nationality is not reported to be a major issue in *Belgium*, there are conditions related to activation measures to assist young people out of unemployment that could raise questions as to their compatibility with EU rules on free movement of workers. Among these is the requirement to complete six years of studying at an authorized Belgian educational institution to be eligible. The *Bulgarian* law from 2010 on employment promotion contains special measures for young workers. There is no residence based criteria for eligibility but a requirement of registration as a job-seeker at the local employment office of the Employment Agency at the Ministry of Labour and Social Policy. As of July 2013 around 20 new measures to reduce the unemployment rate in particular of young people, have been put in place in *Croatia*. Those who are registered as unemployed with the Croatian Employment Service can benefit from the measures, EEA and Croatian nationals equally. In *Denmark*, EU citizens who are minors and wish to obtain a registration certificate as a worker must present proof of the nature of the work, information on with whom he/she will reside in Denmark, a statement of income and expenses in connection with private accommodation and an original declaration of consent from the person(s) having parental rights and responsibilities. Two bills providing for social assistance reform were adopted in June 2013 in Denmark. They aim at granting educational assistance to young unemployed persons without education and eligibility does not seem to be conditioned on nationality. Most employment stimulation measures are open to all young workers regardless of nationality in *Finland*, for some measures though, *de facto* residence in Finland is required in practice which constitutes indirect discrimination. In *France* there are no specific legal rules concerning young workers. Programmes in *Hungary* to support young holders of diplomas to obtain work experience do not discriminate on the basis of nationality. Youthreach, a programme exclusively directed at unemployed young early school leavers in *Ireland* gives nationals from other EU Member States the same opportunity of access as Irish nationals. Adolescent workers can only work in *Latvia* subject to limitations on the number of hours and specific pay scales, where both parents have registration certificates or permanent certificates as EU workers.

Measures to tackle youth unemployment in *Lithuania* that ended in the autumn of 2012 have been replaced with similar measures that provide compensation to employers who employ young workers in their first job. These measures are open for EU citizens in principle but language requirements are reported to be an obstacle to access for assistance. Additionally, the requirement to obtain a residence certificate after 90 days in the country constitutes an obstacle to EU citizens while such certificates are only issued if the person is employed and a person can only become employed if he/she possesses such a certificate. In *Poland* employers who employ young workers are provided with incentives in the form of reduced social contributions. These programmes do not have a nationality requirement. The Government of *Spain* established in 2012 a subsidies programme to reduce unemployment among young workers. Those who are nationals of EU countries or reside legally in an EU country are eligible. Measures in force in *Sweden* to tackle youth unemployment only require that the person be registered as a job-seeker and are open to all EU citizens. The programme reported on in last year's report regarding providing tax reliefs to employers who employed young workers has not been successful while labour market parties did not manage to conclude collective agreements on the matter.

CONCLUSIONS

In several countries where there are no requirements for residence in force in order to access posts in the academic sector, maritime sector or measures to address youth unemployment, requirements for knowledge of the national language are reported to be an obstacle for equal access of EU nationals from other countries. Trends in opposite directions with regards to quotas for the number of foreign players allowed in sport teams are detectable in the Member States. While the limitations have been lifted to include EU citizens on equal basis with nationals in various countries, a number of countries have introduced significantly stricter rules in the last year, even limiting the number of other than 'home grown' players to one. So far changes on the national level in response to the CJEU judgement in *Commission* v. *Netherlands* (C-542/09) are limited to a few countries. The responses have been both positive and negative. Some countries have reacted, or are planning to, by replacing the requirement for residence by other requirements that would limit the number of persons that could be eligible for the grants. The argument being that the system cannot be allowed to become 'overburdened'.

In general there have been very few changes during the reporting period in national legislation that impose a residence requirement or other obstacles to EU citizens and are contrary to the EU rules on freedom of movement of workers.

CHAPTER VII
APPLICATION OF TRANSITIONAL MEASURES

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS

1.1 Transitional measures in place

Not a single Member State imposes transitional measures on workers from the EU-8 Member States. As reported in the 2011-2012 European report special arrangements are still in place in *Malta*. Case law addressing the position of EU-8 workers, who had to register until April 2011, has been included in the *UK* report. The *Austrian* rapporteur notes that according to the information provided by the Federal Minister of Work during a press conference on May 7, 2012, EU-8 workers have mainly replaced 'old' immigrants and are mainly active in the border regions with the Czech Republic, Hungary, Slovakia and Slovenia where they work as frontier workers. The 26 000 EU-8 workers have contributed € 350 Million towards the Austrian tax and social security system.

For the purpose of monitoring the employment market with a view to anticipating potential disruptions to the labour market by an inflow of EU-workers that may put a strain on its labour market, *Malta* maintains an employment licence system. Employment licences are issued automatically and may, in no way, operate as a pre-condition for EU-workers to take up employment in that Member State. The fees for an employment licence have not been changed: € 58.23 (new employment licence) and € 34.94 (extension of an employment licence).

The *Hungarian* rapporteur notes that the Swiss authorities have introduced a yearly quota (2000) for settlement (permanent) residence permits for EU-8 workers, which applies since May 1, 2012. As the number of EU-8 workers employed in Switzerland is no more than 10% of all EU-workers, the quota-system can be labelled 'symbolic'. The effects of the quota will, however, mean a reduction in the number of work permits issued to EU-8 workers from 6500 to 2000. The Hungarian rapporteur notes that the agreement between Switzerland and the EU does allow for temporary restrictions, but these restrictions cannot be discriminatory.

1.2 Case Law

Case law on EU-8 workers is only included in the *UK* report.

The implications of a failure to register and of late registration are still being addressed in *United Kingdom* courts and tribunals. In particular, eligibility for non-contributory benefits by EU-8 workers often depended on their having completed twelve continuous months as an authorised worker. Building on previous rulings establishing that a right of residence applied to EU-8 workers who registered as required[1] the Secretary of State conceded that the principle also applied during the first month of employment, when registration was not yet

1 *Secretary of State for Work and Pensions v JS* [2012] UKUT 347 (AAC).

required in a claim for jobseeker's allowance by a Polish national who had been employed from 26 November 2007 to 10 October 2008, but who had *failed* to register. Accordingly, the applicant was entitled to a jobseekers allowance, in order to ensure that the right of their children to continue in education, then in Article 12 of Regulation (EEC) No. 1612/68, now Article 10 of Regulation No. (EU) 492/2011,[2] is effective.[3] In a case concerning *late* registration of an employment contract (in the fourth month) by a Polish national, the question was whether the receipt of a registration certificate retrospectively authorised the period of employment prior to it being issued.[4] In this case it was accepted that the first month of employment was authorised in any event. The main issue concerned the correct construction of the 2004 Regulations. The Court of Appeal recognised that the provision in Regulation 8 of the 2004 Regulations for the registration certificate to state the start date of an employment, but not the date of an application, was consistent with such retrospective effect. Nevertheless, it held that to permit retrospectivity would conflict with the provisions of the 2004 Regulations concerning the concept of an 'authorised employer' (Regulation 7), and the provision for criminal penalties upon employers who were not authorised (Regulation 9). The Court of Appeal also held that the consequent loss of entitlement to a job-seekers allowance by a person who registered late was not disproportionate under EU-law. In this, it followed the conclusions of the House of Lords on the proportionality of sanctions for non-compliance with the obligation to register a *change* of employer in *Zalewska* [2008] UKHL 67.[5]

1.3 Statistical Data

The number of EU-workers employed in *Hungary* has been declining since 2009. The total number of registered worker on December 31, 2012 was: 5,145 from EU-15 Member States and 44 343 from EU-12 Member States. Workers from EU-Member States are mainly employed in agriculture; trade; processing industry and IT/communications. The majority of workers is engaged in unskilled work, with only 18.3 % of EU-labour employed in highly qualified professions. The top three nationalities for the first three months of 2013 are: Romanians (656), UK-citizens (251) and Slovakians (96). Comparing these figures with the figures for the same period of 2012 (Romanians (777); Slovakians (186); Germans and UK-citizens (both 106)) reveals a decline in number of nationals from these Member States working in Hungary.

2 See: CJEU (Grand Chamber) cases C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065 and C-480/08, *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107.

3 *DJ v. Secretary of State for Work and Pensions* [2013] UKUT 0113(AAC).

4 *Szpak v. Secretary of State for Work and Pensions* [2013] EWCA Civ 46.

5 *Szpak v Secretary of State for Work and Pensions* [2013] EWCA Civ 46.

TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

2.1 Continuation of transitional measures

The transitional measures that apply to Romanian and Bulgarian workers will come to an end on December 31, 2013 in: *Austria, Belgium, France, Germany, Luxembourg, Malta, the Netherlands* and *the United Kingdom*. As reported in previous reports *Cyprus*, the *Czech Republic*, *Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia* and *Sweden* either did not subject workers from these Member States to transitional measure, or have since lifted these measures. Both *Bulgaria* and *Romania* did not apply transitional measures to EU-15, EU-8 nationals or each others' workers. *Croatia* does not apply a transitional regime to workers from Bulgaria and Romania.

The following comments concern the transitional arrangements in place in *Austria, Belgium*, *Germany, Hungarian, the Netherlands, Romanian* and *Spanish* reports.

Though transitional arrangements apply in *Austria* to Bulgarian and Romanian workers, there are 67 professions in which that Member State experiences a shortage of labour which are open to workers from the EU-2 Member States.

There is a special, facilitated procedure in place in *Belgium* for Romanian and Bulgarian workers applying for a work permit who want to take up employment in sectors with a labour shortage. To be issued a work permit under this procedure, workers from these Member States have to provide evidence that they will be employed in that Member State during a period of twelve consecutive months.

The *German* authorities, who do not anticipate problems when the transitional measures are lifted, have announced that they will closely monitor future development and, if necessary, take measures to ensure a social balance. Legislation has been put in place establishing an obligatory minimum wage for temporary and posted workers.

The *Hungarian* rapporteur notes that the fact that the National Tax and Customs Authority has to be informed one day prior to a worker being employed can be seen as an additional administrative burden, as this authority, being a State authority, already has the data that has to been supplied by the employer. The obligation to report to the Tax and Customs Authority is thus qualified as a double check imposed on the employer, who has to make a special report and keep that on file for a period of three years.

Discussions to extend transitional measures applicable to Bulgarian and Romanian workers beyond December 2013, instigated by the right-wing PVV and the Socialist Party, took place in the *Dutch* parliament, but the motions requesting the Dutch government to amend the Accession Treaties were rejected.[6] The overhaul of Dutch Immigration Law, which entered into force on June 1, 2013 (*Wet Momi*), has not affected legislation governing the position of Bulgarian and Romanian nationals in the Netherlands. The policy rules in the *Vreemdelingencirculaire* have, however, been revised. They now explicitly state that workers from these Member States are entitled to a residence permit that is endorsed with the statement 'Free access to the labour market; no work permit required'. Immigration officers have been instructed to immediately issue family members of Bulgarian and Romanian nationals who are lawfully resident in the Netherlands, upon request, a statement concerning

6 *Kamerstukken II* 2012-2013, 29 407, Nos. 155 7 156.

their right of residence that includes their right to free access to the labour market without having to apply for a work permit. Points 37 and 38 of the Annex to the Ministerial Decision Implementing the Aliens Employment Act [*Wet Arbeid Vreemdelingen*] stipulates an exemption from the obligation to obtain a work permit, if Bulgarian and Romanians have pursued lawful employment in the Netherlands during a period of twelve months. Where work permits are still required, they are issued following a labour market test.

The special arrangements which only apply to Romanian workers in *Spain*, as reported in the 2011-2012 report, have been prolonged and will apply until December 31, 2013.[7] These measures were a source for internal political debate in *Romania*. The effect of the Spanish measures is that Articles 1 to 6 of Regulation (EU) No. 492/2011 are temporarily suspended.[8] The special measures do not apply to Bulgarian nationals and do not affect Romanian workers or members of their family if they were employed in Spain on August 12, 2011, or were registered as unemployed at the Spanish public employment services on that date. Romanian workers and their family members who were not in Spain on August 1, 2011, need to apply for a work permit.[9] Work permits are issued if:

a. there is an offer of contract, signed by the employer and the employee and providing evidence of continued economical activity by the worker during the period of validity of the authorization to work as well as stating the number of hours during the employer will be working to ensure that the economical activity generates an adequate level of income for the worker (employment at the minimum wage shall require a 40 hours per week job offer);
b. working conditions, as stated in the employment contract, are consistent with those in legislation and the collective agreement for the same activity, professional category and locality. If the fixed contract is part-time, remuneration will be less than the minimum wage for full-time and is calculated annually.
c. the employer applicant is enrolled in the Social Security system and fulfils tax and social security obligations; and
d. the employee has the professional training and, where appropriate, qualifications which are legally required to exercise the profession for which s/he is being employed.

Finally, the available financial and material means, as well as staff must be sufficient to ensure that the obligations assumed by the worker can be met.

2.2 Case law

Case law has been included by the *French* and *Dutch* rapporteurs.

A rejection to issue a Romanian worker with a work permit by the *French* authorities was upheld by the Lyon Administrative Court, hereby sanctioning a refusal to grant residence permission and the obligation to leave French territory and return to Romania. The work permit had been applied for employment in a profession not included in a list of professions for which priority on the local labour market does not apply. Therefore the authorities had to establish if there was labour available for this job. From the decision it transpires that the employer, not withstanding a request to do so, had not provided details concerning

7 Instruction of the Secretariat General of Immigration and Emigration (SGIE/3/2012) of December 27, 2012.
8 Regulation (EU) No 492/2011 of the European Parliament and of the Council of April 5, 2011 on freedom of movement for workers within the Union, OJ EU 2011, L 141/1.
9 Article 64.3 of Royal Decree 557/2011.

the search for suitable labour, the percentage applicable to the profession or applicant's curriculum vitae.[10]

In June 2013, the *Dutch* Council of State, Judicial Division confirmed the case law of the District Courts that the rules on the issuing of work permits to Bulgarian and Romanian workers would be applied more strictly, as announced by the Minister of Social Affairs in April 2011 and reported in the 2011-2012 European report. A more strict application of these rules was considered incompatible with the stand still-clause in the Accession Agreement with Romania. The Council of State Judicial Division ruled that when issuing worker permits, the UWV (the agency that issues work permits) had not established that the reduction was only due to the changes in the labour market situation. Hence, that agency was found to have provided an inadequate justification of its decision.[11] The issue of compatibility with the stand still-clause was also addressed by the District Court Haarlem in 2012. This court established that the more restrictive rules on salary levels for the admission of highly qualified workers were in breach of stand-still-arrangements.[12] The Equal Treatment Commission [*Commissie gelijke behandeling*] issued opinions in two cases concerning the compatibility of the treatment experienced by two Romanian nationals with the Equal Treatment Act [*Wet gelijke behandeling*]. In the first case it held that a building company had violated that Act when it prohibited a Romanian national to enter a building site on the basis of his nationality. The Romanian was self-employed, which meant that he did not need a work permit. The refusal emanated from the building company's policy to prohibit all Romanian, Bulgarian and third-country nationals from accessing the building site if they did not have a work permit, to prevent financial sanctions imposed on firms for employing irregular labour.[13] In the second case, the Equal Treatment Commission held that the Dutch government's decision to reduce the statutory old age pension benefit of a Romanian man on the ground that he had lived in Romania for thirty years, rather than in the Netherlands, and therefore did not accumulate pension entitlements during these years did not amount to discrimination on the basis of nationality.[14]

2.3 Statistical Data concerning EU-2 workers

Statistical data concerning the number of EU-2 nationals working in their Member State is found in the *Belgian, Croatian,* and *Dutch* reports.

The trend signalled by the *Belgium* rapporteur in the 2011-2012 report of an increasing number of work permits being issued to Romanian workers and stagnation in the number of work permits issued to Bulgarian workers has continued in 2012. A total of 58 000 work permits (type: B) were issued to Romanian and Bulgarian workers in 2011, which is 24% (Romanians) and 9% (Bulgarians) of the total number of work permits issued by that Member State's authorities. There is a striking difference between applications made for employment in the Flemish Region (60%); Wallonia (less than 20%); and the Brussels Region (more than 20%).

On January 1, 2012, 37,000 Bulgarian and Romanians had registered in the *Dutch* Municipal Population Registration (*Gemeentelijke Basisadministratie*). In reality, the figure of

10 Cour Administrative Lyon, December 27, 2012, *Fagyuar v Précture de l'Isère*, No. 12LY01313.
11 Judicial Division of the State Council, June 12, 2013, LJN: CA2855 and CA2856
12 Rechtbank 's-Gravenhage, zp Haarlem, June 28, 2012, LJN: BX7326.
13 Equal Treatment Commission, Opinion No. 2013-37, March 21, 2013.
14 Equal Treatment Commission, Opinion No. 2013-52, April 25, 2013.

Bulgarians and Romanians in the Netherlands is higher as most workers from EU-2 Member States do not register their presence with the municipal authorities as their stay is too short to be obliged to register or they prefer not to register. The number of work permits issued to Bulgarian and Romanian workers by the Dutch authorities declined from 1,875 in 2011 to 1,061 (522 for Romanian workers and 539 for Bulgarian workers) in 2012, which the Dutch rapporteur attributes to the more restrictive application of the rules on the issuing of work permits taking effect in 2011. A dramatic decrease in the number of workers employed by service providers is seen for the period 2010-2012. In 2010 a total of 6,525 (Bulgarian: 1,114 and Romanian: 5,411) workers were employed by service providers. The figure for 2012 is: 1,285 (Bulgarian: 424 and Romanian: 861).[15] This dramatic decrease in the number of workers employed by service providers can partly be explained by a different method of counting - in 2012 each workers was counted once – and changes in the economical situation, but is probably also due to a more strict application of the rules. An announcement has been made that a Memorandum of Understanding has been signed with the Bulgarian and Romanian authorities on the exchange of information with a view to monitor the correct application of the Directive on posted workers in the Netherlands.[16] Finally, the Labour Inspectorate reported 1,214 cases for 2012 in which Bulgarians (953) and Romanians (261) were working in the Netherlands without the required work permit, which is almost half the number of undocumented workers detected for that year. This is a significant increase compared to earlier years (2010: 30% and 2011: almost 40%).[17] The number of Bulgarians and Romanians who claimed to be working as self-employed persons, but are classed as workers by the Labour Inspectorate for 2012 is twice as high as in 2010 and 2011: 481, compared to approximately 250 for the previous years. This rise may reflect an increasing demand for foreign labour and the politically inspired focus on monitoring EU-2 workers. Individuals and companies have been fined heavily, with fines varying between € 6 000 and € 328 000 for employing Bulgarian and Romanian workers without the required documentation. In a few cases these fines were reduced by the courts by 50%. To tackle the problem of 'pseudo self-employment', closer collaboration with Bulgaria and Romania is envisaged.

2.4 Miscellaneous

The following information has been taken from the *Estonian, Dutch* and *UK* reports.

The labour shortage reported by *Estonia*, which is seeing its nationals moving to EU-15 Member States, is a problem as has been signalled in previous reports.

A proposal to introduce new restrictions in the Aliens Employment Act [*Wet Arbeid Vreemdelingen*] was sent to the Second Chamber by the *Dutch* government in November 2012.[18] Though the Explanatory Memorandum spells out that proposed restrictions will not apply to Bulgarian, Romanian and Turkish workers, the proposed Article 24, stand still-clause, only addresses the implications for the Rules in the Association Agreement EEC-Turkey. As a hind thought it was acknowledged that the stand still-provision in the Accession Agreement with Croatia prevents the application of more restrictive rules to workers from that Member State. As for Bulgarian and Romanian workers, they are still the subject

15 *Kamerstukken II* 2012-2013, No. 1721.
16 *Kamerstukken II* 2012-2013, 29 407, No. 161, p. 34.
17 Annual Report Inspectorate SZW, 2012, p. 34.
18 *Kamerstukken II* 2012-2013, 333 475, No. 3, p. 9.

of more restrictive rules introduced in 2011 notwithstanding the recognition of the effects of the stand still-clause in the Accession Agreements concluded with those Member States.

With effect from July 16, 2012, the *UK* legislation implementing EU-free movement rights was amended to ensure compliance with to the Court of Justice decisions in *Lassal*[19] and *Ziolkowski*.[20] These two rulings are reflected in a new provision for pre-30 April 2006 residence to count under the 2006 Regulations.[21] The ruling in *Lassal* is reflected in the statement that a period of residence counts if it qualified under *any* previous UK implementing legislation or EU-free movement Directive. The ruling in *Ziolkowski* is reflected in the statement that a period of residence counts if (i) a person "carried out an activity or was resident in the United Kingdom" at a given time, (ii) that person then had leave to enter or remain in the United Kingdom, and (iii) that person "would have been carrying out that activity or residing in the United Kingdom in accordance with these Regulations had the relevant State been an EEA-State at that time and had these Regulations at that time been in force." The immediate effect of the second of these amendments is to confirm that nationals from States which recently joined the EU (the EU-10 and the EU-2), or which will soon do so (Croatia) are able to count pre-accession periods of lawful residence towards the acquisition of permanent residence, from the point at which their state acceded to the EU. It should be understood however that this amendment reaches further back, and also covers periods of residence prior to earlier accessions. Indeed, it appears that even periods of residence prior to the United Kingdom's accession to the European Economic Community (January 1, 1973), or the foundation of that Community (January 1, 1958) could, in principle, be relied upon.

3. Croatia

3.1 Croatian workers

The position of Croatian workers following that Member State's accession to the European Union on July 1, 2013, has been addressed in the *Austrian, Czech, Cypriot*, *Danish*, *French*, *German*, *Hungarian*, *Irish*, *Luxembourg*, *Dutch Polish* and *UK* reports. From this information it follows that no transitional measures apply in *Denmark*, *the Czech Republic, Hungary, Ireland* and *Poland*. The position of Croatian workers in *Belgium*, *Bulgaria*, *Estonia*, *Greece*, *Finland*, *Italy*, *Latvia*, *Lithuania*, *Malta*, *Portugal*, *Romania*, *Slovakia, Spain* and *Sweden* is not addressed explicitly by the rapporteurs for these Member States. However, from the Croatian report it transpires that transitional arrangements will also apply to Croatian workers in: *Belgium*, *Greece*, *Italy*, *Malta*, *Spain*[22] and *Slovenia.* This means that besides the four Member States already listed as not putting transitional measures in place, Croatian workers also enjoy access to the labour market in *Bulgaria*, *Estonia*, *Latvia*, *Lithuania*, *Portugal*, *Romania*, *Slovakia* and *Sweden*.

According to the information provided in the *Austrian*, *Cypriot*, *French*, *German*, *Dutch* and *United Kingdom* reports those Member States will restrict the access of Croatian workers to their labour market. Further details on the transitional regime are found in the *Austrian*,

19 CJEU case C-162/09, Lassal [2010] ECR I-09217.
20 CJEU joined cases C-424/10 and C-425/10, Ziolkowski and Szeja and Others, December 21, 2011, n.y.r.
21 Schedule 4, para 6 to the 2006 Regulations, as amended by the Immigration (European Economic Area) (Amendment) Regulations 2012, SI 2012 No. 1547.
22 The Spanish government adopted the instruction SGIE 4/2013 on 1 July 2013.

German, *Dutch* and *UK* reports. *Austria, the Netherlands* and the *United Kingdom* have chosen to subject Croatian workers to a transitional regime that mirrors the regime that they applied to EU-8 and EU-2 workers following the accession of their Member State in 2004 and 2007. In *Germany* Croatian workers will have to obtain a work permit under Sec. 284 § 2 *Social Code III*; the general rules that apply to third-country nationals under the Residence Act. Restricted access to the labour market will also be a fact in the fields of construction, the cleaning of buildings and interior decoration analogous to the rules that applied to Romanian and Bulgarian workers. There is an exemption for seasonal worker. The Croatian rapporteur notes that transitional measures in Germany include posted workers in sectors as specified in the Annex V to the Accession Treaty, under 2, §12. The *Luxembourg* report mentions that the issue was discussed in parliament, but does not specify what the current position of Croatian workers is. That transitional measures will apply to Croatian workers in this Member State follows from the information provided by the Croatian rapporteur.

3.2 Access to the Croatian labour market

Croatia has amended its Aliens Act (Article 153) so that beneficiaries of free movement rights (EU-citizens, nationals of EEA States and Switzerland and their family members, irrespective of their nationality) can take up employment in that Member State from the date of accession of that Member State to the European Union without having to apply for either a work or residence permit. Access to the labour market under this provision is, however, subject to reciprocity; Member States that apply transitional measures to Croatian workers, will see their nationals subjected to transitional arrangements if they want to pursue an economical activity as a worker in Croatia.[23] The choice for reciprocity was justified by the high unemployment rates in Croatian.[24] To ensure that it is known to the public when transitional arrangements are to be applied, a list of Member States whose workers are subject of transitional measures has been posted on the web sites of the following three Ministries: 1) the Ministry of Labour and Pension System; 2) the Ministry of Foreign and European Affairs; and 3) the Ministry of the Interior.

The Croatian rapporteur questions the legitimacy and necessity of installing reciprocal transitional measures and hopes that the Croatian Government will reconsider its decision. Regarding the legitimacy, it is emphasized that the stand still-clause restricts Croatia's powers to adopt transitional measures to those that were in force on December 9, 2011 and that on that date the quota system did not apply to EU-workers and their family members. As to the two bilateral agreements with Germany, it is argued that as Germans were not subject to the quota system these agreements are only relevant for the access of Croatians to the German labour market after its accession to the European Union. As to the necessity of transitional measures it is argued that as the number of EU-workers in Croatia is small (1509 out of a total of 5144 temporary residence permits issued to nationals of EU-Member States with a further 4386 permanent residence permits issued to nationals of EU-Member States) and

23 Government Regulation on Provisional Applications of Rules on Employment of EU Citizens and their Family Members (Croatian Official Gazette No. 79/13).

24 In December 2012 the registered unemployment rate was 23.5%, while survey unemployment rate according to Eurostat data (based on ILO definition) was 17.5%. In May 2013 the registered unemployment rate was 19.6%, while survey unemployment rate was 16.5%. The drop can be explained by increased demand for seasonal workers (source: Croatian Bureau of Statistics and Eurostat).

most EU-workers are employed as key personnel or intra-corporate transferees, restricting access to the Croatian labour market might have a negative effect on the Croatian Government's proclaimed intention to attract foreign investments, in particular from other EU-Member States.

On May 29, 2013, 5,144 EU-citizens were resident in *Croatia* on a temporary residence permit. The figures are broken down over the following categories: family reunification; work; education; scientific research; humanitarian reasons, use of real estate; autonomous reasons for residence; and other reasons. On the same day 4,386 EU-citizens enjoyed a permanent right of residence in that Member State. The top 3 nationalities with temporary residence permission are: Slovenians (1,011); Germans (1,008); and Italians (642). For permanent residence the figures are: Germans (1,343); Slovenians (1,236); and Italians (466).

4. IN SUM

The transitional arrangements applicable to EU-8 nationals have been lifted by all Member States and December 31, 2013 will mark the end of these measures in the remaining eight Member States that still apply transitional measures to workers from Bulgaria and Romania. No real problems are anticipated for these Member States when EU-2 nationals enjoy full free movement rights. Only in the UK are the courts and tribunals still adjudicating on the effects of the workers registration scheme which applied to EU-8 nationals from May 1, 2004-April 30, 2011. The courts and tribunals are, in particular, having to address the implications of this scheme in cases in which the EU-8 worker failed the failure to register or registered too late and the eligibility for non-contributory benefits which require the completion of twelve continuous months as an authorised worker.

Thirteen Member States apply transitional measures to workers from Croatia. The latter Member State, that has chosen to apply transitional measures on a reciprocal basis, will accordingly apply transitional measures to nationals of these twelve Member States. To ensure that only workers from those Member States that apply transitional measures to Croatian workers are subjected to such measures, the Croatian Ministry of Labour and Pension System; the Foreign and European Affairs Ministry; and the Ministry of the Interior have posted a list specifying which Member States are subject of transitional measures on their web sites.

CHAPTER VIII
MISCELLANEOUS

This chapter first examines the relationships between EU social security rules (Regulations 1408/71 and 883/04) and Regulation 492/2011 as well as between Directive 2004/38 and Regulation 492/2011 with regard to frontier workers. It then provides an overview of developments in Member States which impact on free movement of workers, with a focus on integration measures that apply to EU citizens, especially those from the EU-12; developments in immigration policies applicable to workers from third countries and the application of the EU preference principle; and the return of nationals to the new EU Member States. Information is also provided on non-judicial mechanisms in Member States (in addition to national SOLVIT centres, which EU citizens can approach for information about their rights) under free movement law or to resolve difficulties in accessing these rights.

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFEU AND REGULATION 492/2011

In most countries there have been no new developments on this relationship during the reported period. New developments are mentioned in the reports of *Austria, Belgium, Bulgaria, Hungary, Latvia, Lithuania* and *the Netherlands*.

The *Austrian* report refers to the request for a preliminary ruling in the Brey case (C-140/12) regarding "additional payments for pensions" ("Ausgleichszulage"). In February 2012 the Supreme Court for Civil Law and Penal Law asked whether this additional payment is a "social assistance payment" in the sense of Article 7 (1) b Directive 2004/38/EC. The same Court decided in 2011 [1] that Union citizens are entitled to these payments if they are habitually living in Austria and their (foreign) pension doesn´t reach a fixed amount. It has to be noted that Sect. 51 (1) 2 SRA rules that EEA citizens have the right to stay for more than three months if they do not need social assistance payments or "additional payments for pensions". The CJEU decided on 19 September 2013 that a social benefit, which fall within the scope of Regulation 883 also can be seen as 'social assistance' in the context of Directive 2004/38 and that EU law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement in this case, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

This point of view of the Court still does not give a clear answer to the question which consequences the entitlement to these kind of benefits have for a right of residence.

1 30.8.2011, 10 ObS 181/10f and 21.7.2011, 10 ObS 172/10g.

The *Bulgarian* Administrative Court of Sofia examined a national law provision that stipulated the conditions for qualifying for a right to an old age pension and asked the CJEU in 2013 for a preliminary ruling. According to Article 94 (1) of the Code on Social Security (as until 01.01.2012), in order to be granted an old age pension one must have discontinued his/her social security insurance. The case before the national court concerned an appeal lodged by a Bulgarian citizen, Mrs. Somova, against the decision of the Bulgarian social security authorities of 2011 to withdraw her right to pension and to oblige her to return the pension that she had received since July 2007, along with the interest rate applicable to it since that date. The social security authorities based their decision on the fact that during the period of time in question Mrs. Somova had not discontinued her social insurance as she had been working in Austria where she paid her social insurance according to the applicable Austrian law. In the preliminary ruling request the Bulgarian Court essentially asks whether the requirement of Article 94 (1) of the Bulgarian Code on Social Security to have discontinued one's social security insurance in order to qualify for a right to an old age pension is compatible with the TFEU regarding freedom of movement of 'employed and self-employed workers'.

Of importance here is also the recent judgment of the CJEU of 11 April 2013 in the *Jeltes* case (Case C-443/11): Mr Jeltes and Ms Peeters are frontier workers of Dutch nationality who worked in the Netherlands while resident in *Belgium* and Mr Arnold is a frontier worker of Dutch nationality who worked in the Netherlands while resident in Germany. Mr Jeltes became unemployed in August 2010, that is, after 1 May 2010, the date Regulation No 883/2004 entered into force. He submitted a claim for unemployment benefit, under the WW, to the Dutch authorities but they rejected his claim. Dutch law prohibits the payment of unemployment benefit to unemployed workers who do not reside in national territory. The Dutch authorities based their refusal on Article 65 of Regulation No 883/2004, under which the Member State of residence, that is to say Belgium for the first two applicants and Germany for the third applicant, is the Member State responsible for paying unemployment benefit..

The Court decided that a wholly unemployed frontier worker can obtain unemployment benefit only in his Member State of residence and that that rule applies even where the worker has maintained particularly close links with the State where he was last employed, but there is an exception where the transitional regime laid down by Regulation 883/ 2004 applies to him.[2]

The *Hungarian* report emphasises that there is a concrete set of cases in which the relationship between Regulation 883/2004 and Regulation 492/2011 together plays an outstanding role. The essence of these cases is as follows. Until 31st of October 2006 there has been a bilateral agreement between Hungary and Romania. Pursuant to this agreement the country where the person resided when s/he reached pensionable age was responsible for the payment of benefits. In fact it meant that Hungary was (and still is) responsible for the pay-

2 The rules on the freedom of movement for workers, contained in particular in Article 45 TFEU, must be interpreted as not precluding the Member State where the person was last employed from refusing, in accordance with its national law, to grant unemployment benefit to a wholly unemployed frontier worker whose prospects of reintegration into working life are best in that Member State, on the ground that he does not reside in its territory, since, in accordance with Article 65 of Regulation No 883/2004, as amended by Regulation No 988/2009, the applicable legislation is that of the Member State of residence. But the provisions of Article 87(8) of Regulation No 883/2004, as amended by Regulation No 988/2009, should be applied to wholly unemployed frontier workers who, taking into account the links they have maintained in the Member State where they were last employed, receive unemployment benefit from that Member State on the basis of its legislation, pursuant to Article 71 of Council Regulation (EEC) No 1408/71.

ment of pensions where no payment of contributions at all took place in Hungary but only in Romania if the person has finally chosen to reside in Hungary residence. This could be contrary to the principles of Regulation 883/2004/EC that is based on the *lex loci laboris* principle.

The *Latvian* report mentioned a problem concerning access to some social benefits. According to the Law on State Social Allowances[3] and Law on Social assistance and social services[4] a foreigner must have a permanent residence permit to be entitled to state flat-rate allowances and social assistance and social services. According to the Latvian State Social Insurance Agency state flat-rate social allowances qualifying as family allowances under Regulation 883/2004 (1408/71) are provided to Union citizens and their family members, however the rest of state flat-rate social allowances and social assistance and social services are provided only to those foreigners holding permanent residency rights in Latvia. It is questionable whether this Latvian regulation regarding the right to state flat-rate social allowances, social assistance and social services is in accordance with Article 45 of the TFEU and Article 7(2) of Regulation 492/2011.

On 5 May 2012, *Lithuania* signed an agreement with Latvia, which entered into force on 1 April 2013. This agreement is applied to persons who acquire or acquired the right to pension and whose insurance periods during the Soviet period overlap according to Latvian and Lithuanian legislation, as well as for family members whose rights are derivative of the mentioned persons. The agreement allows avoiding situations where the insurance periods were not calculated at all or were calculated twice in both countries. As a result of this agreement, pensions may increase for those persons whose insurance periods of working in companies of former Soviet Union were not calculated. The agreement ensures that the person receives full pension for all working experience, including the periods for the mentioned period and in accordance with the simplified order.[5]

On 9 April 2013 there was a request for a preliminary ruling from the *Dutch Centrale Raad van Beroep* in a peculiar case on the interpretation of Articles 2, 3 and 16 of Council Regulation (EEC) No 1408/71 and Article 7(2) of Council Regulation (EEC) No 1612/68. It concerns the personal scope of the Old Age Pension Act and the insured position of someone with a privileged status: 1. Must Article 2 and/or Article 16 of Regulation 1408/71 be construed as meaning that a person like Evans, who is a national of a Member State, who exercised her right of freedom of movement for workers, to whom the social security legislation of the Netherlands was applicable and who then went to work as a member of the service staff of the Consulate General of the United States of America in the Netherlands, from the commencement of such work no longer falls under the personal scope of Regulation 1408/71? If not: 2(a): Must Article 3 of Regulation (EEC) No. 1408/71 and/or Article 7(2) of Regulation (EEC) No 1612/68 be construed as meaning that the application of privileged status to *Evans*, which in this case consists inter alia of not being compulsorily insured for the purposes of social security and of not paying contributions in that regard, should be considered a sufficient justification for discriminating on grounds of nationality? (b) What significance must be attached in that regard to the fact that in December 1999 *Evans*, when asked, opted for the continuation of the privileged status? (Case C-179/13 *Evans*; LJN BZ6146).

3 OG No.168, 19 November 2002.
4 OG No.168, 19 November 2002.
5 A similar agreement with Estonia entered into force on 1 October 2008.

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 492/2011 FOR FRONTIER WORKERS

There are no developments on this issue during the reporting period

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF WORKERS

3.1 Integration measures

As also observed in previous reports, there are no integration measures specifically aimed at EU citizens in most of the EU-15 (*Austria*, *Belgium*, *France*, *Germany*, *Ireland*, *Italy*, *Netherlands*, *Poland*, *Sweden*, *United Kingdom*) and EU-12 Member States (*Bulgaria*, *Cyprus*, *Estonia*, *Hungary*, *Latvia*, *Lithuania*, *Malta*, *Romania*, *Slovakia*, *Slovenia*) as well as Croatia which acceded to the EU on 1 July 2013.[6] Whereas there are mandatory integration measures, such as language classes, third-country nationals in some EU Member States (*Austria*, *Germany*, *Netherlands*, *United Kingdom*), it is expressly stated by the rapporteurs that EU citizens are not encompassed by such measures, unless they are part of the naturalization process (*United Kingdom*). This is also true of third-country national family members as well as Turkish workers in light of the Court of Justice's judgment in C-256/11 *Dereci*, as indeed confirmed by the Administrative Court in *Austria*. In *France*, a written question on reverse discrimination was submitted by a Senator to the Interior Minister. While the admission of third-country national family members of non-French EU citizens is facilitated, third-country national family members of French citizens are required to apply for a long-stay visa if they wish to stay in the country for a period longer than three months, which will only be issued (either within France or in the country where the application is lodged) if they can demonstrate knowledge of the French language and values of the French Republic. In his April 2013 reply, the Interior Minister stated that no amendments to the current legal situation are foreseen concerning the third-country national spouses of French nationals in the sense of aligning national law with EU measures on the free movement of workers since these two situations fall under two different legal regimes. In *Hungary*, the rapporteur refers to a different kind of "integration policy", namely an accelerated naturalization process for persons of Hungarian origin from neighbouring countries, including EU Member States. The amendment to the Act on Hungarian Nationality in 2010 has resulted in approximately 400,000 newly naturalized nationals mainly from Romania, Slovakia, Serbia and Ukraine, as well as from the migrant diaspora in the country.

In a number of Member States, EU citizens can also access general language courses available to foreigners residing in the country. EU citizens and their family members residing in *Denmark* on the basis of the EU free movement rules are entitled under the *Act on Integration* to an introductory course offered by the municipalities. The course comprises classes on the Danish language, and Danish society, culture and history, and includes elements aimed at integration in the labour market. Moreover, the Act also provides the legal

6 Not all national reports expressly discussed integration measures during this reporting period and therefore where this has been mentioned in the past it has been assumed that the situation remains unchanged in the Member State concerned.

basis for municipalities to offer support to companies establishing a special advice function to non-nationals residing *inter alia* on the basis of the EU rules on free movement. The 2011 Act on Promotion of Integration in *Finland* contains provisions on voluntary integration measures to be provided to persons moving to Finland. This Act also applies to EU citizens who have registered their right of residence, to their family members with a residence card, as well as to EU citizens and third-country nationals residing in the country on the basis of a residence permit. Under this legislation, the authorities have an obligation to provide persons moving to Finland with general information on Finnish society and integration services. Furthermore, persons coming under the scope of this Act, and who are registered as unemployed job-seekers, have the right to a personal integration plan for a maximum period of three years. The plan is drawn up by the migrant herself, the employment consultant, and where necessary, a representative of the municipality where the individual lives. It includes an agreement on the measures to be taken in order to help the migrant integrate into Finnish society and to enter the labour market. Such measures include courses in the Finnish or Swedish languages and an assessment on how the qualifications or degrees that the person has taken outside Finland can be made to meet the requirements of Finnish working life, and the further training that may be needed. As observed in previous reports, in the *Czech Republic*, free Czech language courses are offered to children with the citizenship of other Member States to assist their integration in elementary schools and, in *Sweden*, basic language courses offered to foreigners in general are also available to EU citizens. In *Croatia*, EEA nationals can also participate in the different language programmes.

In the *Netherlands*, however, amendments to the Integration Act have abolished the concept of voluntary integration, which means that EU citizens can no longer benefit from its provisions. These amendments, however, do not mean that the concerns regarding Dutch language skills as a key to participate successfully in Dutch society have diminished, in particular in respect of those EU citizens who intend to stay for a longer period in the country. An amendment to the Education and Professional Training Act now entitles them to participate in Dutch as a second-language courses and other measures focusing on Dutch language skills are being developed with an eye to the end of the transitional arrangements for Bulgarian and Romanian nationals at the beginning of 2014. For example, social loans to help EU workers, who registered in the Municipal Population Administration after 1 January 2013, to pay for language and integration courses have been introduced and improvement of language skills at work, with an emphasis on the employer's responsibility for the language skills of their employees. In February 2013, the new coalition government also adopted the "Integration Agenda", which contains the integration policy and measures of the new government, with specific attention to the promotion of Dutch language skills of EU and Turkish citizens.

As discussed in previous reports, in *Ireland*, there is an emerging national integration policy applicable to the integration of immigrants generally, and includes a number of specific strategies such as the Intercultural Education Strategy 2010-2015, the National Intercultural Health Strategy 2007-2012 and the Workplace Diversity Initiative, with the latter two strategies finishing at the end of 2012. While in *Italy* EU citizens are excluded from the implementation of integration measures foreseen for foreigners in the general legislation on immigration, some regional authorities have put in place integration measures, mainly in the fields of social assistance and health care, from which EU citizens in need can also benefit.

In *Lithuania*, as reported previously, the question of integration support to foreigners living in the country, in addition to persons granted asylum, has been the subject of discussion, but has not yet given rise to any concrete actions or legislation. However, the rappor-

teur notes that there are now plans to address this question in 2013 by measures under the European Integration Fund, but these are only likely to address the integration of third-country nationals. In *Portugal*, as also outlined in the 2011-12 report, the Second Plan for immigrants' integration, approved by a Council of Ministers Resolution in July 2010, develops the national strategy concerning the reception and integration of immigrants, and includes measures in a wide range of fields (employment, vocational training, health, education, social benefits, and access to justice).

3.2 Immigration policies for third-country nationals and the Union preference principle

There continues to be an interest in some Member States to attract more highly skilled migrants despite the economic recession. For example, as observed in previous reports, the quota system for immigration in *Austria* has been replaced by a points-based system, which includes the category "extraordinary qualified workers", and lists 24 professions where there are known shortages and other key personnel. The third-country national workers concerned are entitled to a "Red-White-Red Card". Within the first year of the scheme's operation, approximately 1,500 such cards were granted (397 in management, 221 in IT and software engineering, and 116 in the field of sports), with only 100 issued to extraordinary qualified workers. The rapporteur notes that there is currently a discussion about reforming the system by reducing the salary threshold to less than EUR 1,900 per month for academics and accepting a Bachelor's degree as a sufficient qualifying condition. In the *Czech Republic*, the "Green Card" scheme has been in place since 2009 and the "Blue Card" Directive was introduced in 2010, although the rapporteurs also refer to the 2009 Government Resolution which authorized the Ministry of Interior to review the situation on the labour market in cooperation with other ministries, and to implement programmes aimed at encouraging the return of foreigners to their home country and reintegration into the labour market with a view to preventing their repeated migration in the Czech Republic. This resolution also authorized the Ministry of Labour and Social Affairs to ensure that sanctions are imposed on employers who violate the terms of the Employment Act and the Ministry of Finances to execute these sanctions. A number of other Member States also transposed (or continued to transpose) the Blue Card Directive during this reporting period (*Austria*, *Germany*, *Lithuania*, *Poland*, *Sweden*), while various schemes (green card, positive list, pay limit scheme, corporate residence permit) are in place in *Denmark* and facilitate access to the labour market for highly qualified third-country nationals. However, in the *United Kingdom*, the rapporteurs refer to on-going government efforts to reduce the number of third-country national admissions to the country, which have been relatively successful, assisted also by the economic downturn that has diminished the appetite of British businesses for foreign workers. They note that in May 2013 it was widely reported in the national press that the latest numbers from the Office for National Statistics show that net migration was 153,000 in the year ending September 2012, compared to 242,000 in the previous year.

During the reporting period, new migration policies or other developments in relation to third-country nationals and institutions have been evident in the following EU Member States:

- *Italy* – the 2012 annual quota for third-country nationals provided for the issue of 13,850 work permits for salaried and self-employed workers, but only 2,100 permits were available for those residing abroad.
- *Netherlands* – the entry into force on 1 June 2013 of the Modern Migration Policy Act, streamlines admission procedures for third-country nationals. The legislation was approved by Parliament in 2010 but its entry into force was postponed for an indefinite period because of ICT problems. The rapporteurs also refer to proposed legislation that aims at reducing forced marriages by prohibiting marriages between relations in the third and fourth degree (i.e. niece-nephew/cousin-marriages), reducing the possibilities to recognize polygamous marriages and, more generally, making it more difficult to recognize a marriage convened abroad.
- *Sweden* – a tightening up of the rules in January 2012 concerning the recruitment of foreign labour under the 2008 labour migration law (discussed in previous reports) requires employers in specific sectors to guarantee that wages will be paid and, if they have previously recruited migrant workers, to provide evidence that the workers have been paid. The purpose is to prevent foreign workers from being exploited on the Swedish labour market. However, the rapporteur notes that many instances of abuse have been reported in 2012-2013 and the Minister of Labour has announced measures to address the abuses.
- *Poland* – the regularization exercise, referred to in previous reports, and which came into effect on 1 January 2012, resulted in 4,593 positive decisions (representing 48 per cent of submitted applications mostly by citizens of Viet Nam, Ukraine, Pakistan, Bangladesh and Armenia. Those foreign nationals who met the criteria have been issued with a residence permit valid for a fixed period of two years and the right to take up employment.
- *Belgium* – the rapporteurs refer to the new citizenship Code and the impact of the increase of the period for access to permanent residence from three to five years.

As observed in the national reports for this reporting period as well as in previous reports, the Union preference principle is applied in most EU Member States (*Austria*, *Bulgaria*, *Croatia*, *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Ireland*, *Lithuania*, *Luxembourg*, *Malta*, *Poland*, *Portugal*, *Romania*, *Slovakia*, *Slovenia*, *Sweden*, *United Kingdom*), whether explicitly in law or in practice. For example, in *Austria*, the public employment agencies apply the principle of Union preference. Issuing an employment permit depends on the situation of the national labour market, and it is only possible to issue the permit for third-country nationals if no Austrian, EEA citizens, or Turkish workers are available for the job in question. As observed in the previous report, in *Bulgaria*, third-country nationals who wish to work in the country have to pass a strict labour market test. They will only be granted access to the labour market if their prospective employer can demonstrate that no other Bulgarian, EU national or permanent resident third-country national is able to perform the job, and this test is applied in respect of all third-country nationals who hold a "continuous" residence permit which is renewable on an annual basis. As noted in previous reports, in *Finland*, third-country nationals may only be issued with a residence permit by the Directorate of Immigration to work in the country if the employment office is satisfied that issuing such a permit would not prevent a person already in the labour market (i.e. Finnish citizens, citizens from other EU

Member States and lawfully resident third-country nationals) from finding a job.[7] In *Germany*, the rapporteurs observe that with regard to less qualified jobs the Federal Labour Agency and its local branches will include the European Job Mobility Portal (EURES) in the search for preferred workers to take up the job in question. In *Malta*, third-country nationals must possess an employment licence and its issue is subject to a labour market test, which is not conducted in the case of those who are long-term residents, while in *Sweden*, which introduced in 2008 an employer demand-based system of labour migration from third countries that has been discussed in previous reports, a work permit is only granted if it is consistent with that country's EU commitments. The Swedish Migration Board assesses whether the employer's recruitment is in conformity with the EU preference principle, for example that information about the job in the employment office is also available on EURES. In *Croatia*, third-country nationals cannot work unless they obtain a "stay and work permit", a single permit that allows non-nationals to temporarily stay and work in the country. It is issued by a competent police administration or police station in a form of a decision on the basis of an annual quota – established by the Ministry of Labour in accordance with the migration policy and the situation on the labour market, and on the basis of opinions of social partners – or outside of the annual quota. EU nationals and their family members are among the categories of workers falling outside of the quota and consequently, according to the rapporteur, this measure will now be applicable to nationals of those Member States that have activated transitional arrangements, i.e. they will need to apply for a "stay and work permit", but without the need for employers to justify their employment to the authorities.

In a number of Member States (*Czech Republic*, *Denmark*, *Germany*, *Poland*, *United Kingdom*), exceptions to the EU preference principle are possible in respect of certain categories of third-country national workers in sectors where a need exists. As observed in previous reports, in *Denmark*, when issuing residence permits on the basis of highly qualified employment, the immigration authorities do not consult regional employment councils to determine whether there is available labour in EU/EEA countries within the sector in question. Nevertheless, the authorities consider the EU preference principle as being complied with because there are still additional administrative and material requirements imposed on third-country nationals as opposed to EU citizens who may enter Denmark and work without restrictions, a position that is questioned by the rapporteurs. As stated in the previous report, the transposition of the Blue Card Directive in *Germany* has resulted in the non-application of the EU preference principle in respect of highly qualified migrants, even though the discretion to apply a labour market test to this group is retained in the Directive. In contrast, as noted previously, transposition of the Blue Card Directive in *Bulgaria* has been accompanied with the retention of this principle in respect of highly qualified migrants while, in *Poland*, a number of categories of third-country national workers do not require a work permit, such as permanent residents, EU long-term residents, and persons of Polish origin coming from the territory of the former Soviet Union and holding a document entitled Charter of a Polish National ("*Karta Polaka*"), which provides free access to the national labour market.

In *Hungary*, the emigration of health professionals (i.e. doctors and nurses) continues to give rise to grave concerns. According to the data of the Central Statistical Office, in 2011, the shortage of medical doctors and other health care professionals in the health care system stood at 1,634 and 3,433 respectively. Moreover, there are still no measures implementing

7 There are also some specific types of work-based residence permits which can be issued without a prior consideration by the employment office.

the EU rules on Turkish workers, even though 176 new work permits were issued for Turkish nationals in 2011 and 193 in 2012.

3.3 Return of nationals to new EU Member States

There continues to be official as well as anecdotal evidence in a number of the EU-12 Member States that their nationals are returning home after being employed in the former EU-15, particularly in the light of the impact of the economic crisis on some of the latter countries. However, the rapporteur for *Hungary*, refers to EUROFOUND research on labour mobility within the EU, published in August 2012,[8] which found that emigrants from Hungary, Latvia, Poland and Romania did not return home en masse; indeed, many of them either stayed in the host country, adopting a 'wait-and-see stance', or migrated to other destination countries. On the whole, this observation is confirmed by the information from the individual reports considered below. Even in *Romania*, the nationals of which comprise a significant number of returnees in the data from the EU-15, the rapporteur concludes that there was no 'mass return' of migrant workers.

Official statistics in *Lithuania* refer to 17,357 citizens (out of a total of 19,843) who "re-immigrated" to the country in 2012, as compared to the 14,012 citizens (out of a total of 15,685) who "re-immigrated" in 2011, which confirms the continuing trend of return. There are no figures yet in *Poland* on the scale of those Polish citizens who have returned to the country: these were expected at the end of 2012 but are still not available. However, according to the final results of the June 2013 migration report of the 2011 Census, as of 31 March 2012, there were just over two million Polish nationals abroad for a period of more than three months, which is considerably higher than the 786,000 recorded in the 2002 Census ten years previously. A considerable majority of those Polish citizens (1.56 million) were outside the territory of Poland for more than 12 months, as compared to those who stay between three and 12 months (i.e. 4.53 million). However, the rapporteur also draws attention to the interesting trend of a 'trap migration' affecting those Polish citizens who returned home and then, after some time, decided to re-emigrate, which may be related to the loss of social networks in Poland or de-skilling as a result of working far below the level of their qualifications. In *Slovakia*, as referred to in previous reports, there has been a gradual decrease in the number of Slovak citizens working in other EU Member States since 2007.

In *Latvia*, on the other hand, while there is still no reliable data on the number of persons who have returned to the country from the EU-15, unofficial figures indicate that despite an increase in unemployment in the EU-15 a higher proportion of Latvian citizens continue to leave for the EU-15 than return to Latvia.

With regard to data from the EU-15 on EU-12 nationals returning to the new EU Member States, no significant return movements have been observed in *Austria* where 2012 figures indicate that 8,004 Romanian nationals, 6,457 Hungarian nationals, 3,686 Polish nationals and 3,538 Slovak nationals left the country, although, as noted in the 2010-11 report, it is unclear whether they returned to their Member State of origin or to another Member State. In *Finland*, the rapporteur reiterates the position in previous reports that the return of EU citizens to new Member States has not taken place in any significant numbers.

8 E. Barcevičius et al., Labour mobility within the EU: The impact of return migration, EUROFOUND, 21 August 2012, available at: http://www.eurofound.europa.eu/publications/htmlfiles/ef1243.htm.

In *Ireland*, as noted in earlier reports, the Reception and Integration Agency, under the auspices of the Department of Justice and Equality, supports the repatriation of destitute EU-12 nationals who do not satisfy the habitual residence condition for social assistance. In 2012, 213 return flights were booked for citizens of the EU-12, as compared with the 416 persons assisted in 2011. In 2012, Romanian nationals constituted the largest number of voluntary repatriations (112), representing 52.6 per cent of the total of return flights, followed by Polish nationals (31) or 14.6 per cent. However, the number of return flights booked for citizens of the EU-12 has steadily decreased over the past four years. The rapporteurs for the *Netherlands* note that, in 2011, there were 60 cases in which residence permission was withdrawn following unreasonable reliance on social benefits, although the data does not always distinguish EU-10 nationals from other EU citizens. Voluntary return activities of EU citizens not entitled to reside in the country under EU law have continued by the Amsterdam, The Hague and Utrecht local authorities in over 100 cases, with the assistance of the NGO *Stichting Barka*. Local authorities of other municipalities, institutions and police forces have also shown interest in this cooperation and have contacted *Stichting Barka*. In *Spain*, under the Social Attention Programme of that country's voluntary return programmes, the rapporteurs note that in the period 2009-2012, 145 EU nationals voluntarily returned home, with most of these (142) returning to Romania.

As discussed in Chapter I, some of the EU-15 Member States (*Netherlands*, *United Kingdom*) have tightened up their rules regarding the entry, residence and expulsion of foreign nationals, which appears to have had a disproportionate impact on nationals from the EU-12, thus raising profound concerns regarding the conformity of such restrictions with EU law. In *France*, the persons most affected by removal measures are EU-12 nationals, and Romanian nationals in particular. In 2012, a total of 1,726 EU citizens were obliged to leave *Germany*, of which 1,338 left in reality, either voluntarily or by means of deportation. The largest number obliged to leave came from Romania (439), Poland (362), Bulgaria (251), and Lithuania (94). In the *Netherlands*, it is reported that in the first half of 2012, there were 190 return cases (and in 100 of these cases it is known that the EU citizen left the country) compared to 230 such bans for the whole of 2011 (when 140 persons actually left).

A phenomenon worth mentioning is the emigration of EU nationals from those EU-15 Member States particularly affected by the economic crisis. While the number of foreigners coming to *Italy* continues to increase, the rapporteur notes that many Italians are also moving abroad, much more than in previous years, and refers to the outcome of a survey highlighted in the press showing that, in 2012, Italian emigration had grown by 30 per cent as compared to 2011 and that 78,941 Italians had left the country.

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF EU LAW CAN BE LAUNCHED

In *Austria*, *Bulgaria*, *Croatia*, *Czech Republic*, *Denmark*, *Germany*, *Ireland*, *Lithuania* and *Slovakia*, the rapporteurs observed that, with the exception of national SOLVIT centres, they were not aware of specific national non-judicial bodies to which complaints against violations of EU law could be addressed, with the exception of general administrative bodies, national and regional parliaments (*Germany*), the Ombudsman, or trade unions or employers' and/or professional organizations (see also below). The public institution of the Ombudsman is specifically mentioned in the reports of *Belgium*, *Bulgaria*, *Croatia*, *Czech*

Republic, *Cyprus*, *Denmark*, *Finland*, *Greece*, *Hungary*, *Ireland*, *Latvia*, *Lithuania*, *Luxembourg*, *Netherlands*, *Poland*, *Portugal*, *Romania*, *Spain* and *Sweden*. In *France*, the *Le Défenseur des droit*s is a new administrative authority, which brings together existing authorities, in particular the HALDE (*Haute Autorité de lutte contre les discriminations et pour l'égalité*). In previous years, the HALDE was able to assist EU citizens. Examples of recent actions by the Ombudsman relevant free movement of workers are described in the following EU Member States:

- *Bulgaria* – During the reporting period, the Ombudsman has continued to play an active role in respect of the imposition of exit bans limiting the right to free movement of Bulgarian nationals, as well as with regard to issues related to third-country nationals under the Law on Foreigners.
- *Czech Republic* – The rapporteurs referred to a dispute concerning the introduction of a provision of competition rules for water polo, pursuant to which a maximum of three foreign players, including EU citizens, were allowed to start in a match. An affected club sought legal action and also requested a legal opinion from the Office of the Government of the Czech Republic, the Ministry of Education, Youth and Sports, the European Commission and the Public Defender of Rights (Ombudsperson). All institutions confirmed explicitly (citing relevant EU legislation and Court of Justice judgments) that national quota provisions, such as the one introduced by the rules, are not in compliance with EU law. The impugned provision was consequently removed from the rules.
- *Finland* – In February 2013, the Parliamentary Ombudsman issued a decision concerning an EU citizen's access to health services. The complainant, who worked in Finland and was therefore enrolled in the Finnish social security system, did not have a home municipality in Finland. He had contacted a public health centre in order to obtain health services. However, he was informed by the centre that he was entitled only to emergency health care, because he did not have a home municipality. The complainant filed a complaint to the Parliamentary Ombudsman concerning his treatment. The Ombudsman concluded that instead of informing the complainant that he was entitled only to emergency treatment, the health centre should have requested him to provide further proof of his right to health care in Finland in order to determine the treatment to which he was entitled, or to contact the National Insurance Institute in order to verify whether the complainant was also entitled to other health services in addition to the emergency treatment. The health centre had therefore failed in its duty to properly clarify the health services to which the complainant was entitled.
- *Hungary* – A mixed-couple (German father and Hungarian mother) living and working in the town of Sopron complained to the Ombudsman of discrimination on the grounds of the father's nationality. A local decree provided support of EUR 150 to young parents of a new-born baby if the child is a Hungarian national and the parents are permanently resident with an address in Sopron. The couple's request was refused because of the father's non-national status, and subsequently the clerk in the municipal office and the mayor admitted that due to the economic recession and budget deficit there was no support available. The investigation continues, although an amendment to the decree has been promised.

In *Greece*, the rapporteurs note that there is a special section in the Ombudsman's Office dealing with the rights of all categories of immigrants and the annual report includes comments on migration and discrimination issues, while in *Latvia* it is specifically reported,

as in 2010-11, that the Ombudsman has not reviewed any case regarding discrimination on the grounds of nationality against any EU citizen of another Member State. The 1998 Law on Parliamentary Ombudsmen in *Lithuania* does not limit the possibility of making complaints to citizens only, and therefore EU nationals and third-country nationals can also make complaints. However, the Parliamentary Ombudsmen Office confirms that the number of applications from EU citizens is particularly small with the result that this remedy appears to be relatively under-explored for the purpose of defending the rights of EU citizens in the country. In *Slovakia*, the Office of the Public Defender of Rights cannot address any possible violation of EU law, but only in those instances where fundamental rights and freedoms have been infringed contrary to the legal order or principles of the democratic state and the rule of law in relation to the activities, decision-making or inactivity of a public administration body.

Equality or anti-discrimination bodies may also be pertinent to resolving free movement issues, and these are referred to by rapporteurs of the following Member States:

- *Belgium* – Centre for Equal Opportunities and Opposition to Racism.
- *Bulgaria* – According to the Migrant Integration Policy Index (MIPEX),[9] the Protection Against Discrimination Commission established under the 2004 Protection Against Discrimination Act, is considered to be one of the strongest equality bodies in Europe. The 2004 Act prohibits discrimination on all grounds, including nationality. It contains specific rules on multiple discrimination and protection against victimization. Victims can access administrative and legal proceedings and are not always obliged to carry the burden of proof. If they cannot bring the case themselves, they can look to NGOs for support and both class actions and *actio popularis* are available.
- *Estonia* – The Legal Chancellor is a constitutional institution whose task is to ensure that the legal acts adopted by local governments, the Government of the Republic, and Parliament are in conformity with the Constitution. The Legal Chancellor also has the task to litigate disputes (litigation is free of charge) that concern discrimination on different grounds, including discrimination based on nationality. The Commissioner of Gender Equality and Equal Treatment also addresses discrimination and is responsible for litigation disputes that concern discrimination based on citizenship, although there have been no such disputes to date.
- *Finland* – The Ombudsman for Minorities is tasked with advancing the status and legal protection of ethnic minorities and foreigners, as well as equality and non-discrimination. The Ombudsman can be contacted in cases involving discrimination on the grounds of nationality and ethnic origin.
- *Ireland* – The Equality Authority provides information on discrimination and also includes a legal section that can, at its discretion and where the case has strategic importance, provide free legal assistance to those making complaints of discrimination under relevant national legislation.
- *Italy* – UNAR (National Office against Racial Discrimination). Victims of alleged discrimination on the grounds of race or nationality can submit their case to UNAR, which is mandated to issue recommendations..
- *Lithuania* – Equal Opportunities' Ombudsman who considers individual complaints concerning discrimination on various grounds. The Equal Opportunities Ombudsman may analyse cases dealing with administrative offences and assign administrative fines, refer cases to pre-trial institutions and bodies in the event of elements of criminal activity

9 See http://www.mipex.eu/bulgaria.

in the complaint, issue warnings concerning the violations committed, and temporarily suspend advertising in certain cases, etc. While only one complaint was made by a foreigner (a third-country national) in 2012, according to the representative of the Service, the language issue is very relevant for foreigners (including EU citizens) as concerns access to the labour market.

- *Netherlands* – Equal Treatment Commission, which became part of the Human Rights Board in October 2012.
- *Portugal* – Committee for Equality and against Racial Discrimination, which operates within the Office of the High Commissioner for Immigration and Intercultural Dialogue. The Committee has the duty to publicize cases of discrimination and recommend the adoption of legislative and administrative measures necessary to prevent discrimination based on nationality. Moreover, it has the power to fine anyone that discriminates against EU citizens.
- *Slovenia* – Advocate of the Principle of Equality, which is a specialized body within the Ministry of Labour, Family, Social Affairs and Equal Opportunities for the prevention and elimination of discrimination. The body's main responsibilities are to assist victims of discrimination, provide guidance and advice to prevent discrimination, and furnish information on discrimination and equality.

In *Denmark*, however, while the Board of Equal Treatment plays a role in ensuring the enforcement of legislation on equal treatment, including EU equal treatment law, the rapporteurs note with concern that with regard to EU free movement law, the Board apparently does not consider itself to have competence.

Important roles are also played in EU Member States by those public authorities with responsibilities for supervising employment and working conditions. For example, the Occupational Health and Safety Authority in *Finland*, which was also mentioned in previous reports, may conduct inspections at work sites and screens job advertisements to ensure that no prohibited requirements (e.g. reference to a particular citizenship or disproportionately high language skills) are being applied. Employees who experience discrimination or other problems pertaining to working conditions may also contact the Authority. In *Belgium*, mediators at the federal and community levels are relevant, while, in *Poland*, Regional Foreigners Service Centres are located in each of the 16 Polish provinces at which foreigners can obtain a range of comprehensive information. In *Portugal*, the national organization specifically responsible for receiving complaints of violations of EU citizens' rights is the Office of the High Commissioner for Immigration and Intercultural Dialogue, which is responsible for fighting all forms of discrimination based on nationality through the prosecution of violations of the law. The Office has created a national support immigrant network that comprises national support centres including several bodies and offices competent to answer any questions raised by EU workers. In *Romania*, as observed in the 2011-12 report, complaints can also be addressed to competent national authorities, such as the Ministry of Labour, Family and Social Protection and subordinate bodies, or the Immigration Authority. In *Sweden*, the Migration Board is the principal body responsible for handling cases concerning applications of residence permits and appeals against its decisions can be made to the migrants' courts and the Migration Court of Appeal, which is the final legal instance.[10]

As discussed in previous reports, assistance or representation can be sought in a number of Member States from the non-governmental sector, such as trade unions, employers' or-

10 Information provided in the 2011-2012 report.

ganizations and/or professional associations, NGOs and advice centres. Some examples are provided below:

- *Austria* – Amnesty International, Caritas Österreich and Helping Hands.[11]
- *Croatia* – Legal clinics established since 2010 within the four Faculties of Law in the country (Zagreb, Rijeka, Osijek and Split) that provide free legal advice to all those in need.
- *Denmark* – The private and social relief organisation affiliated to the National Church *Kirkens Korshær* established a counselling service for homeless migrants, including those EU citizens seeking work, entitled *Kompasset*, described in Chapter I of this report; Project *UDENFOR* ('OUTSIDE'), a private foundation combining active social street work with training and research in approaches to homelessness and social marginalization, and, as also observed in Chapter I, published a 2012 report according to which the vast majority of the 500 or so homeless migrants in Copenhagen are EU citizens; and Cafe *Grace,* run by the social, Christian organisation *Blå Kors,* which offers inter alia Danish language courses (and in the future English language courses), assistance in writing CVs and in job-seeking, and assistance for returning to one's home country (business plan, counselling, etc.).
- *France – Groupe d'information et de soutien aux immigrés* (GISTI), CIMADE[12] and *Réseau Education sans frontières* (RESF), which assists Roma children;
- *Ireland* – Immigrant Council of Ireland and other law centres which offer guidance on free movement issues.
- *Luxembourg* – ASTI – *Association de Soutien aux Travailleurs Immigrés*, CLAE – *Comité de Liaison des Associations d'Étrangers*, Caritas, and the Luxembourg Open and Joint Action–Human Rights League.[13]
- *Poland* – Legal Clinics Foundation, Legal Bureaux for Foreigners, Helsinki Foundation for Human Rights, Institute for Public Affairs, the Union of Citizens Advice Bureaux, Foundation of Polish Migration Forum, Association of Legal Intervention, and Association of Marriages with Foreigners. The rapporteur notes that the most active NGO is the Helsinki Foundation for Human Rights, which not only actively supports foreign nationals during proceedings before Polish authorities, but also advocates for changes in the law and practice whenever problems are drawn to its attention. A good example of this active approach was the Foundation's engagement in a case concerning the refusal of admission to Poland of a third-country national partner of a Polish returning citizen. The Foundation not only supported the person concerned, who was a citizen of the Dominican Republic, but also prepared an official request to the Border Guard which resulted in the adoption of a circular on the treatment of family members of EU citizens.
- *Portugal* – Legal Aid Immigrants Office, operating in Lisbon and Oporto, which provides free legal advice and assistance to EU citizens concerning their rights and obligations.

In the *United Kingdom*, as noted in previous reports, a small number of specialized NGOs continue to provide advice, including to EU citizens, namely: the Advice and Information on Rights in Europe (AIRE) Centre, which provides advice and assistance in matters of EU and European human rights law; and the Child Poverty Action Group (CPAG), which provides expert advice and assistance on social benefits' questions. There is also a wide-ranging

11 Information provided in the 2009-2010 report.
12 Information provided in the 2008-2009 report.
13 Information provided in the 2009-2010 report.

network of Citizen's Advice Bureaux (CAB) – in 3,500 locations – offering assistance across the country. It is a free service staffed by a number of professionals and aided by trained volunteers offering advice to help people resolve their problems with debt, benefits, employment, housing, discrimination, and many other issues. The CAB is often a first stop for people with problems who are then referred on to more specialist agencies. Community Legal Advice also provides assistance on a wide variety of issues including housing, employment and social benefits. In *Ireland*, individuals can also contact the 'Your Europe Advice Service', hosted by the EU representation, to obtain practical and personalized advice in relation to their rights under EU law.

5. SEMINARS, REPORTS, ARTICLES

As observed in previous reports, there are an increasing number of research projects, books, reports, articles, resource websites and seminars relating to the free movement of workers, including in the EU-12 and *Croatia*.

Pertinent research projects of relevance to free movement in *Hungary* have been undertaken, notably the *Magyar Tudomány*, a monthly periodical of the Hungarian Academy of Sciences, which published a thematic issue on *Migration in Contemporary Hungary* covering *inter alia* the following themes: the main pillars of migration law in Hungary; xenophobia and discrimination against migrants; migrants and new citizens from adjacent states – changing trends; transnational aspects of migratory movements; Hungarian migrant workers abroad; and migration from the health care sector. The rapporteurs for *Ireland* refer to a report by T. Strik, B. de Hart and E. Nissen on *Family Reunification – A Barrier or Facilitator of Integration?*, Immigrant Council of Ireland, March 2013, which presents the outcome of a comparative study on family reunification policies in six EU Member States (Austria, Germany, Ireland, Netherlands, Portugal, and the United Kingdom) and their impact on the family life of the residents of these Member States. In the *Czech Republic*, the website http://www.portal.gov.cz set up by the public administration continues to be a useful tool containing information on free movement of workers and their rights guaranteed under the EU rules, including information on the possible action that can be taken in the event of termination of employment in an EU Member State. In *Denmark*, the report on *Human Trafficking for forced labour in Denmark? Migration and working conditions for a group of migrant workers employed in the cleaning industry, in the green sector and as au pairs,* (http://www.centermodmenneskehandel.dk/nyheder/ny-rapport-om-tvangsarbejde-2) is relevant given that, as mentioned above, a number of victims of trafficking are EU citizens from the EU-12, including persons of Roma origin. As noted in Chapter I. the Ministry of Interior in *France* has developed new web pages devoted to EU citizens, their rights, and how these can be exercised.[14] In *Poland*, two notable publications include: G. Birgit, et al., (ed.), *Mobility in Transition. Migration Patterns after EU Enlargement*, 2012 and P. Kaczmarczyk, "Labour market impacts of post-accession migration from Poland" in OECD, (ed.). *Free Movement of Workers and Labour Market Adjustment. Recent Experiences from OECD Countries and the European Union,* OECD. Paris, 2013, pp. 173-196. In *Romania*, the rapporteur draws attention *inter alia* to the comparative study edited by D. Tarnovschi on *Roma from Romania, Bulgaria, Italy and Spain between Social Inclusion and Migration*, Soros Founda-

14 See: http://www.interieur.gouv.fr/A-votre-service/Mes-demarches/Etranger-Europe/Etrangers-en-France/Citoyens-europeens-en-France.

tion, Bucharest, 2012. In the *United Kingdom*, a detailed study on obstacles to the exercise of free movement rights was published by two universities with the support of the Nuffield Foundation: J. Shaw, et al., *Getting to Grips with EU citizenship: Understanding the friction between EU free movement law and UK immigration law* (Edinburgh Law School Citizenship Studies, May, 2013).

Below are some of the event highlights of relevance to free movement of workers held across the EU-28 during the reporting period (in reverse chronological order):

- "Forum on the European Union", organized by the Croatian Academy of Sciences and Arts for academics and the general public, Zagreb, 18 June 2013 (I. Vukorepa lectured on the topic: "Freedom of Movement for Workers within the European Union").
- "Meaning of EU citizenship for Lithuanians", Discussion of the Human Rights Committee of the Parliament of Lithuania on occasion of the European Week 2013, Vilnius, 29 May 2013 (addressing issues of free movement of workers).
- "Seminar on Fundamental Rights Protection in the European Union", Irish Centre for European Law, 10 May 2013 (on the theme of fundamental rights protection in the EU, with a particular focus on assessing the impact of the Charter of Fundamental Rights since its adoption, and on the EU's accession to the ECHR).
- "Implementing and Delivering Free Movement of EU Workers and Citizens in the UK", organized by the Immigration Law Practitioners' Association, Queen Mary, University of London, 19 April 2013.
- "Seminar on Free Movement of EU Citizens", organized by the Finnish Ministry for Interior, 19 March 2013. The topics discussed included: EU policies on free movement of workers within the EU; free movement in the recent jurisprudence of the Court of Justice; and regulation of free movement as a part of immigration policy.
- "Family Reunification – a barrier or facilitator of integration?, Final Conference of he Family Reunification Project, Dublin, 14 February 2013.
- Annual Conference on "Free Movement of Workers within the EU", 15-16 November 2012, Valletta, Malta, organized by the Network, http://www.ru.nl/law/cmr/projects/fmow-2/annual-conference/.
- International Round Table, "Labour Migration and Integration – European Practices", Sofia, 1 October 2012, Migrapass Project, CERMES, http://www.cermes.info/page.php?category=35.
- Round Table, "*Doctors and Mobility*", Sofia, 22 November 2012, Health Commission of the National Parliament and CERMES, http://www.cermes.info/page.php?category=35.
- Czech Republic-Slovakia Seminar on "Free movement of Workers", June 2012, organized by the Czech and Slovak members of the Network. http://ec.europa.eu/social/main.jsp?langId=en&catId=457&eventsId=580&furtherEvents=yes.
- "Migrating workers in the housing services sector", Warsaw, 20 November 2012.
- "Polish citizens on the Netherlands labour market", Warsaw, 24 October 2012.
- Regional Seminar concerning "Cross-border work between Denmark and Sweden", Copenhagen, 31 May 2012, organized by the Danish and Swedish members of the network. http://ec.europa.eu/social/main.jsp?langId=en&catId=457&eventsId=551&furtherEvents=yes.
- First International Scientific Conference, "European Sports Labour Law – Towards a Social Dialogue in Croatian Sport", organized by the Faculty of Law, University of

Rijeka, Jean Monnet Inter-University Centre of Excellence – Opatija, Croatia, 25 May 2012.

- Ligue des droits de l'homme, "Liberté de circulation: de l'exigence à la réalité. Impact sur le marché du travail et la sécurité sociale", 23 March 2012.
- "Polish Migrants and Schooling: Perceptions of the English Education System and Migration Decisions", Warsaw, 20 March 2012.
- Progress Lawyers Network, "Être étranger est-ce un crime?", 16 March 2012.
- Lecture by I. Vukorepa on "Freedom of Movement for Workers within the EU", organized by the Lawyer's Club of the City of Zagreb and the Faculty of Law of the University of Zagreb, Zagreb, 14 February 2012.
- Ligue des droits de l'homme, "Les gens du voyage en droit au respect de leurs droits", 2 February 2012.
- Colloquium on "Roma people facing the law in Belgium", University of Namur, 26 April 2011. In 2012, the papers presented at the colloquium were published in a book. See J. Fierens (ed.), *Les Roms face au droit en Belgique*, Bruxelles, La Charte, 2012.

ANNEX I – COMMENTS OF AUSTRIA

Page 84

The statement in paragraph 2 should be amended or read as follows:
“The legal provision in question was nevertheless not only not set aside, on the contrary: The Federal Parliament confirmed the provisions made in reaction to the judgment Hütter with § 7a GehG stating that the new provisions are fully compatible with European law. A number of Austrian preliminary rulings pending on this issue will bring clarity.

ANNEX II – COMMENTS OF CYPRUS

Page 10, 2nd paragraph

As regards the judicial review mentioned in this section, it should be noted that the issue was finally resolved by decision of the Supreme Court of Cyprus in appeal No 72/2008 on 22/12/2010, which decided that Cypriot citizens do not fall within the scope of Directive 38/2004/EC. This of course has been changed to cover cases of Cypriots moving to Cyprus by the amendment of 2011 mentioned above.

Page 14, 2nd paragraph

Considering that this announcement was not made by the Ministry of Labour and taking into consideration that there have been no actions taken either by the Government or by social partners on such an issue, nor any implementation measures were actually adopted, it is obvious that this announcement has been given undue significance by the National Expert."

Furthermore, it should be noted that the proportion of non nationals participating in the labour market in Cyprus is the biggest among all EU Member States.

According to the statistical data kept by the Social Insurance Services of the Ministry of Labour and Social Insurance the number of employed persons (contributors) in July 2013 (last available data) was 401399 with EU citizens being 64261 (16%) and third country nationals being 39874 (9,9%).

Page 27, 2nd paragraph regarding delays

Article 10 (1) of the Directive 2004/38/EC, has been correctly transposed in Cyprus (Article 10(2) of Law 7(I)/2007-2013). It states that :

«The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.»

The Civil Registry and Migration Department has no applications for Residence Card submitted by third country nationals who give family members of EU citizens pending for more than four and a half months. Therefore, it is considered that there is no violation of Directive 38/2004/EC.

Regarding the finding that these applications can take up to six months to be processed, the following must be mentioned:

1) In Cyprus marriages of convenience, conducted by EU citizens and third country nationals already staying illegally in Cyprus are a major concern. That means that in some cases where there is reasonable doubt as to whether a Union citizen or his/her family members satisfy the conditions set out in Directive

38/2004/EC, the competent authorities of Cyprus need to verify whether these conditions are fulfilled, with additional investigations.

2) There is delay in some specific cases, due to the lack of compliance of applicants with the instructions of the Department.

It must be noted that after the upgrade of the computer system of the Civil Registry and Migration Department, applications pending for four months can be easily pinpointed and are handled as a matter of priority.

Page 29, 2nd paragraph

Concerning the high number of EU citizens expelled, it must be mentioned that in Cyprus the number of registered EU citizens is 121.113, meaning that the number of EU Citizens expelled (1795 since 2004-year of Cyprus accession)consists only of 1,41% of the total number of EU citizens. Furthermore, it must be noted that from 2006 till 27/12/2013, 1702 EU Citizens were expelled out of a total of 32.746 expelled foreigners, meaning that the number of EU Citizens expelled consists only of 5,19% of the total number of deportations.

Before taking an expulsion decision on the grounds of government policy or public security, competent authorities examine considerations such as how long the individual concerned has resided on Cypriot territory, his/her age, state of health, family and economic situation, social and cultural integration into the Republic of Cyprus and the extent of his/her links with the country of origin. The persons concerned are notified in writing of any decision taken in such a way that they are able to comprehend its content and its implications. The persons concerned are informed, precisely and in full, of the government policy, public security or public health grounds on which the decision taken is based, unless this is contrary to the interests of the national security.

ANNEX III – COMMENTS OF SPAIN

We do not consider it appropriate for the report to include general evaluations and comments on substantive aspects — both in the general introduction (pages 6 and 7) and on specific aspects such as case-law — page 53 — (writ of the Criminal Court of Bilbao of 28 September) without the said aspects being suitably specified and duly identified in the report, page 53, four unidentified cased which, as they are neither specified or identified in full, make it impossible to make an assessment and objective evaluation of their content or make any observations other than those relating to the insufficient identification of the matters cited.

We also record our express disagreement with the statement in point 2 (page 7) of the General Introduction to the report and with what are in the opinion of the Network of Experts the objectives of the reform made in Spain concerning access to the health system because the rules were changed for the purposes of adapting to and transposing Directive 2004/38/EC of 29 April 2004 almost word-for-word, and for which reason we are asking for this statement to be withdrawn.

Chapter I, The Worker: Entry, Residence, Departure and Remedies:

1. Transposition of specific provisions concerning workers

Article 14(4) of Directive 2004/38/EC (page 20 of the Report) contains in the latter of the two existing paragraphs a hypothesis that is absolutely subjective and has no basis in fact, for which reason we would ask to have the comment deleted.

We recall in this regard that the safeguard imposed by Article 14(4) would become unnecessary since there are no procedures in place for the expulsion of persons benefiting from free movement for reasons other than public order, public safety or public health.

In any case, we think it would be appropriate for this same paragraph and any other reference made in the report to the cited Article 14 to include a reference to the cited legislative amendment of Article 7 of Royal Decree 240/2007.

The statement on page 31 of the report concerning Spanish case-law on removal orders and entry bans should be deleted given that the entry bans of between five and ten years are for third country nationals. Regardless of the length of the ban on entry imposed, beneficiaries of freedom of movement may ask for the ban to be lifted after three years.

Chapter II

In Chapter II Members of a Worker's Family in questions relating to members of the family, as already stated, the comment on page 53 concerning Spain and sentences in Spanish courts should properly identify all the cases, because not identifying them or

failing to identify them properly make it impossible to assess their tenor and make any observations.

Chapter III

Point 2 of Chapter III of the report, "Access to Employment in the public sector, mentions on page 75 an alleged non-compliance with Article 45 of the TFEU.

We insist in this regard on this unit's comments on the draft report on public-sector posts reserved for nationals – New developments in the 27 Member States in 2009-2012.

In this regard, as pointed out by the Directorate-General for the Civil Service, it should be made clear that Spanish law on the civil service does not breach Article 45 of the TFEU regarding the free movement of workers within the European Union or the ban on any discrimination on grounds of nationality. The general principle of access to the civil service is to afford access to EU nationals, and such access is only restricted to Spanish nationals in the case of certain corps, in limited cases listed as exceptions in a measure having the force of law (the EBFP). This restriction does not apply throughout the service.

The regulations in this regard are specifically Article 57 of Law 7/2007 of 12 April on the Basic Public Workers' Statute: "nationals of the Member States of the European Union may access public service posts as officials on the same conditions as Spanish nationals with the exception of those posts which directly or indirectly involve participation in the exercise of public authority or in functions safeguarding the interests of the State or of the Public Administrations."

Chapter VI

Concerning Chapter VI Specific Issues:

In the section on Sports Sportsmen and women (page 107 of the Spanish version) the report does not mention the fact that the Federación Española de Baloncesto (FEB, Spanish Basketball Federation), the Asociación de Clubes de Baloncesto (Liga ACB, Association of Basketball Clubs) and the Asociación de Baloncestistas Profesionales (ABP, Association of Professional Basketball Players) agreed, on 19 July 2011, to amend the rules for player participation in the Liga ACB along the lines of the amendments adopted by the FEB, thus completing the regulatory changes that had begun in May 2011.

The Agreement, as reported at the time, brings the eligibility process for Liga ACB players into line with the recommendation made by the European Commission in relation to the application of Article 45 of the TFEU, thus doing away with the practices (establishment of nationality quotas) that discriminated against Community

basketball players with regard to access to and participation in professional basketball competitions in Spain.

Chapter VII

Referring to Chapter VII Application of transnational measures, page 120 of the report 2. Transitional measures imposed on workers from Bulgaria and Romania. 2.1. Continuation of transitional measures, we would inform you that, pursuant to point 7 of Annex VII to the Act concerning the conditions of accession of Romania on 31 December 2013 the measures restricting access to the labour market for the free movement of employees of Romanian nationality ceased to apply.

On 17 December 2013 the Secretariat General for Immigration and Emigration issued Instruction SGIE/5/2013 implementing the above Decision. Accordingly, once the transitional phase of restriction of the free movement of Romanian workers comes to an end, with effect from 1 January 2014, Romanian nationals will not require a work permit to take up paid employment because they and their family members who have the rights of free movement and residence will be subject to the regime provided in Spain for citizens of European Union Member States and other states party to the Agreement on the European Economic Area and the Swiss Confederation provided for in Royal Decree 240/2007 of 16 February on the entry, free movement and residence in Spain of nationals of European Union Member States and of other states party to the Agreement on the European Economic Area.

ANNEX IV – COMMENTS OF FRANCE

Page 58, 2nd paragraph of the "Case law" section:

The Bordeaux Administrative Court of Appeal ruling of 5 July 2012 does not cite the Dereci ruling. Moreover, the situations are not comparable, because there was no marriage of convenience in the European case law cited. The link between the Bordeaux Administrative Court of Appeal ruling of 5 July 2012 and that of the Court of Justice of the European Union of 15 November 2011 is therefore not relevant.

ANNEX V – COMMENTS FROM LATVIA

References to Latvia in pages 22, 90, 104, 129
Comments from the Ministry of Welfare
According to the Law on Social Services and Social Assistance the general principle is that social services and social assistance are available to citizens, non-citizens and aliens who have been granted a personal identity number, except for those who have received a temporary residence permit. However, there are several exceptions:
1) persons with an alternative status have the right to receive a shelter and night shelter services as well as to receive information, including about social services available free of charge;
2) orphans and children left without a parental care have the right to receive social care services and almost all of the State funded social rehabilitation services if the alternative status has been granted,
3) victims of trafficking in human beings holding the European citizenship and their accompanied children have the right to receive State funded social rehabilitation services for victims of trafficking in human beings,
4) victims of trafficking in human beings from the third countries and their accompanied children have the right to receive State funded social rehabilitation services for victims of trafficking in human beings if they have been granted a temporary residence permit.

When applying for State funded social rehabilitation services it is not essential if a person has a permanent or a short-term residence. For persons holding the European citizenship it is important to have a residence in Latvia and to reside there for a period not less than three months. According to the regulation set in the Law on Social Services and Social Assistance and Regulations of the Cabinet of Ministers issued pursuant to the Law on Social Services and Social Assistance in order to receive State funded social rehabilitation services a person shall:
1) have a Latvian citizenship or non-citizenship or
2) have a personal identity number and a permanent residence permit or a citizenship or European Union (alternative status in case of orphans and children without parental care or temporary residence permit in case of victims of trafficking in human beings from the third countries) +
3) comply with the requirements provided in specific Regulations of the Cabinet of Ministers (i.e., has received a status of a victim of trafficking in human beings, has a medical conclusion on addiction from psychoactive substances etc.).

Reference to Latvia in page 61

Comments of the Ministry of the Interior:

For Latvia the characteristically tendency is voluntarily or forced involvement of Latvian citizens in marriages of convenience in other European Union member states or third countries. Currently, Latvia is considered as the country of origin of fictive spouses. In most cases people are voluntarily involved in such marriages for the purpose of obtaining remuneration and to provide the opportunity for a spouse obtain

the right of residence in the relevant country and all across the European Union. The available data show that mostly women with Latvian citizenship are involved in conclusion of marriages of convenience in Ireland and the UK.
In order to reduce the number of marriages of convenience and inform the society about the consequences and threats of marriages of convenience the Ministry of the Interior regularly cooperates with the media and non-governmental organizations as well as actively participates and plans to participate in organization of information campaigns, public inquiries and trainings.
At the same time in order to prevent further active recruitment of brides and grooms in territory of Latvia for marriages of convenience, as well as to deter potential brides and grooms from marriages of convenience in order to obtain remuneration, the proposals to amend the Latvian Criminal Code were supplemented with a new Article 285 2 establishing criminal liability for a person who commits malicious provision with a possibility to acquire the legally right to reside in the Republic of Latvia, other Member State of the European Union, Member State of the European Economic Area or Swiss Confederation. This of the Criminal Code provision was approved by the Parliament on 13 December 2012 and entered into force on 1 April 2013.
Considering the increasing problem of marriages of convenience number of measures are included in the National Strategy for the prevention of Human Trafficking 2014 - 2020, which is currently in the approval process in the Cabinet of Ministers.

Comments of the Ministry of Welfare:

In 2012 State funded social rehabilitation services for victims of trafficking in human beings were provided by one NGO – "Shelter "Safe House"". Accordingly, State funded social rehabilitation services received 25 victims, of which 14 cases where cases of shame marriages (women only), six cases of sexual exploitation (one man and five women), three cases of forced labor (one man and two women) and two cases of other kind of exploitation (domestic servitude and forced begging).

Reference to Latvia in page 63

Comments of the Ministry of the Interior:

It should be noted that each residence document, issued in Latvia, contains the indication on the access to labor market. The residence permit of family member of EU citizen contains the text: "Tiesības strādāt bez ierobežojumiem" (The right to work without restrictions).

Reference to Latvia in page 84

Comments of the Ministry of Welfare:
There are some exceptions concerning requirements for the persons who want to access the posts which are connected with the exercise of public authority.

According to the Article 7 of the State Civil Service Law the mandatory requirements for a person who may be a candidate for a civil service position are as follows:

1) he or she is a citizen of the Republic of Latvia;
2) he or she is fluent in the Latvian language;
3) he or she has a higher education;
4) he or she has not reached the age of retirement determined by law;
5) he or she has not been convicted of deliberate criminal offences, or has been rehabilitated, or for whom the conviction has been set aside or extinguished;
6) he or she has not been dismissed from a civil service position by a court judgment in a criminal matter;
7) he or she has not been found as lacking capacity to act in accordance with the procedures prescribed by law;
8) he or she is not or has not been in a permanent staff position in the State security service, intelligence or counter-intelligence service of the U.S.S.R., the Latvian SSR or some foreign state;
9) he or she is not or has not been a participant in organizations prohibited by law or by an adjudication of a court;
10) he or she is not a relative (a person who is married to, or in kinship or affinity of the first degree with, or a brother or sister of, a civil servant) of the head of an institution or a direct supervisor. The Cabinet may determine exceptional cases if a relevant institution cannot otherwise ensure the fulfilling of prescribed functions; and
11) he or she for whom have not been retained such consequences of the activities of the disciplinary sanction, which for a specified period prevents him or her to hold a civil service position.

ANNEX VI – COMMENTS OF LITHUANIA

Page 15 Section Article 7(l)(a) - right of residence for more than three months of workers or self-employed persons

It should be noted that pursuant to the current legal acts of the Republic of Lithuania, EU citizens and their family members as well as other persons entitled to liberty of movement are issued temporary and permanent documents to specify and certify the right to residence (Article 99 and Article 104 of the Republic of Lithuania Law on the Legal Status of Aliens (hereinafter referred to as the Law)). The orders of the Minister of the Interior of the Republic of Lithuania specified below regulate the procedure of issue of documents:

1. Order No. 1V-290 of 25 July 2008 of the Minister of the Interior of the Republic of Lithuania "On the approval of the Description of the procedure for issue of residence certificate entitling a citizen of an EU Member State to reside in the Republic of Lithuania and the Description of the procedure for issue, renewal and evocation of residence permit entitling a family member of a citizen of an EU member state to reside in Lithuania" (hereinafter referred to as the Description of the procedure for issue of temporary certificates).
2. Order No. 1V-369 of 25 October 2007 of the Minister of the Interior of the Republic of Lithuania "On the Approval of the Description of the procedure for issue of residence certificate confirming the right of a citizen of an EU Member State to permanent residence in the Republic of Lithuania and the Description of the procedure for issue, renewal and revocation of residence permit entitling a family.

It should be noted that pursuant to Paragraph 21 of Article 133 of the Law, a citizen of an EU Member State and (or) a family member of the citizen of an EU Member State or other person who exercises the right to freedom of movement may be prohibited from entering the Republic of Lithuania for a period not longer than 5 years only if the arrival or presence of this person in the Republic of Lithuania may constitute a threat to national security or public policy. Pursuant to Paragraph 5 of the same article, the decision to prohibit (not to prohibit) the alien to enter the Republic of Lithuania shall be made by the Migration Department. Based on this decision, a citizen of an EU Member State or a family member of the citizen of an EU Member State shall be entered in the national list of aliens prohibited from entering the Republic of Lithuania.

It should be noted that pursuant to Article 136 of the Law, decisions made in accordance with this Law may be appealed against in accordance with the procedure established by this Law and the Law an Administrative Proceedings.

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Pursuant to both the Description of the procedure for issue of temporary certificates and the Description of the procedure for issue of certificates confirming the right of permanent residence in the Republic of Lithuania, if the application is submitted together with documents issued by state institutions, these documents must be legalised or certified with Apostille in line with the procedure specified in the laws,

except for cases when international treaties of the Republic of Lithuania or legal acts of the European Union do not require a document to be legalised or certified with Apostille. These documents must also be translated into Lithuanian, and the translations must be certified in line with the procedure established by laws.
It should be noted that on 29 January 2010, the Convention on the issue of multilingual extracts from civil status records (hereinafter referred to as the Convention), signed on 8 September 1976 in Wien, entered into force in Lithuania. Extracts from civil status records (birth, marriage, death certificates) of state parties issued according to the form established by the Convention without any additional formalities (legalisation, certification with Apostille or translation) must be accepted in other states parties, therefore, the number of such documents that must be translated into Lithuanian is not high what does not impose a heavy burden of administrative formalities on aliens (international letters of higher schools or companies' employment agreements are concluded in Lithuania, therefore, they are written in the Lithuanian language).

Page 20
It should be noted that pursuant to Paragraph 6 of Article 106 of the Law, upon withdrawal of the right of residence in the Republic of Lithuania, the citizen of an EU Member State and/or his family members must depart from the Republic of Lithuania, and persons, who have failed to fulfil this obligation or in cases specified in item 1 of Paragraph 1, item 1 of Paragraph 2 and item 1 of Paragraph 3 (i.e. because of threats to national security or public policy), are expelled in accordance with the procedure established by this Law.

Page 21 Article 17 - right of permanent residence for persons and their family members who are no longer in employment

Item C of Paragraph 4 of Article 17 of Directive 2004/38/EC implies that the spouse of a citizen of an EU Member State would lose the citizenship of the Republic of Lithuania following marriage to the worker or self-employed person. It should be noted that Article 24 of the Republic of Lithuania Law on Citizenship of the Republic of Lithuania establishes the grounds for the loss of the citizenship. This law does not specify the grounds for the loss of the citizenship following marriage. With regard to the aforesaid, it was not necessary to transfer this provision.

Page 29
Pursuant to Paragraph 6 of Article 106 of the Law, upon withdrawal of the right of residence in the Republic of Lithuania, the citizen of an EU Member State and/or his family members must depart from the Republic of Lithuania, and persons, who have failed to fulfil this obligation or in cases specified in item 1 of Paragraph 1, item 1 of Paragraph 2 and item 1 of Paragraph 3 (i.e. because of threats to national security or public policy), are expelled in accordance with the procedure established by this Law. Pursuant to Paragraph 3 of Article 127, the obligation to depart from the Republic of Lithuania specifies a period not exceeding 30 days during which the alien must depart from the Republic of Lithuania.

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The concept of another person who, pursuant to EU legal acts, exercises the right to freedom of movement, i.e. "Another person who exercises the right to freedom of movement as per legal acts of the European Union" must be clarified. It is a person who is not a family member of a citizen of an EU Member State, but a cohabitant, with whom the citizen of an EU Member State has maintained continuous relations over the last three years, which can be evidenced with proper documentation, as well as a person who is maintained by a citizen of an EU Member State or maintains common household together with a citizen of an EU Member State or who, due to serious health problems, requires personal care by a citizen of an EU Member State, if it is confirmed with proper documents.

Page 50

The link should be provided not only to Article 100 of the Law, but also to Article 105(2), since Article 100 establishes only the term for processing the application to issue or replace the EU temporary residence permit card, whereas, Article 1052 of the law deals with the processing term of the application to issue or replace the EU permanent residence permit card.

Biometrics is included on the EU temporary residence permit card (Paragraph 2 of Article 99) and EU permanent residence permit card (Paragraph 4 of Article 104).

Pursuant to Article 102 of the Law, an EU residence permit shall be issued and extended for a period of five years or for the intended period of residence in the Republic of Lithuania of the citizen of the EU Member State, where such period is shorter than five years. Pursuant to Paragraph 4 of Article 104, EU permanent residence permit cards are issued for the period of ten years.

The withdrawal of the right of residence in the Republic of Lithuania is established in Article 106 of the Law.

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Starting from July 2008, in Lithuania applications on issue and replacement of temporary certificates of EU citizens and cards of family members of EU residents (confirming the right of temporary residence) are submitted to migration services of territorial police institutions, which also take decisions on issue or replacement of certificates and cards. Citizens of the European Union receive certificates by mail. Therefore, the currently operating system is a one stage system.

Page 63

Pursuant to Article 103, citizens of an EU Member State and their family members intending to work in the Republic of Lithuania shall not be required to obtain a work permit.

Page 65
Pursuant to Article 103, citizens of an EU Member State and their family members intending to work in the Republic of Lithuania shall not be required to obtain a work permit

Page 95 concerning VAT

The VAT Directive 2006/112/EC provides for a special scheme for small enterprises, the purpose of which is to simplify and alleviate VAT obligations for SMEs. Under this special scheme, the Member States may exempt small enterprises from VAT obligations if the enterprise's turnover does not exceed the ceilings specified in the directive. However, according of Article 283 these arrangements cannot be applied to supplies of goods or services carried out by taxable persons who are not established in the Member States (i.e. by foreigners) in which the VAT is due. This means that according to the aforementioned VAT Directive foreign taxable persons are required to register for VAT purposes from the moment they commence economic activity in Lithuania. Therefore, the provisions of Lithuanian legislation regarding registration for VAT purposes are fully in line with aforementioned VAT Directive.

ANNEX VII – COMMENTS OF SWEDEN

Page 133

Given the fact that the Swedish labour migration system has proved to be effective, flexible and open there are good reasons to maintain the Swedish approach to labour immigration while addressing the weaknesses and vulnerabilities that have been identified so far. Therefore, the Swedish Minister for Migration and Asylum Policy has announced measures to address the abuses.