EUROPEAN REPORT
on the Free Movement of Workers in Europe in 2008-2009

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Executive Summary

The assessment of the application of the EU workers' right free movement in the Member States in 2008 is surprisingly positive notwithstanding the turbulence in the markets which marked the year. In many areas, Member States have brought their legislation into line with their EU obligations and in others their practices have improved. However, new challenges and issues are clearly arising which will need close monitoring.

On the positive side:

- Following the European Court of Justice judgment in *Metock* on the right to family reunification, and notwithstanding the considerable political static which followed the judgment, virtually all Member States are correctly applying the judgment and made the necessary adjustments to their rules and practices;
- Free movement of workers is virtually complete for EU 8 nationals (only Austria, Germany and the UK are maintaining transitional arrangements for the final two years); the main destination countries of EU 2 workers (with the notable exception of Italy) have opened up free movement of workers to them;
- The Commission's action over the past decade to ensure proper implementation of the European Court of Justice's judgments on access to the public sector for workers from other Member States is really paying off; substantial progress was reported in many Member States in 2008.

On a more sombre note:

- The economic turmoil has resulted in a number of workers returning to their Member State of origin and encountering difficulties in obtaining recognition for their work in other Member States and social benefits;
- Far too few Member States recognise the rights of job-seekers as distinct from economically inactive citizens of the Union; this results in job-seekers being subject to financial and health insurance requirements which are not permissible in EU law;
- Frontier workers are forming an increasingly important part of the EU labour force but they still suffer many obstacles as a result of being resident in one Member State and economically active in another Member State. These problems are often related to the treatment of family members, access to social benefits and taxation;
- Administrative delay is still dogging the enjoyment of free movement rights; too many Member States are failing to comply with their obligations to issue residence certificates immediately and residence cards as quickly as possible (and in any event within six months), documents verifying the acquisition of permanent residence etc. The practical problems which these delays cause can be enormous for workers and their families.

There is still plenty of room for improvement by Member State administrations in their application of EU workers' rights. One key aspect is that Member States must ensure that all the different government departments which have responsibility for various aspects of workers rights are fully informed of their obligations to ensure proper compliance.

General Introduction

The **Centre for Migration Law** of the Radboud University Nijmegen, The Netherlands, coordinates under the supervision of the European Commission a European Network on Free Movement within the European Union. One of the activities of this Network is the annual production of 27 national reports and one European report on the implementation of EU free movement law in the Member States.

This European report covers the period of 1 January 2008 - 1 July 2009. Previous reports can be found on the website of the Commission: http://ec.europa.eu/social/main.jsp?catId=475&langId=en.

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

1. EFFECTS OF THE ECONOMIC CRISIS

The economic crisis that became acute in the second half of 2008 clearly had far reaching effects on free movement of workers between Member States. The first and most visible effect has been a sharp reduction of workers using their free movement and an increased return to the Member State of origin. This effect of the crisis appears to affect especially workers from the EU-8 and EU-2 Member States. The number of Romanian and Slovak workers employed in Hungary at the end of 2008 was reduced with more than one third as compared with the end of the previous year. The number of workers from Poland and the Baltic States employed in Ireland and the UK also went down considerably.

The economic crisis has prompted budgetary measures in many Member States. Those measures may well work out negatively on free movement and on the rights of EU nationals having used their free movement rights. Examples are the tax reform adopted in Lithuania that may have negative effects for EU and EEA nationals. In Italy legislation was enacted restricting certain social benefits to Italian nationals and long-term resident non-citizens. Such reforms may not be targeted at EU/EEA nationals, but they may hit them more often than nationals not having used their free movement rights.

2. IMPLEMENTATION OF DIRECTIVE 2004/38 AND THE *METOCK* JUDGMENT

During 2008 and the first half of 2009 several Member States (e.g. Czech Republic, Estonia, Hungary, Italy, Malta and Poland) have amended their national legislation in order to extend, improve or complete the implementation of Directive 2004/38. Luxembourg was the last Member State to transpose the Directive in its national legislation in 2008. In Cyprus, Hungary and Lithuania changes in the national legislation contributed to the implementation of the provisions in the Directive on the rights of third-country family members or to making those rights more clear and accessible.

Whilst the judgment of the Court in the *Metock* case was subject of political and public debate in several Member States, the four Member States (Denmark, Finland, Ireland and the UK) that had introduced previous lawful residence in another Member States as a requirement for recognition of free movement rights of third-country family members at the time of

the transposition of Directive 2004/38, all four complied with the Metock judgment and changed their immigration legislation, bringing it in line with the judgment. In Germany the requirement of third-country family members to have passed the integration test abroad before a visa for family reunification was granted, was deleted from the circular of the Ministry of Foreign Affairs. The intention of the Dutch government to introduce a similar requirement in the immigration legislation for third-country family members of EU nationals, announced in 2005, was abandoned after the judgment. In the Netherlands the debate on the Metock judgment actually resulted in implementation of the 2007 judgment of the Court in the Eind case.

3. APPLICATION OF TRANSITIONAL MEASURES

By the end of 2008 eleven of the EU-15 Member States had abolished transitional measures and granted free access to employment to all EU-8 workers. The remaining four Member States (Austria, Belgium**,** Denmark and Germany) all had introduced measures reducing the obstacles to free movement for certain categories of EU-8 workers. Belgium and Denmark have lifted their restrictions as of 1 May 2009. Germany and Austria continue to require, also after 1 May 2009, a labor permit for EU-8 workers but have simplified the procedure for certain categories of those workers.

At the end of 2008 the majority of EU-15 Member States decided to continue transitional measures with regard to workers from Bulgaria and Romania. But Greece, Hungary, Portugal and Spain did abolish transitional measures for EU-2 workers, joining the eight EU-10 states and Finland and Sweden that granted free access to workers from Bulgaria and Romania already in 2007. Denmark abolished these transitional measures as of 1 May 2009. In Germany highly qualified EU-8 and EU-2 workers may profit from the liberalization of the national rules of the admission of foreign workers with high qualifications for certain professions. The details of the (non-)application of the transitional measures are presented in chapter VIII.

The issue of substandard pay and working conditions of workers from Member States that joined the EU in 2004 or 2007, especially for workers from those states posted in other Member States or employed through the intermediary of private employment agencies, is subject of debate in several Member States.

4. RETURNING MIGRANTS AND OTHER CATEGORIES WITH SPECIAL PROBLEMS

Several national reports mention problems encountered by nationals returning to their Member State of origin after having used their right to free movement. In Poland the recognition by employers of employment and experience acquired in another Member State raises problems. Other problems are the treatment under national tax legislation (Latvia, Lithuania) or a temporary ban to leave the country (in Romania; the issue has been dealt with in the *Jipa* judgment). Both Denmark and the Netherlands amended their immigration rules explicitly recognizing the right of their nationals to bring their third-country family members with them after having used their free movement rights in another Member State.

Special problems concerning the social and other rights of job-seekers or cross border workers are mentioned in the reports on Germany, Spain and other Member States. A detailed discussion of those categories is to be found in chapter III and VI. The special prob-

lems of cross border workers are also reflected in the poor follow-up of the *Hendrix* and *Renneberg* judgments of the Court of Justice, while many Member States continue to apply strict residence clauses with regard to certain social and tax advantages (see Chapter VII).

5. EMPLOYMENT IN THE PUBLIC SECTOR AND LANGUAGES REQUIREMENTS

The constant action and pressure of the Commission, since the early 1980s, on the issue of access of EU nationals to employment in the public service of another Member State continues to bear fruit. The national reports on Bulgaria, Finland, Poland and Portugal mention changes in the national legislation removing legal obstacles to the employment of EU nationals in certain jobs in the public service. For more details see chapter V of this report.

The issue of unjustified language requirements being a barrier to access to employment both in public service and with private employers is mentioned in several national reports. For more details see chapters II, IV and V. During 2008, Dutch MPs of various political parties repeatedly requested the introduction of a statutory obligation for Polish workers, who do not have basis knowledge of the Dutch language, to participate in Dutch language and integration courses.

6. OTHER OBSTACLES: ADMINISTRATIVE DELAYS AND COMPLEX LEGISLATION

Two practical barriers to the exercise of free movement rights have been mentioned in the national reports on 2008/2009: long delays in registration or issuing of EC residence cards and the complexity of the relevant national legislation. The report on Cyprus mentions a backlog of 27,000 pending application for registration as a resident EU national. The UK report mentions ten to twelve month delays in handling applications for an EC residence card. Those long delays are reported to have far reaching consequence for the EU nationals concerned, such as dismissal, treatment as illegal resident by employers and public agencies, difficulties when travelling abroad since the passport is with the immigration authorities, and the need to provide new documents since the documents originally provided are no longer valid or accepted by the immigration authorities by the time they finally deal with the application.

The other practical barrier mentioned in some reports is the complexity of the legislation transposing the EC free movement legislation in the national law. If the implementation does not take the form of a separate Act or decree, but is spread over the various chapters of the general immigration law, it is often hard for migrants and for immigration authorities or other officials to find and apply the relevant provisions granting privileged treatment in comparison with third-country nationals. This raises practical problems especially with regard to third-country family members of EU migrants. Such problems are mentioned in the reports on Cyprus, Hungary and Lithuania, but this issue arises also in Member States that acceded to the EU before 2004.

Chapter I
Entry, Residence, Departure and Remedies

INTRODUCTION

This chapter focuses on the transposition in the 27 EU Member States of specific provisions of the EU Citizens Directive (hereafter 'Directive 2004/38/EC')[1] concerning EU workers, namely: the right of residence for more than three months of workers or self-employed persons – Article 7(1)(a); retention of status of the worker or self-employed person by EU citizens who are no longer in employment– Article 7(3)(a)-(d); administrative formalities relating to the residence of EU workers and self-employed persons – Article 8(3), first indent; prohibition on expulsion of EU citizens or their family members if they are workers or self-employed persons, or job-seekers – Article 14(4)(a)-(b); right of permanent residence for persons and their family members who are no longer in employment – Article 17; and the derogations from equal treatment – Article 24(2).

In summary, transposition of these provisions in most of the EU Member States can be assessed 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 almost verbatim (*Cyprus*, *Denmark*, *Estonia*, *Finland*, *Greece*, *Luxembourg*, *Portugal*); (2) generally complete, with the exception of one or two gaps or relatively minor inaccuracies (*Belgium*, *Czech Republic*, *France*, *Hungary*, *Ireland*, *Italy*, *Malta*, *Poland*, *Romania*, *Sweden*); (3) partial or incomplete, where more gaps or serious deficiencies in transposition have been highlighted (*Austria*, *Bulgaria*, *Latvia*, *Lithuania*, *Slovenia*, *United Kingdom*); and (4) where transposition of these specific provisions is virtually non-existent (*Spain*). It should be noted, however, that in respect of (1) and (2) above, there is relatively little information available on how these provisions are applied in practice, particularly Articles 7(3)(a)-(d) and 17. Only a few Member States have in place some more favourable rules relating to these provisions. In *Belgium*, EU workers and family members (but not students) acquire the right to permanent residence after three years rather than the five years stipulated in Directive 2004/38/EC (Article 16), while in *Sweden*, 'worker' has been defined more broadly than in previous legislation. In *Spain*, the non-transposition of many of these provisions is explained by the rapporteurs in positive terms as generally giving rise to a much more favourable position for EU citizens (including job-seekers), although, interestingly, the lifting of the transitional arrangements as from January 2009 in respect of Bulgarian and Romanian nationals has resulted in official instructions referring specifically to 'workers'.

This chapter also examines the specific situation of EU job-seekers in Member States with specific reference to pertinent provisions of the Directive, including recital 9 which requires Member States to grant more favourable treatment to this group with regard to the right of residence in accordance with the case law of the Court of Justice. Finally, it highlights a number of pertinent issues of concern relating to substantial delays in issuing residence certificates, residence cards and documents certifying permanent residence; the refusal of entry to and expulsion of EU citizens, particularly those coming from the new Member States; and remedies.

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

Article 7(1)(a)

This provision appears to have been transposed correctly in most EU Member States, i.e., *Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Sweden*, and the *United Kingdom*.[2]

In *Latvia*, however, the implementing regulations stipulate that a EU citizen is under no obligation to obtain a registration certificate if s/he resides in Latvia longer than 90 days *and* resides in the country for up to six months within a period of one year for the purpose of employment or is employed in Latvia but resides in another EU Member State where s/he returns on a weekly basis. The reference to 90 days is also questioned because the period of three months is usually longer than 90 days. In *Spain*, this provision has not been transposed in the Royal Decree 240/2007 (as amended) implementing the Directive, which merely states that 'citizens of the EU or of the EEA have the right to residence in Spain for a period longer than three months' without any reference to workers or self-employed persons.

Article 7(3)(a)-(d)

Article 7(3)(a)-(d) seems to have been correctly transposed in *Belgium, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Romania* and *Sweden*. However, no transposition of these provisions has taken place in *Austria*, *Lithuania* and *Spain*, with the result that the status of EU workers and self-employed persons after the termination of the employment relationship is unclear.

As noted in previous reports, Article 7(3) has been incorrectly transposed in *Slovenia* because the national legislation only permits retention of the right of residence in case of the circumstances stipulated in paragraphs (a)-(d) and not retention of the status of worker or self-employed person. In *Bulgaria*, transposition is generally accurate with the exception of Article 7(3)(d), in respect of which the national law expressly excludes vocational training related to previous employment in the case of involuntary unemployment, which is not the intention of this provision. Similarly, in *Slovakia*, there is inaccuracy in the transposition of Article 7(3)(a). If the EU citizen is no longer in employment, and s/he is temporarily unable to work as a result of an illness or occupational disease or work accident which was not the reason for the termination of the employment, according to Slovak law, such a person is not considered as possessing residence on the basis of the first residence permit in Slovakia unless there is an assumption that s/he will be employed. In the *United Kingdom*, there is a serious problem with the transposition of Article 7(3)(c) because the national regulations require the person to have been in employment for one year or more, a threshold not found in that provision which refers to involuntary unemployment after completing a fixed-term employment contract of less than one year.

Article 8(3), first indent

This provision has been transposed correctly in *Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Luxembourg, Poland, Portugal, Romania,*

2 Although the need to possess a work 'licence' in *Malta* or a 'work permit' in *Slovenia* is problematic in terms of Article 8(3) – see below).

and *Sweden*. In the *United Kingdom*, however, a number of administrative barriers have been introduced in new rules which entered into force on 1 June 2009.[3] In *Spain*, there is an obligation on EU citizens to register before the end of the first three-month period of residence, although no further administrative formalities are required.

While this provision has also been transposed in *Lithuania*, the rapporteur notes that all the documents to be provided in connection with Article 8(3) have to be translated into the Lithuanian language, which may serve as an obstacle to obtaining the residence certificate. In *Malta*, a licence has first to be issued for employment, and although this is stated to be a formality, it may nonetheless constitute an administrative impediment to free movement of workers. Similarly, in *Slovenia*, the additional requirement that both the worker and self-employed person hold a valid work permit is not in conformity with this provision. In the *Czech Republic*, some of the documents required to obtain a temporary residence certificate, such as the document confirming guaranteed accommodation, are not in compliance with Directive 2004/38/EC. In *Cyprus*, EU citizens working in the territory but where the company base is abroad, have to meet minimum income requirements in respect of themselves as individuals and their family members, in order to proceed with the application for a residence certificate. This condition is not in conformity with Article 8(3), first indent, and, in the view of the rapporteur is also suspect to discrimination on gender grounds. In *Italy*, where there is an obligation to register if the residence is for more than three months, in practice applications to do so have proven difficult because some municipalities request more documents than those permitted (e.g. birth certificate) or have added bureaucratic or unnecessary steps to the application process. Excessive information (including evidence of sufficient financial resources) is also requested in *Latvia* where EU citizens and their family members are required to complete an extensive questionnaire on registering their residence in the country.[4]

Article 14(4)(a)-(b)

Article 14(4)(a)-(b) has been fully transposed in *Belgium*, the *Czech Republic*, *Denmark*, *Estonia*, *Finland*, *France*, *Greece*, *Italy*, *Luxembourg*, *Malta*, *Portugal*, *Romania*, *Sweden* and the *United Kingdom*. Indeed, in *Finland*, the Government Proposal 205/2006 concerning the transposition of Directive 2004/38/EC explicitly states that an employee, self-employed person or a job-seeker cannot be removed from the country even if s/he would constitute a burden on the social assistance system. In *France*, the transposing provisions explicitly require EU job-seekers to provide evidence that they are seeking employment and have a really chance of being engaged. In *Latvia*, however, only Article 14(4)(a) has been transposed and the Article 14(4)(b) derogation relating to job-seekers does not appear anywhere in the implementing regulations.

There are no national provisions in the laws of *Austria*, *Bulgaria*, *Ireland*, *Poland*, *Slovenia* and *Spain* transposing these provisions. However, the legal position in *Poland* would appear to be that the mere fact of resort to social assistance benefits is insufficient to substantiate the expulsion of EU citizens and their family members. In *Ireland*, the rapporteur ob-

3 See Immigration (European Economic Area) (Amendment) Regulations 2009 (SI No. 1117). There also continue to be serious delays in the issue of registration certificates in the UK – see 'Other issues of concern' below.

4 This questionnaire is essentially aimed at extracting information from third-country nationals and with a view to including all persons with a residence permit in the Population Register.

serves that a possible difficulty arises in relation to residence for up to three months, which in the regulations implementing Directive 2004/38/EC is conditional upon the person in question not becoming an unreasonable burden on the social welfare system, and no specific derogations are foreseen for workers or self-employed persons, or job-seekers. However, this difficulty does not arise in respect of workers or self-employed persons enjoying the right of residence for more than three months because there is no such condition.

Article 17

Article 17 has been fully transposed in *Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia* and *Sweden*, but not in *Austria*.

Transposition of the Article 17 provisions has been completed in *Lithuania*, but, as observed above in relation to Article 8(3), first indent, all supporting documents have to be translated into the Lithuanian language. In *Bulgaria*, the legislator appears to have totally misunderstood this provision stating that EU citizens and their family members qualify for permanent residence if they have resided continuously in the country for five years *and* fulfil any of the requirements in Article 17 of the Directive. In the *Czech Republic*, transposition is essentially *verbatim* with the exception of Article 17(3), which is only partly transposed in respect of the right of permanent residence of family members of workers or self-employed persons acquiring permanent residence in accordance with Article 17(1). 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 this nationality by marriage to that worker or self-employed person. Similarly, in *Slovenia*, the rules for acquiring permanent residence are more favourable in respect of EU nationals of Slovenian origin and EU nationals whose residence is deemed to be in the interest of Slovenia.

While the transposition of Article 17 in *Ireland* is generally correct, two small discrepancies have been identified in the implementing regulations in relation to Article 17(1)(c) and Article 17(3). Similarly, in *Latvia*, where the regulations transposing Article 17(3) stipulate that the permanent residence permit issued to family members of a worker or self-employed is only for a period of ten years. In *Spain*, only Articles 17(1)(b)-(c) and 17(2) have been transposed, and, in the *United Kingdom*, the rapporteur refers to the continued restrictive interpretation of the right to permanent residence of nationals from the ten new Member States, in respect of which the UK Border Agency requires evidence that during the five years of residence they were exercising a right under Community law.

Article 24(2)

Denmark, France, Greece, Ireland, Italy, Poland, Portugal and the *United Kingdom* have transposed the derogations in Article 24(2), but there are no explicit national provisions transposing this provision in *Austria, Belgium, Bulgaria, Romania, Slovenia*, and *Spain*. In *Romania*, however, the Government Emergency Ordinance transposing Directive 2004/38/EC underlines that, as a general rule, EU citizens are entitled to the same social protection measures as Romanian citizens, and, in *Spain*, Royal Decree 240/2007 also contains a general equal treatment clause applicable to EU citizens, including third-country national family members. In *Estonia*, this provision does not appear to be applied as all persons

who have a right to stay also have the right to social assistance, study loans and vocational training.

On the other hand, in *Slovenia*, the situation in respect of Article 24(1) is rather problematic because there is no explicit provision in the national legislation assuring to EU citizens equal treatment with nationals in respect of social assistance, only a rule ensuring equal treatment between nationals and foreigners who are permanent residents. Transposition of Article 24(2) in *Latvia* lacks clarity with regard to social assistance and is only partial as far as education grants are concerned. In *Italy*, however, the legislative decree transposing this provision makes it clear that workers are entitled, during the first three months of their residence, to those social benefits which are automatically connected to their employment or as otherwise provided by the law. In *France*, however, the NGO GISTI (*Groupe d'Information et du Soutien des Immigrés*) has questioned whether the application of the derogations to certain family benefits are permissible given that the provision refers specifically to 'social assistance'. In *Sweden*, for periods of stay of up to three months, persons (irrespective of their nationality) who are not resident in the local community are only entitled to social assistance in emergency situations.

SITUATION OF JOB-SEEKERS

The situation of job-seekers in EU Member States can be divided into two broad categories: (1) where there are rules recognizing their existence 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 Directive 2004/38/EC. Recital 9 in Directive 2004/38/EC has not been explicitly referred to in the transposing rules in any Member State, although its application is clearly implicit in some (e.g. *Malta, Sweden*). Moreover, the rapporteurs for *Lithuania*, *Luxembourg*, *Slovakia* and the *United Kingdom* expressly observed that there are no references to this recital in national legislation and/or in preparatory documents.

Residence registration requirements for job-seekers differ. In some Member States (*Estonia*, *France*, *Greece*, *Latvia*, *Lithuania*, *Netherlands*, *Poland*, *Portugal*, *Spain*), the general rules on residence apply to job-seekers, either expressly or implicitly, and they need to register their residence if they are going to stay longer than three months in the territory, while in other Member States (*Austria*, *Belgium*, *Czech Republic*, *Malta*, *Sweden*, *United Kingdom*) there is no such requirement. In *Austria*, however, job-seekers first have to report their presence in the territory within three days, which does not appear to comply with the requirement of 'a reasonable and non-discriminatory period of time' in Article 5(5) of Directive 2004/38/EC and the judgment of the Court of Justice in C-265/88, *Messner*. In *Portugal*, registration of residence rules for EU job-seekers staying longer than three months require them to register within 30 days after the period of three months from the date of entry into the national territory and in addition to showing a passport or valid identity card, they have to make a declaration that they have sufficient resources for themselves and their family members as well as sickness insurance (if this is also required of Portuguese citizens in the Member State of their nationality).

In a number of Member States, registration is usually necessary to access the services of public employment/labour services (*Bulgaria*, *Czech Republic*, *Germany*, *Latvia*, *Poland*, *Sweden*) and may also be important when assessing the qualifying period for permanent residence (*Czech Republic*). In some instances, it is possible after registration of residence to

access social benefits/assistance (*Belgium*, *Poland*). In *Latvia*, it is in theory possible to obtain the status of an unemployed person or job-seeker without possession of a registration certificate, but in practice the State Employment Agency awards this status only if EU citizens have the certificate. The official status of an unemployed person or job-seeker allows the person concerned to unemployment benefit exportable from another Member State and to attend educational and vocational courses.

In *Denmark*, *Malta* 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, and, in *Denmark*, it is clear they may also stay longer if they apply for a residence certificate and can demonstrate that they are continuing to seek employment and have a genuine chance of obtaining it. In *Portugal*, there is also no time limit on the stay of job-seekers so long as they can prove they are looking for work. Similarly, in *Finland*, job-seekers may reside for a reasonable period of time beyond three months without the need to register their residence provided they continue to look for work and have a real chance of finding it. However, what is a 'reasonable period of time' is not defined.

The specific situation of job-seekers in a number of Member States is unclear and essentially appears to have been overlooked in transposing national provisions. In *Estonia*, there are no special rules applying to this group, and their situation is not regulated in *Lithuania*. In *Bulgaria*, the law implementing Directive 2004/38/EC is silent on the question whether registered job-seekers can stay longer than three months, and, in *Cyprus*, it is also uncertain how long job-seekers may stay without any formalities, although this period is presumed to be indefinite so long as they do not seek recourse to public funds. In *Ireland*, the rapporteur observes that the position of job-seekers who enter the country is very unclear, although in practice there is nothing precluding job-seekers who are EU citizens from entering because there is no requirement for them to prove their status to the immigration authorities (i.e. no obligation to register and no entitlement to social benefits – see also below). In *Italy*, it is unclear whether job-seekers should be treated as workers or non-workers (and therefore whether they are required to possess 'sufficient resources'), although their protection from expulsion is stated in relation to Article 14(4) (see above). Similarly, in *Romania*, there are no rules on job-seekers in the Government Emergency Ordinance transposing Directive 2004/38/EC, with the exception of the reference to the prohibition on their expulsion in those instances where they can prove that they are looking for work and have a genuine chance of being engaged. In *Spain* (in keeping with the general non-transposition of the specific provisions relating to workers above), there are no special provisions regarding the treatment of EU job-seekers, and, in *Slovenia*, while the legislation enables EU, EEA and Swiss citizens to be recorded in the register of unemployed persons irrespective of their length of stay, the specific situation of job-seekers is not covered.

With the exception of unemployment benefit which is exportable under EU social security provisions,[5] it is generally not possible for job-seekers to access non-contributory public benefits, such as social welfare or social assistance benefits, in most Member States (*Austria*, *Cyprus*, *Denmark*, *France*, *Germany*, *Greece*, *Ireland*, *Italy*, *Lithuania*, *Malta*, *Portugal*, *Slovenia*, *United Kingdom*), although in *Belgium* this may be possible, though not automatic because of the requirement to possess sufficient means of subsistence. In *Spain*, job-seekers may in principle access social assistance or other benefits of the type recognized in the

5 However, the report of *Luxembourg* refers to two cases in which EU job-seekers were denied unemployment benefits by that country's Employment Administration (*L'Administration de l'Emploi – ADEM*). Both persons have appealed on Community law grounds.

judgments of the Court of Justice in C-138/02, *Collins* or C-258/04, *Ioannides*, and, in *Sweden*, a public investigation in 2005 found that EU job-seekers most probably could have the right to equal treatment regarding social benefits provided that they are registered with the employment office and have a real chance to obtain employment. In *Slovakia*, there is no obligation for EU citizens (including job-seekers) to register their residence, but if they do register (and they only need to show a travel document to obtain a registration certificate – see Article 8(1), first indent, above) their residence is considered as a first residence and on this basis it is possible to request social assistance. In *Italy*, the legislative decree implementing Directive 2004/38/EC stipulates that EU citizens who entered the country to seek employment are not entitled to social assistance for the first six months of residence unless such assistance is granted under the law. There is a similar rule in *Malta*. In *Lithuania*, because the situation of job-seekers is not regulated, it is difficult to see how they could access certain social security benefits (e.g. maternity and sickness benefits) because of the specific conditions relating to previous employment or contributions. Their lack of an 'official residence' status would also preclude their access to employment support (e.g. counselling, mediation, active employment measures), although they would be entitled to basic health services.

In some Member States, EU job-seekers may have access to benefits connected with the employment situation. In *Finland*, EU job-seekers who have studied at degree level can be regarded as having links to the Finnish labour market and may claim a labour market subsidy. In *Ireland*, it is theoretically possible for EU job-seekers to access social benefits such as the Job-seeker's Allowance if the conditions for habitual residence are met and the reason for the person coming to Ireland are consistent with a genuine search for employment. In *Latvia*, nationals and EU citizens with the official status of unemployed person or job-seeker are entitled to a study grant and reimbursement of travel expenses during attendance at vocational training provided by the State Employment Agency for the purposes of retraining.

OTHER ISSUES OF CONCERN

Delays concerning the issue of residence certificates and residence cards for EU citizens and their family members continue to be serious problem in *Cyprus*, where the waiting-list for appointments to obtain residence certificates went up to one year, and in the *United Kingdom*, where the average delay between application and receipt is ten to twelve months.

With regard to refusal of entry and expulsion of EU citizens, as also observed in the 2007 Report, concerns persist in a number of Member States that nationals of the new Member States are being treated less favourably in this regard. While in *France* there is now some recent case law applying Community law principles to the expulsion of Romanian nationals, the rapporteurs note that the figures concerning the voluntary return of Bulgarian and Romanian nationals for humanitarian reasons are still integrated into the general expulsion figures. Moreover, the 'voluntary nature' of some of these returns has been questioned by the organisation, *Collectif Romeurope*. In *Finland*, the procedural safeguards in the case of expulsion of EU citizens and their family members who have registered their residence or obtained a residence card are considerably stronger than in the case of those who did not, irrespective of the length of time they have spent in the country, in that the criteria in Article 28(1) of Directive 2004/38/EC are applied to the former but not the latter. As documented in previous reports, the inclusion in *Hungary* of HIV infection as a disease endangering public health is problematic from the standpoint of Community law. In *Lithuania*, there continue to be no

special provisions in the foreigners' legislation regulating the departure of EU citizens, with the exception of the application of different timelines, although there are now draft amendments to this law, which would, if adopted, introduce more precise rules on the expulsion of EU citizens in accordance with Directive 2004/38/EC. In the *Netherlands*, 2008 saw a significant increase in case law concerning declarations of EU nationals as 'undesirable aliens', indicating that many such declarations are not in conformity with Community law. In *Romania*, the implications of the Court of Justice's judgment in C-33/07, *Jipa* concerning national legislation allowing for the imposition of restrictions on the travel of Romanian citizens abroad continue to reverberate in the domestic courts. In the *United Kingdom*, Bulgarian and Romanian nationals who are working in the country are asked to produce evidence at the border that they are lawfully employed which is contrary to Community law. Moreover, unauthorized employment cannot amount to a valid 'public policy' ground for their exclusion. The finding also by the H.M. Inspector of Prisons that five per cent of persons detained in UK-administered places of detention in Pas de Calais, France, were Lithuanian nationals raises serious questions in light of the judgment of the Court of Justice in C-215/03, *Oulane*.

In *Belgium*, the limited jurisdiction of the new CEE in respect of the residence of EU citizens and their family members (see the 2007 Report) continues to raise concerns as far the EU non-discrimination principle on the basis of nationality (Article 12 EC) is concerned. In *Italy*, the exclusion of suspensive effect in respect of challenges to expulsion decisions that are effectively based on public security grounds (and not, as stated, on 'imperative grounds of public security') is not in conformity with Directive 2004/38/EC. In *the Netherlands*, the administrative court which has to decide the lawfulness of the detention (of EU citizens) cannot consider the legality of a decision to withdraw residence and to declare the person as an 'undesirable alien', with the result that continued detention is likely to be contrary to Community law.

Chapter II
Access to Employment

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT OUTSIDE THE PUBLIC SECTOR

In all countries equal treatment of EU citizens as regards access to employment is guaranteed by general legislation on equality and non-discrimination or specific labour law.

EU citizens and their family members are formally entitled to public employment services, including assistance of employment agencies. In some countries there are practical problems regarding the registration of EU job-seekers for this assistance (Bulgaria, Latvia, Slovenia). Another obstacle is the sole use of the national language by the employment agency (Cyprus, Latvia).

In *Bulgaria* there is a formal proclamation in labour law that documented job-seekers who are EU citizens or family members have the same rights and obligations as Bulgarian nationals. However, the national law transposing Directive 2004/38 does not envisage a right of residence over 3 months for EU citizens who are documented job-seekers.

In *Denmark* in 2008, the international section of the job centres, provided by EURES was closed down. However, the tasks are now handled in 3 international centres, established on 1 October 2008.[6] The purpose of the establishment of these centres is to strengthen and professionalize the recruitment of foreign labour in Denmark. Hence, the centres' core area are focused directly on assisting companies in recruiting workers from abroad and on assisting alien workers in their job seeking in Denmark in general. In connection with the establishment of the international centres, a special Polish hotline was established. The hotline provides guidance on job seeking and establishment in Denmark in Polish for Polish job-seekers only.[7]

An issue of concern is the fact that public employment agencies in *Cyprus* do not provide services in any language other than Greek which may be a barrier to many Union citizens who are non-Greek speakers. Despite assurances that there have been no problems or complaints of discrimination by Union citizens exercising the right to free movement of workers,[8] trade unions claim that the problems on a daily basis as regard the procedures of considering applications continue.

Following the decision of the ECJ[9] in the *ITC* case, the *German* Federal Agency has changed its administrative regulations for issuing an employment voucher. Employment vouchers are now also granted for services providing employment offers in EU Member States. The Federal Agency for Labour, however, has emphasised that Union citizens who do not have a permanent residence or ordinary domicile within Germany and who want to take up employment on the German labour market under Sec. 30 Social Code I are not entitled to promotional measures for taking up employment according to the provisions of the Social Code III. According to the view of the Federal Agency for Labour the Court's decision of 11

6 See www.workindenmark.dk, accessed on 19 March 2009.
7 Cf. information obtained from an official within the Ministry of Employment by e-mail of 17 June 2008 and http://workindenmark.dk/Contact.aspx, accessed on 19 March 2009.
8 Interview with officers of Department of Labour, 23.2.2009.
9 European Court of Justice of 11 January 2007, case –208/05 ITC Innovative Technology Centre/Federal Agency for Labour.

January 2007 is limited to the inadmissibility of a distinction between a provision of services for employment offers in Germany or an employment offer in other EU Member States.[10]

The *Dutch* parliament urged the Minister to be alert on the effects of flanking measures designed to secure that the rules on minimum wages for EU 10 workers are maintained and to investigate measures against mala fide employers using workers hired out by temporary work agencies. See also Chapter VIII.

In *Latvia*, EU and EEA citizens are formally entitled to any employment assistance and vocational training on equal basis without having a registration certificate, but in practice the State Employment Agency requires a registration certificate. Also insufficient knowledge of the Latvian language may create obstacles, since all services and support is provided in Latvian only and it is almost impossible to get employment in Latvia without knowledge of the official language.

The *Lithuanian* report emphasizes the active role of the EURES network in providing employment assistance in Lithuania and the rest of the EU.

The 2007 report on *Slovenia* has drawn attention to the inconsistency between the provisions of the Aliens Act and the Employment and Work of Aliens Act regarding the kind of permit provided for as a condition on the basis of which the unemployed EU, EEA and Swiss federation citizens may record in the register of unemployed persons in Slovenia. According to unofficial information, this inconsistency is supposed to be abolished by the amendments to the Employment and Work of Aliens Act.

The *Swedish* report indicates that the most important restrictions for access to employment – in the private as well as in the public sector – are the rules making access dependent on authorisation and/or the possession of a certain diploma, showing that the applicant has the necessary professional qualifications

2. LANGUAGE REQUIREMENTS

There are no explicit statutory language requirements for private employment in Austria, Belgium, Denmark, Finland, Greece, Ireland, Italy, Malta, The Netherlands, Portugal, Sweden and the UK.

In practice, for most white collar jobs applicants will be required to have a good knowledge of language of the country they seek work. Language requirements are sometimes 'hidden' in recognition of diplomas legislation. For several regulated professions a formal or a practical language requirement exists. In some states, as for instance Cyprus, Estonia, Latvia, Lithuania, Luxembourg and Slovakia, language requirements represent still a serious obstacle for EU migrant workers.

In *Bulgaria*, the Law on Health provides that the Ministry of Health and the high schools should provide EU citizens (whose medical professional qualification has been recognized) with conditions for acquiring the necessary language knowledge and professional terminology in Bulgarian 'when this is in their interest and in the interest of their patients'. In comparison, the same provision stipulates that third country nationals are allowed to practice their medical profession in Bulgaria only after it has been established in accordance with the rules in a Minister's ordinance that they know Bulgarian language and the respective professional terminology in Bulgarian. According to the Attorney's Act, membership in the Bulgarian Bar is allowed after a thorough exam in Bulgarian national law (in Bulgarian). That

10 This interpretation of the Federal Agency for Labour is provided in a letter to the author of 1 July 2008.

possibility for membership of non-Bulgarian citizens is given only to persons who have acquired their professional qualification in an EU Member State, but it is conditioned by knowledge of Bulgarian law and language

Knowledge of the *Czech* language is required for some professions (o.a. doctors, dentists and pharmacists), where the language is so important that it constitutes the basic element of the profession.

In *Denmark*, according to a Circular a language requirement is formally a neutral requirement. However, in situations where an employer imposes a language requirement which is not reasoned/objectively justifiable, a language requirement may constitute indirect discrimination. This will be the case if the requirement to the person's ability to speak or write Danish is disproportionate and without relevance for the maintenance of the job in question.

The report on *Cyprus* mentions language requirements problems for nursing professions, real estate agents, building contractors, insurance brokers.

In July 2008 the *Estonian* government adopted new requirements for employees in order to be able to communicate in Estonian. According to the new rules there are three levels for understanding Estonian language: A, B, C.

In *Luxembourg* most jobs still require candidates to speak several languages fluently, including Luxembourgish, French, English and/or German.

In some areas there are regulations on language requirements in *Romania*. For example, in the area of credit institutions, if none of the directors holds Romanian nationality, at least one of them must speak Romanian.

New 2008 regulation in *Spain* establishes that

> 'Persons benefiting from the recognition of professional qualifications shall have knowledge of Spanish, or languages other than Spanish which have been declared an official language in the Autonomous Communities, which are necessary for practising the profession in accordance with Spanish legislation'.

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

In *Germany* some Länder have interpreted Directive 2005/36 as authorising language requirements for the recognition of professional certificates for instance in regulated medical professions and have therefore included into their laws that in order to receive a certificate a person must prove sufficient knowledge of the German language. Other Länder have abolished the language requirement as a requirement for recognition of a professional certificate arguing that under community law language requirements may only be admissible as a condition to exercise a professional activity.

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

In *Latvia* there are high levels of language knowledge required for the regulated professions. In 2008 the list of professions has been extended substantially. According to the Latvian rapporteur the provisions requiring this language knowledge could be contested from the perspective of the indirect discrimination and principle of proportionality.

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

The most significant development in 2008 in *Ireland* exists of a liberalisation of the 1929 legislation on Irish language competence for barristers and solicitors.

In order to establish a bank in *Poland*, at least two members of the management board shall prove their knowledge of Polish language. However, it is possible that the Polish Financial Supervision Authority in the form of decision issued at request of the founders, will depart from this requirement if it is not necessary for prudential supervision, taking into account in particular level of permissible risk or the scope of the activity of bank. Language requirements apply also to some regulated professions (advocates, legal counselors, doctors, dentists, midwives, nurses, veterinary surgeons, medical assistants, and barber-surgeons). There are no distinctions between language requirements in the private sector in comparison with public sector.

The *Slovak* report indicates that some difficulties regarding the language requirement in employment relations may arise from the fact that all written legal acts in employment relations have to be in Slovak.

3. CONCLUSIONS

Formal equal treatment is afforded for EU citizens in all Member States, including assistance of employment agencies, but there are practical problems in some Member States (i.e. Bulgaria, Latvia, Slovakia) concerning the registration of EU job-seekers for this assistance. Moreover, in some Member States, employment agencies only use the national language.

On the subject of language requirements for private employment, in a number of Member States there are no explicit language requirements, but in practice language knowledge is needed. Language requirements are also hidden in the regulations on recognition of diplomas in some Member States.

Chapter III
Equality of Treatment

Over the period 2008/09 most Member States have suffered turmoil in their financial markets resulting in concerns about job losses and economic retrenchment, as we discuss in the general introduction to this report. In some Member States by mid 2009, economies had contracted by significant amounts. Equal treatment for nationals of one Member State working in another is a core entitlement of the fundamental freedom of workers. In times of economic contraction special attention needs to be paid to the delivery of equality in the market place as such periods are ones where a temptation to discriminate against non nationals often manifests. 2008 was also the final year of the transitional arrangements for nationals of EU 8 countries leaving aside the exceptional possibility of a further two year exclusion from labour market access for these nationals. Three Member States used the exceptional provision to extend existing transitional arrangements – Austria, Germany and the UK (though the later had already opened its labour market to EU 8 nationals so the restriction is limited to a continuation of the worker registration scheme). According to the rapporteurs the situation in 2008 appeared as follows:

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Rapporteurs in a number of Member States indicated that discrimination against EU national workers had not been an issue in their state over the reporting period. Specifically, *Austria, Cyprus, Germany* and *Latvia.* In *the Netherlands* and *Slovenia* no change from 2007 was reported.

In a number of Member States there is a formal prohibition on discrimination against EU nationals though this is not universally the case. Member States with no such a prohibition include *Estonia, Poland* and *Sweden*. States with a prohibition include *Hungary, Portugal, Romania* and *Spain*. As mentioned in the Swedish report, where there is no express provision in national law, the direct effect of Regulation 1612/68 in this regard is particularly important.

Discrimination on the basis of nationality in social benefits arose in a number of reports. While there is a separate chapter on the issue of social and tax advantages in this report, it is worth mentioning here that changes to the *Czech Republic's* health care system is creating discrimination against family members of Czech nationals in comparison with those of EU nationals. In *Finland* the two tier system of benefits with a two year contribution period is often harder for EU workers to fulfil than Finnish ones. In *Italy*, the removal of EU nationals from the immigration law has resulted in the loss of health care entitlements for the EU economically inactive.

In three Member States, discrimination on the basis of ethnic origin has been an issue for EU nationals. In *Denmark* formal discrimination against EU nationals on the basis of nationality does not appear to be a problem. Discrimination on the basis of ethnic origin is more problematic and has given rise to judicial consideration. A new Committee on Equal Treatment has been established. In *France* the anti-discrimination authority criticized a nationality requirement regarding transport workers. *Ireland* has had a number of tribunal decisions on ethnic discrimination in respect of EU workers. On a similar point, in *Belgium* the cap on

access to higher education for EU nationals (30%) and an obligation in some areas to learn Flemish for access to housing do not appear to be consistent with the equality right.

A number of Member States rapporteurs have noted problems in practice for EU workers. This is particularly the case, according to the reports, in *Finland, Ireland* and *the UK*.

In *Lithuania* there is equality now for EU workers in access to trade unions while in *Luxembourg* dual nationality is now permitted.

In the *Czech Republic* the risk of reverse discrimination against Czech nationals as regards family reunification with third country national family members has led to many discussions and also activities which are aimed at improvement of the position of Czech nationals to family life with third country national family members..

2-3. SOCIAL AND TAX ADVANTAGES AND OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

Increasingly in the area of social and tax advantages, the issues regarding social advantages have become clearer (though not always resolved) over the past few years while the issue of tax advantages has emerged as a source of friction. One of the consequences of increased cross border mobility, particularly for those EU nationals who live in one Member State but carry out economic activities in another Member State, is that differential tax treatment by their Member State of residence and economic activity is resulting in disadvantage (as well as advantage in some cases). The complexity of Member State tax arrangements has started to have a real impact on migrant EU workers. The increasing number of issues in this area which have come before the ECJ recently is further testimony of this change. Further details on the impact of recent ECJ judgments in the tax field can be found in the chapter on the ECJ decision. In this part of the synthesis report we will deal with the general issues.

No problems were reported either as regards social or tax advantages in *Austria, Bulgaria, Estonia, Portugal* and *Romania*. Changes in the law were signalled in a number of countries where national legislation has been brought better into line with EU obligations. These include the *Czech Republic* where rules permitting anyone who pays tax to claim deductions for children and spouses are applied; *Denmark* where EU nationals (frontier workers) are now permitted access to integration programmes (previously reserved for third country nationals – with reference to Art. 7(2) Regulation 1612/68 it is stated that the expenses for these courses will be covered); *Hungary* where the law has been changed to permit EU nationals access to social benefits; *Ireland* where national guidance now makes it clear that EU workers are eligible for social benefits without the application of a 'habitual residence' test. In *Spain* a measure is under discussion to extend maternity grants but problems will still arise as regards discretion against EU nationals. In *Sweden*, in 2008 tax relief on insurance payments made to insurers in other Member States were approved by the *Riksdag* while in the *UK* a change to tax legislation will place EU nationals on a more equal basis with British citizens.

The courts of a number of Member States have handed down decisions which correctly implement Article 7(2) of the regulation. For instance in *Belgium* a court held that discrimination on the basis of ethnic origin in employment is contrary to EU law. In *Italy* the opposite has happened - a tribunal upheld a housing requirement which legal authorities have criticised as contrary to EU law. In *Latvia* the ombudsman has been engaged in a complaint by a German national whose invitation to a Russian to come for a visit was not accepted for

the issue of a visa. In the *Netherlands* the Equal Treatment Commission found indirect discrimination against EU 8 nationals in wages.

Continuing problems in social advantages were signalled in the following Member States: in *Denmark* long residence requirements for access to social benefits; in *Finland* differential treatment of EU 8 posted workers; in *France* legislation on social benefits still requires the production of residence documents; in *Germany* frontier workers are disadvantaged (see below); in *Italy* long residence requirements (ten years) have been added to eligibility to social benefits and EU nationals are excluded, or subject to lengthy residence requirements, from a number of social benefits such as a social card and access to public housing in a number of regions. In *Latvia* access to social benefits is dependent on possession of a personal code and permanent residence in the country. Our rapporteur doubts that the administration applies Article 7(2) of 1612/68 directly instead of the national rules. In *Luxembourg* there are continuing problems with reimbursement of medical cost incurred in other Member States. In the *UK* a number of studies have indicated serious problems with access to social benefits and housing in particular for EU 8 nationals.

In *Greece* there is direct discrimination against nationals of other Member States regarding special pensions and access to free medical care for persons over 68 years. A residence requirement for maternity benefits was held by a Greek court to constitute indirect discrimination against EU nationals.

As regards tax advantages, there is a more disparate overview. In *Cyprus* and *Poland* tax liability is on the basis of residence but in the later losses generated outside the country by individuals generating income in *Poland* but not resident there cannot be offset. In *Finland* there is a differentiation between workers who work more than six months and those who work less in the country. There tax treatment is different privileging those working short permits. Mortgage tax relief on foreign property is permitted but car taxes are still a problem as regards compliance with EU obligations. In *Greece* a tax provision on exemption in respect of transfer of real property in specified circumstances which is subject to a residence requirement applies but our rapporteur considers this proportionate. In *Hungary* deductible expense for tax purposes are an issue in that voluntary contributions to funds formed abroad do not give rise to relief (while such payments to Hungarian formed funds do). There are also problems regarding tax liability in Hungary of Hungarians working in other Member States. In *Italy* an obligation on persons not resident in the country to notify the authorities of various fiscal acts has brought action by the Commission. In *Lithuania* everyone now has to pay tax on Lithuanian arising income, while EU nationals must pay VAT as soon as they commence economic activities in the country, Lithuanians only must do so when they surpass a turnover threshold. In general the administrative burdens in tax matters are substantial. In *Poland*, however, where 75% of a couple's income is arising in the country they are deemed tax resident. In *Slovenia*, on the other hand, if 90% of taxable income is Slovenian arising for a non resident the individual can claim deductions and allowances.

Other issues which were signalled in the reports under this heading include: problems regarding recognition of diplomas in *France.* In *Greece* and *Luxembourg* a nationality requirement still applies to notaries. In *Hungary* rules on placement agencies are not obviously compatible with EU law. In *Italy* the census on travellers' camps has caused concern as regards discrimination against one group of residents on the basis of ethnicity. In *Malta* the derogation regarding acquisition of immovable property causes frustration among some EU nationals while in *Cyprus* it is the lack of access to property as a result of the division caused

by the Green Line which is problematic. In the *Netherlands* a financial scheme to assist migrants to return to their country of origin is not open to EU nationals. In *Sweden* the authorities have discontinued the system where EU nationals could obtain identity documents through the Swedish Cashier Service. The result has been delay and problems for EU nationals who cannot open bank accounts, receive registered mail etc. because they are awaiting their card. However, a new Swedish identity card for persons registered in Sweden should be available from June 1, 2009.

4.1. Frontier workers

As is evident from the information on the application of article 7(2) Regulation 1612/68 regarding tax advantages, the issues which are arising and the cases which are coming before the ECJ revolve around EU nationals whose economic activities and residence are in different states. While frontier workers form a major part of such individuals they do not cover the totality (for instance not all persons living in cross border situations are workers). The information which we have regarding frontier workers tends to be partial. Issues which may appear important in one Member State do not figure in another – for example the new tax agreement between France and Belgium which gains prominence through the publicity activities of actors in Belgian but primarily in France where no actors appear to be promoting knowledge of the agreement. Further, it is increasingly difficult to capture information about frontier workers as the traditional figure of the frontier worker – an individual who moves back and forth across borders which have geographical proximity – is challenged by alternative realities for frontier workers – for instance individuals who live and work in Member States with little geographical proximity. The new Dutch/UK taxation agreement evidences pressures to regulate this rather less traditional group of frontier workers between these two states. Once again, prominence to the agreement appears in the Netherlands while in the UK there appears to be little attention to it.

In a number of Member States no issues regarding frontier workers were reported. These include *Austria* (though when the transitional arrangements on movement of workers are eventually lifted in 2011 there is likely to be more attention to this); *Bulgaria* (though there are questions about the numbers of such workers in Greece); *Cyprus* (though here the Green Line problem arises again).

There are no special arrangements regarding frontier workers in the *Czech Republic, Estonia, Malta, Romania* and *Slovenia*.

In *Denmark* there is a marginal rise in frontier workers as some EU nationals move to Sweden to live but continue to work in Copenhagen and surrounds. The tax regime for such workers permits them to choose to seek tax relief in Denmark if 75% of their income arises there. In *Sweden,* the country of residence of many Danish frontier workers it is noted that the two countries are in discussions regarding the diminution of tax revenues in the most affected parts of the country. Child care allowances are the responsibility of local authorities but the state authorities are seeking to ensure that Hartmann type issues do not arise. Similarly, in *France* the taxation of and access to benefits for frontier workers (with Belgium) has been the subject of a new agreement. Similarly, in *The Netherlands* a new tax agreement with the UK is signalled as valuable for frontier workers. A government report on *frontier workers* between Germany, Belgium and the Netherlands has suggested a variety of recommendations to resolve outstanding problems in tax, insurance and benefits. See for an over-

view of these problems: http://www.euresemr.org/index.php?option=com_docman&task=cat_view&gid=73&Itemid=34.

Changes in health insurance have resulted in substantial increases in costs for frontier workers living in the Netherlands.

In *Germany* also the tax treatment of frontier workers has been an issue. In this case, however, it came before the courts in the form of a claim to deduction of illness insurance and the scope of coverage of insurance in respect of a fund based in another Member State. The claim was rejected by the court.

In *Finland*, attention is given to the developed mechanisms for the treatment of frontier workers across the Nordic area which permits the regulation of access to social benefits as well as tax treatment (in tandem with Regulation 1612/68).

In *Greece* the question of the treatment of frontier workers from Bulgaria has arisen primarily as regards concerns regarding access to social benefits however no specific action or measure has been taken. Similarly, in *Hungary*, frontier workers have been considered in the context of access to social benefits. The approach which has been adopted is to provide fairly complete access to social benefits to frontier workers in particularly regarding family benefits. In *Italy* frontier workers have access to a one off maternity benefit. In *Ireland* as well access to social benefits has been an issue. It appears that which the habitual residence test would exclude frontier workers from access to benefits, officials have assured the rapporteur that in practice they do not apply the test to such workers. The *UK/Irish* border is the source of most state activity on frontier workers. A cross border agency has been established to seek to ensure the correct application of social benefits entitlements. However, the *UK/Spanish* frontier workers continue to be an issue for the UK authorities as their treatment for social security purposes is less advantageous than that of residents in Gibraltar.

In *Latvia* it seems likely that the national measures on frontier workers do not comply with the ECJ's judgments in *Hartmann* and *Geven*, while in *Lithuania* as benefits are allocated on the basis of country of work no problem is anticipated. But in *Poland* as child raising allowances are allocated on the basis of residence there is likely to be an inconsistency with the *Hartmann* decision of the ECJ. In *Slovakia* a similar situation arises as frontier workers are not eligible for social benefits as they do not have permanent residence in the country. In *Spain* no *Hartmann* type of problems are foreseen.

The large percentage of frontier workers in *Luxembourg* (42.3% of the labour force) makes this country particularly interesting in this regard. Once again, it is delays in benefits payments that seem to be causing difficulties.

Car tax has been an issue for frontier workers in *Portugal*. There has been a change to the regulation which now exempts from the tax cars temporarily entering the country.

4.2. Sportsmen and -women

For the 2008 period, the rapporteurs produced special reports on various sports and the compatibility of their organisation with EU law. These reports are the subject of a separate analysis which the Commission has undertaken. In this section, we analyse the information on sport which the rapporteurs included in their national reports.

The reports fall within two main categories – those where no general or specific problem as regards discrimination against sportsmen and women with the nationality of another Member State has been identified and those where problems are either evident or suspected.

Almost without exception, problem areas are around quotas and inscription – which can be either direct or indirect forms of discrimination.

Member States where *no problems* were identified include: *Belgium* where football rules do not appear to discriminate against EU nationals, the rules are those established by the private organisations which regulate sports; the *Czech Republic, Estonia, Ireland*. In *Hungary* changes to the sports regimes have ended a number of discriminatory practices. In *Germany* it is not clear whether there are problems or not as untangling the complexity of the legal regimes applicable to different sports is not yet complete. In *Sweden* there are no quotas though there are preferences for home trained young players. In the *UK* no quotas were uncovered.

Member States where there are *problems* include: *Austria* where the Austrian system applicable to football cause some concern as access to subsidies is dependent on the nationality of team members of clubs. An Austrian court has held that the basketball rules offend EU law as regards nationality discrimination. However, volleyball and handball present no problems. Ice-hockey is regulated by a new set of rules which seem compliant with EU law. In *Bulgaria* there appears to be discrimination in the rules of volleyball, basketball, handball and ice-hockey. With regard to membership fee, a problem has arisen with the FIBA (International Basketball Association), which treats every sportsperson with a non-Bulgarian passport as a foreigner, regardless of his/her EU citizenship. In *Cyprus* it is the rules on young players which privilege nationals over other EU citizens. In general in *Denmark* there do not appear to be problems but a levy on transfers of football players may be problematic, as is a residence requirement in volleyball. The highest Danish football league is covered by home-grown players regulation. A quota is under consideration in handball while there is already a transfer fee arrangement in place. In ice-hockey there are both nationality quotas and transfer fees applicable. In *Finland* the matter is complicated by the fact that many sports are regulated by unwritten rules. However, where there are written rules there are nationality quotas in volleyball. In *France* there is appending preliminary reference to the ECJ on the treatment of football players.

In *Greece* there is discrimination in the form of nationality quotas in basketball while the new football rules appear to discriminate against non national coaches. In *Italy* basketball rules privilege nationals in the training of young players. In water-polo, handball and rugby there are rules which act as obstacles to non national players. *Latvia* and *Lithuania* both have nationality quotas in ice-hockey and transfer payments. In *Malta* while there has been a clarification of water-polo transfer fees, There are nationality quotas in handball, basketball and volleyball. In *Poland* nationality quotas apply in ice-hockey and women's basketball. Similarly, in *Portugal* both nationality quotas apply in volleyball, football (though here the restriction is to locally trained players) and a difference between registration and transfer fees of 4000% (which was condemned by the national ombudsman). In *Slovakia* nationality quotas apply in ice-hockey. In the formal rules the number of foreigners is limited to 2 per game. However, the governing body of a particular competition (league) may allow a higher number of foreigners playing in one game. In the major league, the governing body decided to allow 20 foreigners in a game. In volleyball some leagues ask for extra fees for foreigners who exceed certain quotas. In *Spain* there are nationality quotas in handball and basketball and in football Bulgarian and Romanian players are counted as non EU foreigners.

In the *Netherlands* the sporting authorities, through the government, in a number of sports are seeking changes to the rules to apply nationality quotas. In field hockey there is a gentlemen's agreement to limit non national players to three.

4.3. The maritime sector

The key issue in the maritime sector identified this year was the application of nationality requirements to seamen on flag bearing ships. Quite a diverse picture emerges between those states where there are such quotas and those where there are not.

Nationality requirements exist in the following states: *Estonia, Finland* and *Hungary* for ships' captains; in *Greece, Italy* and *Spain* the posts of master and chief mate are reserved for nationals. Further in *Spain* rebates of harbour fees on the basis of nationality has been attacked by the Commission as discriminatory.

No unlawful nationality requirements apply in *Bulgaria*, the *Czech Republic*, *France, Germany* where the law has been changed to achieve this end. There are no problems in the sector in *Cyprus, Malta, the Netherlands, Poland, Portugal, Slovenia* and *Sweden* . In *Latvia* there are no restrictions nor in *Lithuania* but here a language requirement applies to at least one of the captain's assistants. Also, in the later state, a change to the taxation of sailors' income now creates discrimination based on the sailor's circumstances. In *Slovakia* while a provision states that the crew of ships in the national register is usually composed of Slovak citizens there is no restriction on membership to Slovaks.

In *Ireland* the re-flagging of a main ferry company to the Bahamas to avoid EU and national regulation caused turbulence. There has been a diminution of wages and a worsening of working conditions following the change. In *Sweden* contracting requirements regarding collective agreements may constitute an obstacle to other EU nationals seeking to participate in the sector. In the *UK* the problem is the non-application of minimum wage rules in the sector.

4.4. Researchers and artists

The problems around the treatment of researchers and artists often come in the category of tax and benefit arrangements. Because these workers tend to work for short periods in Member States – often only a matter of days – withholding taxes on their income arising causes particular problems. Reclaiming withheld taxes can be difficult and offsetting withheld taxes against tax obligations in the country of residence may be complicated or impossible.

In the following Member States no problems were signalled as regards these two sectors: *Austria, Belgium, Bulgaria, Czech Republic, Greece, Hungary, Latvia, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia*. In *France* a new regulation has been adopted to bring the law on researchers and artists into conformity with EU requirements. Similarly, in The Netherlands withholding tax on artists has been abolished. In *Germany*, regarding researchers and artists, the debate is about withholding tax. The German courts, following the ECJ, have upheld claims by artists against rejection of deductions for expenses. The Federal Ministry of Finance considers the law consistent with the ECJ's jurisprudence and forwards the decisions to the local offices to be applied. In *Sweden* a proposal is under consideration to allow *researchers* and *artists* to pay tax on Swedish arising income but to deduct expenses relating to the activities. The artists union is not aware of discrimination problems against EU nationals. In the *UK* changes to the taxation of non-residents is likely to improve the position of artists and researchers.

No information was available on the sector in *Cyprus*. In *Denmark* as a main rule researchers must work at least 10-12 hours a week to qualify as Article 39 workers but all contracts are examined on a case by case basis. Tax incentives for foreign researchers to work in

Denmark exist though the rules are complex and require, for instance no involvement in management for the preceding five years. There are three main options in respect of researchers: first, they are workers employed by Finnish institutions, secondly they are post workers of a foreign institution and thirdly they are students with grants. How the researcher is categorised has consequences of his or her access to social benefits. In *Lithuania* the taxation of artists has been changed and while the rate is relatively low (15%) the rules may give rise to an obstacle. In *Spain* the failure to transpose the self employed provisions of Directive 2004/38 causes problems for artists and researchers.

4.5. Study grants

Access to study grants has been the subject of some judicial consideration over the past few years. The ECJ's decision in *Bidar* opened the door to the possibility that EU national students could obtain study grants after three years residence if they were integrated into the Member State; the limitation on access to study grants to EU nationals who have resided for five years in a host Member State in Directive 2004/38 found favour with the ECJ in its decision in *Förster*. However, where workers go back to studies and seek study grants, whether or not they have lived and worked in a Member State for one three or five years, Article 7(3) Regulation 1612/68 may come into play as well. For the children of EU migration workers, whether they are still working or not in the host Member State Article 12 Regulation 1612/68 requires the children's admission to studies under the same conditions as nationals. Thus the way Member States permit access to study grants is of importance to migrant workers and their family members.

No problems were signalled in the following Member States: *Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France* (where it is clear that the difference between the categories to which the five year requirement can be applied and those where it cannot, is respected), *Germany, Hungary, Ireland, Lithuania, Malta, Sweden,* and *the UK.* In *Slovenia* the law was changed to permit EU nationals access to study grants but they are not permitted aid for student accommodation. A new study grant programme was announced in *Spain* but it is not yet clear if it is limited to Spanish nationals or not.

The following problem areas were identified: in *Denmark, Greece* (where the limitation has been challenged by the ombudsman), *the Netherlands and Slovakia* study grants are only available after five years residence. In *Luxembourg* study grants are available only to those domiciled in the country. In *Poland* there is more favourable access to study grants for people with Polish ancestry.

5. CONCLUSIONS

There is quite a varied picture of issues related to working conditions. In more than one Member State problems in this field are dealt with on the basis of race discrimination rather than nationality discrimination even as regards EU nationals. Tax treatment of EU nationals presents something of a challenge – it seems that quite a number of Member States have yet to address the issue of deductions from income where those deductions related to expenditure in other Member States. Access to social benefits continues to be contentious in a number of Member States.

The treatment of frontier workers reveals quite a varied picture. Many Member States with long borders and centres of population density along them indicate no difficulties while

others have substantial issues. Access to social benefits and tax treatment are among the most consistent of problems for this group of workers. The rules of sports are very varied across the Member States with plenty of examples of questionable quotas restricting access for Union citizens and transfer fees constituting obstacles. A substantial number of Member States still have nationality requirements in place for captains of ships registered in their state though there has been some progress on this issue. Researchers and artists seem to have the most difficulties in tax treatment while most Member States have brought their rules on access to study grants into conformity with the directive and the European Court of Justice jurisprudence though there are some which continue only to provide study grants to EU nationals with permanent residence avoiding their obligations to workers and the children of workers.

In all the fields considered in this chapter there have been positive moves by at least one if not more Member State to bring its legislation and practice into line with EU obligations and the ECJ jurisprudence. It is hoped that this trend will intensify in 2009/10.

Chapter IV
Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68

The problem of this relationship is best shown in the judgment of the ECJ in the *Hendrix* case (C-287/05). The ECJ stated that Article 39 EC and Article 7 of Regulation 1612/68 must be interpreted as not precluding national legislation, meaning that a special non-contributory benefit listed in Annex IIa to Regulation No 1408/71 may be granted only to persons who are resident in the national territory. However, implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. This case shows that residence clauses for social benefits are probably only allowed under strict circumstances. See for a follow up of the *Hendrix* judgment in the Member States Chapter VII.

Some reports give a classification of the benefits which fall within the scope of Regulation 1408/71 and which fall within the scope of Regulation 1612/68. On the relation between both Regulations (and Article 39 EC) there is not much specific information.

Regarding classification the *Spanish* report mentions the problem that it is not always clear when a benefit falls under the scope of 1408/71. The *Finnish* Government argues, contrary to the Commission, that the disabled children's benefit, paid to parents of a disabled child under 16 years, is a special benefit that can be restricted to those residing in Finland. According to the Commission this benefit is a family benefit within the meaning of the Regulation 1408/71 and should thus be exportable.

In *Sweden* a social benefit that is not covered by Regulation 1408/71 and residence should be granted to a worker referring to Regulation 1612/68, article 7.2, and the principle of equal treatment, even if the worker is not settled in Sweden (for instance if he or she is a frontier worker working in Sweden but living in another Member State).[11]

In the *Czech Republic* the system works the other way around. If an EU citizen is not entitled to the social benefits pursuant to Regulation 1612/68, he/she is entitled to the social benefits pursuant to Regulation 1408/71. If Regulation 1408/71 is not applicable, then national laws apply. The laws then usually use the condition of residence in the Czech Republic. (e.g. three month stay for granting of the assistance in need allowances or social security allowances) and the test of unjustifiable burden on social system is done.

In *Ireland*, the government has made a clear distinction between payments caught by the Regulation 1408/71 regime, which (with certain exceptions) are payable by the Member State of employment and social welfare payments which are caught by Regulation 1612/68, so that the habitual residence condition cannot apply to frontier workers and others benefiting from the free movement provisions.

In the *UK* the right to reside test continues to give rise to legal challenges concerning who may rely on Article 7 of Regulation 1612/68; whether the residence test can be objectively justified and is proportionate to the objective pursued, and whether it goes further than what is required to achieve a legitimate objective pursued by national legislation seen in the light of the ECJ judgment in the *Hendrix* case (C-287/05)

11 Official report SOU 2005:34 Socialtjänsten och den fria rörligheten, p. 57.

For the *Dutch* follow up of the ECJ judgment in the *Hendrix* case (C-287/05) see Chapter VII. Here it is worthwhile mentioning that in July 2008 the Dutch Central Appeals Tribunal used the 'disproportionality reasoning' from the *Hendrix* case to justify the entitlement to a Social Assistance Benefit to two British citizens, residing in The Netherlands during the period they would visit a rehabilitation clinic in Scotland. Withdrawal of the benefit because of the residence clause of the Social Assistance Act during this period was seen as an unjustified obstacle to the free movement of services.

The Slovenian report emphasizes that its social benefits legislation is in conformity with the *Hendrix* judgment.

In *Hungary,* in various social benefits legislation in 2008 references to Regulation 1612/68 have been deleted and the wording has been changed to 'persons being entitled to exercise the right to free movement'.[12] This includes not only workers but also self-employed, students and also economically inactive persons if they are residing in Hungary with the aim of a permanent living. It means the extension of rights to every union citizen in the social sphere. This change has influenced the interrelationship between Reg. 1612/68 and Reg. 1408/71 according to the Hungarian report.

An interesting opinion is given by the *Belgian* rapporteurs regarding the follow up of the ECJ judgment in the Flemish care insurance scheme (Case C-212/06). In this case the ECJ did refuse to condemn reverse discrimination but made (in § 40) a strong invitation to the national court to condemn it, using the 'interpretation of provisions of Community law'. But the Belgian Constitutional Court did refuse to do so arguing (in § B16) that this is to be made not by the Court, but by a regional or federal legislation. In consequence, reverse discrimination remains tolerated. The judgment of the Belgian Constitutional Court refusing to make the issue from a strictly internal one to an issue covered by EC law is, strictly speaking, in conformity with the ECJ decision but does not follow the proposition made by the ECJ to the national court to use also for the national question the same interpretation as for the community question. In consequence, in the view of the rapporteurs of the Belgian report, the (lack of) follow up of this ECJ decision on a purely internal situation confirms that the Advocate General's conclusions to give clear interpretation for the Constitutional court to apply the non discrimination principle as well for a community situation with free movement of workers as for a purely internal situation and reverse discrimination should have been followed by the ECJ.

On 1 July 2008 *Lithuania* ratified the agreement with the Government of Estonia concerning calculation of the insurance periods acquired in the territory of former Soviet Union. A similar agreement with Latvia was planned for signature in 2008, however the process has not been completed yet.

12 This is the text of Act I of 2007 (FreeA).

Chapter V
Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

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

During 2008 and the first half of 2009, major changes in the legislation or other rules on the access to positions in the public sector did occur in *Bulgaria, Luxembourg, Poland* and *Portugal*. Minor changes are reported in the legislation of certain *German* Länder and in *Spain*. In both cases these changes are related to the transposition of Directive 2005/36/EC. Minor changes also occurred in the relevant guidelines published in 2008 by the government agency responsible for the public service in *Denmark* and *France*.

In some Member States appointment in the civil service is partly of fully reserved for nationals but EU nationals may be employed on the basis of a labour contract. The status of those employees is similar to that of civil servants (e.g. in *Denmark, Estonia* and *Lithuania*). This begs the question whether relevant differences remain between employment with and without the civil service status. Employment in the public service in *Lithuania* remains restricted to Lithuanian citizens except a few jobs that are available to non-citizens on the basis of a labour contract and without performing any public administrative function.

Basically, Member States use one of two systems with regard to the nationality condition: in the first system all functions in the civil services are reserved for nationals and certain exceptions to that general rule are made for posts; in those exceptional cases EU nationals are exempted from the requirement or assimilated with nationals; in the second system the general rule is that EU citizens can be appointed in the public service both at the national and local level in all functions except it those functions where the relevant legislation explicitly requires that the appointed or chosen person is national. The exemption or the explicit requirement may be codified in the special legislation concerning that function or in a list of (all) functions concerned codified in one single instrument incorporated in or annexed to the general law on the civil service. Moreover, in many Member States the nationality requirement applies for all functions designated as security functions.

Certain Member States, however, do not list the functions that require the nationality, but list the agencies, departments of ministries concerned. This implies that for all functions within such institutions, irrespective of the tasks to be performed, the nationality of the state is required and nationals of other Member States are excluded. This raises questions as to the compatibility with EC law, since in those states, such as *Estonia, Finland, Hungary, Poland* and *Slovakia*, the nationality requirement often is not related to the task to be performed by those employed in that part of the public service. In *Estonia* exemptions of the nationality requirement for EU nationals are decided on a case by case basis. In *Hungary* the minister or the head of the department has a wide discretion in granting or refusing to exempt EU nationals from the nationality conditions. This implies that EU nationals are not entitled to equal treatment as Hungarian nationals even for jobs where there is no relation with the exercise of public authority or state power whatsoever. Similarly, in *Greece* the 35 presidential decrees that specify the government agencies where only Greek nationals can be appointed also cover posts such as firemen, software specialists and journalists.

Practical problems and *de facto* barriers to access to employment in the public sector are mentioned in several reports: for instance, the nationality requirement in advertisements

without mentioning that EU nationals are exempted (*Luxembourg*). In *Denmark* job advertisement may not impose a requirement of Danish citizenship in a manner discouraging nationals from EAA countries from applying for the position, unless the position is encompassed by restrictions justified by regard for public order, public security and public health. Other practical problems are mentioned in the reports on *Cyprus*, *Estonia, Hungary* and *Poland*. In *Luxembourg* the government and the public service trade union reached a compromise in March 2009 which will allow a modification of the law enabling a wider access for nationals of other Member States a wider access to employment outside the six areas that were opened some years ago: research, education, health care, transportation, post and public utilities. However, in advertisements of vacancies in those areas Luxembourg nationality is still mentioned as a requirement. In *Poland* the new legislation that came into force, does not change the principle that only Polish nationals can be appointed as civil servants. It allows that on a case by case basis, after consent of the Head of the Civil Service, a post may be opened for EU nationals as well, if it is not related (in)directly to the exercise of public power. The new legislation does not delete the nationality requirement for any post in the national or local public service, it only opens the way to exemptions in individual cases. A national of another Member State who wants to apply for a vacancy may first have to convince the competent Polish authorities that the job in question is not covered by the exception of Article 39(4) ECT. By the time that dispute is resolved another person may well be appointed in the vacancy.

In *Romania* there is no discussion on opening up certain functions in the public sector to nationals of other Member States: the civil service is still considered to be 'a territory belonging to the national sovereignty'.

In *France* and *Italy* a complete reorganization of the status of persons employed in the civil service, including the entry procedures is under way. Such comprehensive revisions of the system may have major consequences for the access of nationals of other Member States to jobs in the public sector in those two Member States.

In the relevant *UK* legislation the exemption of the nationality requirement for EEA nationals is extended to Swiss nationals and to Turkish nationals by virtue of the Articles 6 and 7 of Association Council Decision 1/80. All three groups are defined as 'relevant Europeans' for this purpose.

Several national reports provide information on the position of notaries. In many Member States notaries are self-employed, but in other Member States they are employed in the public service. In 2007 the Commission decided to bring infringement procedures before the Court against seven Member States concerning the nationality requirement for appointment as a notary. The judgment(s) of the Court may be relevant for the application of Article 39(4) as well. The nationality requirement for notaries is referred to in the reports on *Belgium, Latvia, Netherlands, Poland, Slovenia* and *Spain*. An explicit statutory language requirement for notaries is mentioned in the reports on *Estonia, Luxembourg* and the *Netherlands*. In the last country the bill, proposing to delete the nationality requirement and introduce an explicit language requirement was introduced in 2007 but met with strong opposition in the Senate. It was decided to postpone further discussion on the bill until the Court would have decided the pending infringement cases. In *Spain* a test case on the legality of a reorganization of the legislation on notaries was decided by the Supreme Court in 2008, but the judgment did not relate to the nationality requirement in the legislation in force.

1.2. Language requirements

In the legislation of most Member States there is an explicit requirement that a person to be employed in the public sector or to be appointed as a civil servant should have sufficient knowledge of the national language. In some Member States it is explicit required that the applicant speaks and writes the official language of the country, e.g. in *Austria, Estonia, Finland, Latvia* and *Germany*.

In seven Member States, *France, Hungary, Ireland* (with regard to English), *Netherlands, Poland, Sweden* and the *UK*, an explicit language requirement has not been codified or only for a few special functions. In those states the language requirement is applied in practice or it is implied or indirectly imposed by other rules. In *Hungary* there is a rule providing for additional remuneration for civil servants if they master certain foreign languages besides the Hungarian language and the admission exam for the civil service is conducted in the Hungarian language.

In at least four Member States proof of knowledge of more than one language may be required for appointment in the public service. *Luxembourg* requires knowledge of three languages (Lëtzebuergesch, German and French) and requires applicants for positions in the public service to pass a test of Luxembourg history as well. Two languages are required in *Malta* (Maltese and English), *Finland* (Finnish and Swedish) and for certain teaching jobs in *Ireland*. Interestingly, the Irish report mentions that on the job training in Gaelick (the Irish language) is provided after appointment in the national police and the military. In *Spain* the Supreme Court in 2007 has struck down requirements to speak the regional language in the legislation of certain autonomous communities for appointment in certain public service jobs. Justification for requiring knowledge of more than one language are the necessity to communicate with members of the public (in all four Member States) and constitutional obligation or the government's policy to promote use of the national language (*Ireland* or *Malta*). In *Italy* and *Romania* in certain border regions the knowledge of the language of minority population living in those areas may be required. In *Belgium* no language requirements are mentioned in the vacancies for public service posts published on the website of Public recruitment office.

In *Sweden* for certain public service jobs the requirement of knowledge of Swedish language does not apply to person having another Scandinavian language as their mother tongue.

In *Estonia, Finland, Greece* and *Latvia* the language requirements are particularly rigid and developed. Different levels of knowledge of the national language are required for different functions. The *Estonian* legislation distinguishes between three different levels of knowledge of the Estonian language. In *Finland* the required level is not related to the tasks to be performed but to the level of education required for the job. In *Lithuania* de facto the same level of knowledge is required for naturalization is required for employment in the public service.

In some Member States a statutory provision on language knowledge was introduced or existing provisions extended in other federal or regional legislation at the occasion of the implementation of Directive 2005/36/EC, e.g. in *Germany* and the *Netherlands*. In *Latvia* in 2008 the required level of knowledge of Latvian for firemen was raised.

In several reports (e.g. the reports on *Latvia* and *Poland*) questions are raised with regard to the proportionality of the statutory language requirements and the lack of justification of the required (level of) knowledge considering the tasks to be performed. In *Cyprus* the Anti-Discrimination Authority and the Cyprus Equality Body has dealt with several complaints

concerning the application of the Greek language requirement both with regard to the level of knowledge required and the language requirement as such. The Commission has issued a reasoned opinion against Greece with regard to the requirement of 'excellent knowledge' of the Greek language for EU nationals qualified as teachers in another Member State.

In the *Polish* report the interesting observation is made that a comparative analysis of the formal entry condition for the regulated professions revealed that in the professions where no nationality requirement applies there is a language requirement for entry in the profession. It may well be that the two requirements de facto are functional alternatives barring access to migrants.

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

Many Member States do not have special legislation on the recognition of professional experience for access to the public sector (*Czech Republic, Finland, Germany, Latvia, Malta, Netherlands, Portugal, Slovenia, Sweden* and the *UK*). The general rules on recognition of diplomas and experience acquired in other Member States apply to jobs both in the private and the public sector.

In *Denmark* and in *France* the recognition of professional experience acquired in other Member States is explicitly referred to in the general circular with instructions on employment in the public service. The reports on *Poland, Portugal* and *Sweden* mention the relevance of the national equal treatment legislation as the legal basis for this recognition. *Polish* labor law explicitly allows for the recognitions of qualifications acquired by Polish or foreign workers abroad to be taken into account for entitlement to extra holiday rights and for additional remuneration. In Portugal the employment of an increasing number of Spanish nationals in the public health sector has been facilitated by a practice of recognition of their qualifications and experience obtained in Spain.

The reports on *Greece, Italy, Luxembourg* and *Spain* reveal case law of national courts applying Community law on this issue. The *Greek* report refers to a 2004 judgment of the State Council. The *Italian* report mentions a 2008 judgment annulling the exclusion of a Spanish national from the competition for the post as teacher of Spanish language on the ground that the professional diploma and the experience had been obtained in Spain. A *Luxembourg* court reversed the decision of the Minister of the Public Service and held that the full period of professional experience of a Portuguese medical specialist acquired in Portugal (but not the experience in Switzerland) should be taken into account. The Spanish Supreme Court in two judgments refused claims for damages caused by non-recognition of professional qualifications acquired in other Member States caused by the delay of transposition of the relevant EC directives and in a third case illustrated the limited scope of judicial review of decisions on (partial) recognition of foreign qualifications due the sometimes rather technical nature of those decisions.

In two Member States legislation on this issue entered into force in 2008. In *Bulgaria* a provision was enacted allowing for the recognition of professional experience of nationals of other Member States and their family members. In *Italy* the judgment of the ECJ of 26 December 2006 (C-371/04) was implemented providing for the recognition of professional qualifications, even when acquired in a Member State before its accession to the EU.

On the other hand, in *Slovakia* no professional experience is taken into consideration, either acquired abroad, or in Slovakia and in *Lithuania* and *Romania* this issue has no practical

relevance, since the civil service in those countries is restricted to nationals of those countries.

In *Estonia* several government bodies are competent to deal with request for the recognition of foreign qualifications. In *France* several decrees have been adopted in 2008 specifying the conditions for recognition of qualification obtained in other EU Member States for jobs in public health institutions and for technical or specialist jobs in the military. A *German* administrative court has ruled on the incompatibility of the statutory requirement of having obtained the first German state exam for certain posts in the judiciary. In *Sweden* an official report on the access to teaching jobs proposed to that rules on the recognition of foreign qualifications applying both to the private and the public sector should be introduced in the new legislation.

1.4. Other issues concerning access to posts in the public sector

The *Hungarian* government has announced the introduction of a system of entry exams for access to the public service similar to the system of the concours applied in France and other Member States.

The *UK* report mentions that the system of public service recruitment is open to criticism for the lack of published requirements as regards the recognition of qualifications and experience. However, there is the possibility of redress if it is thought that a refusal of recognition amounts to unjustified indirect nationality discrimination under the 1976 Race Relations Act. The relevant provision of that Act applies to non-exempt jobs in the public service.

2. WORKING CONDITIONS

2.1. Recognition of professional experience for determining working conditions

In several Member States no change of legislation or practice in 2008 and the first half of 2009 was reported. In some Member States, such as *Lithuania* and *Romania*, this issue is not relevant, since *de iure* or *de facto* only nationals have access to employment in the public service. In *Finland, Hungary, Netherlands* and *Slovakia* there are no specific rules on the working conditions of non-nationals employed in the public sector. In the reports on *Cyprus, Germany, Netherlands* and the *UK* the relevance of the national equal treatment legislation that also covers the position of non-nationals employed in the public sector is mentioned. In *Denmark* and *Sweden* the working conditions of persons employed in the public sector are to a large extent determined by collective labor agreements that apply both to national and to foreign workers. According to the reports on *Bulgaria* and *Cyprus* the national legislation is in conformity with Community law, but it is questioned whether this applies to the actual application of the legislation as well. In *Slovenia* all public authorities are instructed by a circular of the Minister of Public Administration that the length of service and professional experience acquired in other Member States should be taken into account in decisions on professional advantages, such as supplementary payment for years of service and the length of the annual leave. In the *Czech Republic* qualifications and experience acquired in another Member State may be taken into account.

In some Member States the scope of the equal treatment is severely restricted. In *Latvia* and *Malta* only employment in the national public service is considered relevant when calcu-

lating seniority. In *Denmark*, this applies regarding grade (a single reward for loyalty with the same employer) but not regarding level of payment. In *Ireland* experience in other Member States is only taken into account for the level of payment, not for seniority, whilst only previous employment in the public service not private employment is considered relevant. In *Italy* an Act adopted in 2008 explicitly provides for the consideration of professional experience in the public sector in other EU states or in EU institutions whilst deciding on seniority of the worker.

In the public service in *Malta* there is a common practice of making promotion to a higher salary scale or grade conditional on the attainment of a certain length of service in a particular grade, which may be incompatible with the case law of the ECJ in *Schoning* and in *Kobler*.

The report on *France* mentions two decrees adopted on the grading of civil servants in a range of public service jobs. Both decrees provide for the experience acquired in other EU/EEA states to be taken into account. However, the decree on the grading of high teaching jobs in university hospitals provides that only half of the foreign experience up to12 years and only one quarter of the experience of more than 12 years will be taken into account.

After recent amendments the *Austrian* legislation explicitly provides for the recognition of professional experience acquired in other Member States, in Switzerland and in EU institutions for the level of the salary. The position of Turkish nationals under this law still is unclear. The Administrative Court in 2008 made an new reference to the ECJ on the statutory limitation of the recognition of non-Austrian university professors.

2.2. Other aspects of working conditions

The report on *Cyprus* mentions various administrative and bureaucratic barriers to access to equal treatment and social benefits for those employed in jobs in the public service. In *Hungary* the planned general reform of the system of recruitment for the public service is postponed and the political climate is not favorable for opening the public service or improving the working conditions for non-national workers. In *Lithuania* there is a clear difference in working conditions of civil servants and those employed in public sector jobs on the basis of a labor contract. The remuneration of civil servants, generally, is higher and they are entitled to longer holidays.

Chapter VI
Members of a Worker's Family

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

Although not specifically requested, a number of national reports include interesting information on the definition of family member in Article 2(2) and Article 3(2) of Directive 2004/38/EC. On the basis of the information provided, the following issues merit separate consideration: the position of registered partners and *de facto* partners, the obligation to facilitate entry and residence of the family members listed in Article 3(2) in those Member States and the issue of reverse discrimination. But first, the following observations made by the national rapporteurs on the definition of family members deserve to be mentioned.
In *Bulgaria* a partner's direct descendants and direct ascendants are not included as family members, where partners are included as beneficiaries of the free movement rules.

A proposal to abolish the current restriction of the right to be accompanied by family members that applies to students under *Finnish* law is pending.

In *Latvia*, *Lithuania* and *Sweden* only the family members listed in Article 2(2) of Directive 2004/38/EC benefit from Community free movement rights. The situation in *Portugal* is the same, but there *de facto* partners are included as a family member of an EU citizen.

The *Slovenian* rapporteur mentions that a child has to be unmarried to benefit from Directive 2004/38/EC and that registered partners do not benefit from free movement rights in that Member State.

Registered partnership and de facto partners

Registered partners benefit from the rights in Directive 2004/38/EC in some, but not all Member States. Various rapporteurs report problems concerning partners.

In *Bulgaria* it is unclear what the difference is between registered partners (Article 2(2)) and de facto partners (Article 3(2)), but this should change when a legislative act, currently pending, will amend Family law in the sense that both registered and non-registered partnerships are recognised. Partners, include same sex relationships in *Cyprus*. Partners who cohabit continuously in an adequately documented relationship enjoy a right of residence along the same lines as other family members.

A circular issued by the CNAF has clarified the position of registered partners in *France*, as it expressly includes in its enumeration of family members 'partenaires de PACS'.

In *Latvia* admission of partners (unmarried or in duly attested durable relationships) and family members with a serious health problem is subject to the following conditions 'dependency' and 'common household in the country of previous residence'.

On July 10, 2009, a Royal Decree (1161/2009) was adopted exempting third-country national family members of EU or EEA citizens residing lawfully in Bulgaria, Cyprus, Ireland, the UK or Romania from the visa obligation when entering *Spain*. Registered partnerships established under Spanish law are not considered to qualify as partners for the purpose of Directive 2004/38/EC as 'the possibility of two simultaneous registrations in this State' is not precluded (Instruction General Director for Immigration, March 22, 2007, DGI/SGRJ/03/2007). The Spanish rapporteur discusses various cases involving registered partners and

presents a decision of the High Court, resolving the issue of the inexistence of a Central Register for partners in Spain in favour of the individual, establishing that the absence of such a register cannot be an obstacle to the exercise of an individual right legally established. It ruled that the creation of a Central Register for partners is the responsibility of the Spanish authorities and does not justify the denial of an individual right derived from Directive 2004/38/EC.

In the *United Kingdom* a durable relationship requires two years of residence together. The courts, however, have still to express their opinion on this requirement. The position of durable partners once they have made an application to the Home Office requires clarification as, until recently they were not given a letter confirming their application enabling them to work pending their application. The British rapporteurs feel that this suggests that the Home Office is unsure whether they are able to maintain their position that a person in a durable relationship must be granted a right to remain (rather than having a right per se).

Position of family members listed in Article 3(2)

From the *Bulgarian, Czech* and *Dutch* reports it appears that where Member States have chosen to equate the position of family members listed in Article 3(2) of Directive 2004/38/EC to that enjoyed by the family members listed in Article 2(2) of the Directive this has raised the question of the nature of the right to enter and remain (national or European based right).

Reverse Discrimination

The issue of reverse discrimination is addressed in the *Bulgarian, Czech, German, Hungarian, Italian, Latvian, Lithuanian, Spanish and Swedish* reports.
The *Bulgarian* report mentions two cases currently pending before the European Court of Human Rights concerning residence rights of third-country national family members of Bulgarian citizens. In both cases infringement of Articles 8 and 14 of the ECHR are claimed.[13]

In *Belgium, Hungary, Spain* reverse discrimination is, in general, not a problem as the national implementing measures extend the rights in the Directive to nationals.

In *Belgium* and *Spain*, assimilation does not include family members in the ascending line. In *Belgium* parents have to prove that they have stable, regular and sufficient financial resources. In practice this has caused problems for parents of Belgium children. The *Chen* case[14] is not considered to apply to their situation. The distinction made in Spanish law was found to violate Article 14 of the Spanish Constitution (equal treatment and non-discrimination).[15]

The restriction of the personal scope of Directive 2004/38/EC to third-country spouses of *Danish* citizens returning to Denmark after having pursued an economical activity in another Member State and continuing such activity or retiring on return to Denmark was debit to the issue of reverse discrimination in that Member State. Following the ECJ's decision in *Eind*,[16] new guidelines were adopted by the Ministry of Refugee, Immigration and Integration Affairs, thus extending the personal scope of Directive 2004/38/EC to all family members of

13 Appl. 33655/08 and Appl. 20116/08.
14 ECJ case C-200/02 [2004] ECR I-9925.
15 Jdo Contencioso Administrativo number 1 of Lleida (Catalonia) November 27, 2008, 00378/2008.
16 ECJ case C-291/05 [2007] ECR I-10719.

Danish citizens returning to Denmark after having exercised free movement rights in another Member State. In November 2008 the Parliamentary Ombudsman issued a report on the alleged failures of the Danish Immigration Services regarding the guidance on residence rights under Community rules in particular for third-country national spouses of Danish citizens.[17]

The *German* rapporteur mentions a decision by the Administrative Appeal Court of North-Rhine Westphalia that excludes EU citizens with dual nationality residing in the country of origin (where nationality is acquired at birth) as beneficiaries of Directive 2004/38/EC in the Member State.[18] He expresses his doubts whether this judgment will be upheld by the ECJ. The Administrative court of Munich relied on the *Chen* case to justify a residence right of a relative of a child born in that country even if there is no proof of sufficient resources.[19] The French report reveals that third-country national family members of French nationals can apply for their long stay visa with the Prefecture if they can prove they have entered France legally (by showing a short stay visa). In practice a joined application is made for a long stay visa and a residence permit.

In *Hungary* a parent or guardian of a minor who is a Hungarian citizen does not have to establish that (s)he has sufficient financial resources. In Hungary a child born to a parent with a permanent right of residence also has a permanent right of residence in that country.

2. ENTRY AND RESIDENCE RIGHTS

The implementation of entry, including visa obligations, and residence conditions is generally considered correct. Likewise there are no real concerns regarding the issuing of registration certificates to family members who themselves are EU citizens or residence permits to third-country national family members. The following remarks were made.

In *Belgium* visa requirements are applied in accordance with the ECJ's *MRAX*-ruling.[20] Various parents who had started legal proceedings against a refusal to issue a visa to their third-country national child found their application declared inadmissible. The Conseil d'Etat has now recognised a Belgium parent's interest to instigate legal proceedings against a decision refusing to issue a visa to a third-country national daughter.[21]

In the *Czech Republic* the obligation to issue a visa 'as soon as possible on the basis of an accelerated procedure' has been implemented as 14 days, which is labelled by the rapporteur as 'questionable' who also expresses concerns regarding the available information on the acquisition of visa.

The *Hungarian* report reveals that the Schengen Borders Code applies to entry and the issuing of visa. There is no right to appeal a refusal to issue a visa. There is, however, an obligation to allow an EEA national or family member who does not satisfy entry conditions 72 hours to acquire the required documents. Residence during the first three months is subject to the requirement that the person does not become an unreasonable burden on the Hungarian social assistance system, which is in line with Article 14 of Directive 2004/38/EC.

The issuing of a registration certificate by the *Latvian* authorities to family members requires the presentation of legalized documents ascertaining the family relationship, which is both costly and time consuming. In addition, an official questionnaire has to be completed.

17 Press release of January 15, 2008 from the Ministry of Refugee, Immigration and Integration Affairs.
18 Administrative Appeal Court of North-Rhine Westphalia, March 17, 2008, 18 B 191/08, ZAR 2008, 197.
19 Administrative court Munich, September 27, 2007, M 10 K 06.1564, ZAR 2008, 144.
20 ECJ case C-459/99, [2002] I-6591.
21 Belgium CE, 31 March 2009, No. 192-061, not published.

This is also the case when the application concerns a (permanent) residence permit. According to *Romanian* law, a third-country national family member applying for a residence permit must submit a legalized copy of marital or other documents establishing the relationship with an EU citizen. According to the Commission's guidelines, however, legalisation of documents can only be required if the national authorities cannot understand the language in which a document is drafted, or where there are suspicions concerning the authenticity of the issuing authority.[22] In *Spain* documents establishing the family relationship, matrimonial or registered partnership have to be translated, an apostille or legalisation is only required 'when necessary'.

In *Lithuania* the *Order on Issuance, Extension and Withdrawal of EU Residence Permits for Family Members of EU Nationals* was adopted on July 25, 2008 (Ministry of Interior, Order No. 1V-290). It addresses the validity of residence permits and the documents to be submitted along with an application for a residence permit. Residence permits are valid for five years, but if issued to a child, the validity is linked to the formal education period, where this is shorter than five years. EU permanent residence permits are issued for a period of ten years and extended once they expire. For children in education the validity is once again linked to the period of formal education.

Decisions on an application for a residence permit are taken within a month and valid for six months. In this six months period a second procedure formalising this right is required. Documental proof of legal residence is required in the second procedure. If the second procedure is not completed within the six months, the first decision is repealed. The *Lithuanian* rapporteur feels that the so-called 'double stage system' is unnecessary and it creates an additional bureaucratic hurdle in the dealings with the immigration officials.

Family permits are granted for six months giving the applicant time to travel to the *United Kingdom*. This causes problems in relation to the ability of the third-country national to work once in the United Kingdom. In reality, given the strict employer sanctions third-country nationals have to obtain a five year residence card for which they have to apply to the Home Office before being able to work. This is highly problematic as applications for a residence permit take six months and in some cases even longer to be dealt with. Although certificates of application are generally sent out quickly, the rapporteurs have experienced that employers are more and more reluctant to accept them. In particular, if a residence card is not granted within the six months, employers are unwilling to continue their employment relationship with third-country nationals. In addition, third-country nationals are being asked for documents by the Home Office which they should not have to provide (e.g. evidence of cohabitation since their marriage or civil partnership and civil partnership ceremony photographs). In addition, as these applications are outstanding for so long, the Home Office is then writing to ask for updated information about e.g. the EEA national working. Also, the procedure for retrieving passports is difficult and haphazard.

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

The preliminary reference from the Irish High Court in the *Metock* case[23] addresses the issue of admission of third-country national family members following the ECJ's ruling in the *Akrich* case.[24] The ECJ explicitly reconsiders the latter ruling where it decided that third-

22 COM (2009) 313, p. 7.
23 ECJ case C-127/08 [2008] ECR I-6241.
24 ECJ case C-109/01 [2003] ECR I-9607.

country national spouses of EU citizens must be lawfully resident in a Member State before they benefit from the rights set out in Directive 2004/38/EC.[25] As a result of the *Metock* ruling Member States are no longer permitted to require prior lawful residence from third-country national family members, nor can they impose conditions concerning the moment when (*ex ante* or *ex poste* entry) or the country where the marriage was convened.[26] The case does not, however, provide a further clarification on the issue of abuse of rights, i.e. marriages of convenience as the national court had explicitly stated that none of the cases concerned a marriage of convenience.[27] The *Metock* ruling was confirmed by the *Sahin* case.[28] The *Austrian* report reveals that following *Sahin* national procedures are decided in line with the ECJ's ruling as now it is recognised that Articles 9 and 10 of Directive 2004/38/EC have direct effect and thus take precedence over conflicting national law. In a different case (2008/18/0507), the Austrian Administrative Court has requested the Austrian Constitutional Court to revoke section 57 of the Austrian *Settlement and Residence Act* that allows for less-favourable treatment of Austrian citizens, i.e. the issue of reverse discrimination that, according to consideration 77 of the *Metock* ruling, does not fall within the scope of Community law. The Constitutional Court has still to decide on the merits of the case.

In the following Member States the *Metock* judgment has had no impact on national law or practice mostly because 'prior legal residence' was not required from third-country nationals *Belgium, Bulgaria, Czech Republic, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain* and *Sweden.* In *Lithuania* though, the requirement of previous residence in the EU still applies with regard to family members of Lithuanian nationals.

In *Cyprus* a Circular was issued by the director of the Migration Department dated January 14, 2009, referring to an interdepartmental meeting where the legal significance of the *Metock* judgment was discussed. However, to date there has been no action to reconsider cases decided *ex ante* the *Metock* judgment along the lines set out by the ECJ in that decision.

Following the ECJ's decision in the *Metock* case, *Denmark* abolished the requirement of prior lawful residence in an EU/EEA Member State and various measures were taken in order to prevent abuse of the EU rules on residence rights for family members.[29] Although not addressed in the *Metock* case, the political agreement of September 22, 2008 on the implementation of the EU rules on free movement in the light of the *Metock* judgment, has meant that third-country national spouses of Danish citizens can rely on Community law upon their return from another Member State to Denmark.[30]

Although 'prior lawful residence' was not required in *France*, Prefectures have been known to request a long term visa to be applied for in the country of origin. The *Metock* case has been relied on by French courts on various occasions.

On May 29, 2009 the *Finish* Government submitted a proposal that will remove the requirement of 'prior legal residence' from the Aliens Act. In January 2009 Guidelines were issued by the Police Department of the Ministry of Interior instructing the police to apply the Directive rather than national law when registering EU citizen's family members or issuing

25 ECJ case C-127/08 [2008] ECR I-6241, cons. 58.
26 ECJ case C-127/08 [2008] ECR I-6241, cons. 99.
27 ECJ case C-127/08 [2008] ECR I-6241, cons. 46.
28 ECJ case C-551/07, December 19, 2008, n.y.r.
29 Executive Order No. 984 of 2 October 2008 amending the EU Residence Order.
30 Press release of January 15, 2008 from the Ministry of Refugee, Immigration and Integration Affairs.

residence permits to third-country national family members.[31] The Guidelines for the issuing of visa to third-country national family members have not been amended following the *Metock* ruling. Information received from the Ministry for Foreign Affairs shows that the *Metock* judgment is understood in this context very narrowly in the sense that it only concerns cases where third-country nationals were married in another Member State and then enter Finland directly from there. The *Metock* judgment is not regarded to preclude application of the condition for previous lawful residence in other cases. This narrow reading is not without implications for procedural safeguards where visa applications are turned down.

The *German* Foreign Office of the Federal Republic has amended the administrative regulations for the visa authorities.[32] Now the German visa authorities issue visas to family members of Union citizens regardless of where they have previously resided and without considering the legality of residence in another EU Member State or a third state. The *Metock* judgment has also meant that family members of Union citizens no longer have to prove that they dispose of a basic knowledge of the German language when they apply for a visa. The *Metock* judgment has not resulted in guidelines on the abuse of free movement rights.

The *Irish* government adopted Regulations amending the offending part of the 2006 Regulations within four working days of the ECJ delivering its judgment bringing Irish law in line with the ECJ's ruling.[33] The Department of Justice, Equality and Law Reform stated that all applications for a residence card made after April 28, 2006 which were refused as there was no 'prior lawful residence' will be reviewed. It was envisaged that this process would take three or four months to complete.[34] At the same time it instigated a campaign, joined by Denmark, to amend the Directive which has culminated in the recent Commission Communication.[35]

The *Metock* judgment meant that the *Dutch* government had to abandon its desire to extend integration conditions to third-country national family members of EU citizens and that long term visa (*machting tot voorlopig verblijf*) requirements cannot be imposed on these family members. 2008 did see the government explicitly stating that language and integration courses can be offered to EU citizens under the same conditions that apply to Dutch nationals and certain third-country nationals. It also led to the introduction of a new requirement for unmarried partners not in a registered partnership who now have to provide evidence that their relationship has lasted for at least six months and that the partners share a common household. The latter is not required if a child has been born out of their relationship. When applying for a residence permit, unmarried partners have to sign a so-called *samenwoningsverklaring* (a document attesting cohabitation, use of the same address and registration in the GBA (municipal population register) as living at that address). The immigration officials have been instructed to establish the existence of family ties before issuing a residence document 'family member of a citizen of the Union' (B10/5.2.2 of the Aliens Circular). A further amendment, which can actually be traced to the ECJ's decision in the *Eind* case, concerns Dutch citizens returning to the Netherlands after exercising free movement rights who no longer have to pursue an actual and real economical activity to benefit from free movement rights for their third-country national family members.

31 Soveltamiskäytännön muutos unionin kansalaisen perheenjäsenen maahantulossa. Vapaan liikkuvuuden direktiivin suora soveltaminen ulkomaalaislain sijasta SMDno/2009/54, 8 January 2009.
32 Visumhandbuch Unionsbürger Freizügigkeit 1.8.2008, as quoted in ANA ZAR 2008, 35.
33 European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (S.I. No. 310 of 2008).
34 See the August 2008 notice 'European Court Judgment on Free Movement of Persons (the '*Metock*' case) (http://www.inis.gov.ie/en/INIS/print/PR08000027).
35 COM(2009) 313 final.

The *United Kingdom*'s authorities have failed to amend Regulation 12(1)(b) EEA Regulations 2006 which in its current wording is contrary to the ECJ's judgment in *Metock* where it requires family members to meet the national immigration rules rather than the family reunification rules in the Directive. During the week of 8 December 2008 guidance was issued to the Entry Clearance Officers informing them that the Entry Clearance Guidance which is the guidance which Entry Clearance Officers would be referring to and the European Casework Instructions which Home Office officials refer to would be updated in due course.[36] The guidance fully implements *Metock*. It does, however, put significant emphasis on the fact that a marriage or civil partnership must not be for reasons of convenience, stresses the three reasons allowed for refusing an application (public policy, security or health) and reiterates the importance of checking the authenticity of documents and the right of the government to take appropriate measures to guard against the abuse of rights or laws. In practice family permits appear to be given priority over other applications and after the issuing of the guidance after *Metock*, most cases were dealt with swiftly. In the case *SM (Sri Lanka)*[37] *Metock* was considered to have no direct relevance to the interpretation of Article 3(2) i.e. for extended or other family members. The case of *KG (Sri Lanka)*[38] was stated to be 'good law' and within the meaning of Article 3(2) and therefore Regulation 8 of the Immigration (European Economic Area) Regulations 2006.

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

In most Member States steps can be taken culminating in a refusal, termination or withdrawal of a residence permit when fraud or abuse of free movement rights has been established. In the three Member States (*Italy, Luxembourg and Spain*) where abuse and fraud are not provided for proposals that will allow their officials to take measures to combat fraud and abuse are pending.

There is little empirical information establishing the number of cases concerning abuse and fraud. Only the *Irish* report provides information regarding the number of marriages of convenience, or fraud. The *Dutch* report does, however, mention research on this issue that is currently being conducted. An increase in the number of marriages of convenience with Latvian nationals following that Member State´s accession to the European Union is mentioned by the *Latvian* rapporteur.

In the *United Kingdom*, although there have been requests for interviews with married couples for the purpose of establishing a marriage of convenience, the rapporteurs are not aware of an increase in house raids for this purpose. Concerning the scope of the problem, the observation by the *Irish* rapporteur that it is extremely difficult to prove a marriage of convenience as it 'is very resource-intensive and can be intrusive' might explain, on the one hand, why so little factual information is available and, on the other hand, why references to case law addressing the issue of abuse is only found in a few reports.

The *Belgium* report is one of the reports that includes a number of decisions, albeit it on the application of the *Baumbast* and *Chen* rulings in cases concerning parents of Belgian children. No decisions on marriages of convenience are included. In *Hungary* the Ombudsman has received a complaint from a Hungarian national married to an Egyptian national concerning a refusal to issue an entry visa as their marriage was assumed to be 'false', where

36 This occurred in January 2009.
37 *[2008] UKAIT 00075.*
38 [*2008] WCA Civ 13.*

no examination had taken place nor did the refusal provide a justification for this conclusion. In the Netherlands, the District Court in The Hague had to decide on a case concerning the checks on unmarried no-registered partners which where introduced to tackle the problem of abuse of free movement rights. The *Romanian* rapporteur mentions that a number of cases concerning marriages of convenience are pending before the courts, but all cases concern national rules rather than Article 35 of Directive 2004/38/EC. In *Sweden* the Migration Court of Appeal had to deal with marriages of convenience on two occasions.

Abuse and fraud are addressed in general immigration law or special rules in *Austria, Belgium, Bulgaria, Cyprus, Denmark, France, Greece, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden* and *the United Kingdom.* The details in the individual reports reveal that although the consequence of abuse and fraud (refusal, termination or withdrawal of residence permission) is the same, the approaches and rules differ from Member State to Member State. Thus, in *Cyprus* and *Poland*, the situation is assessed along the lines of the conditions listed by the Commission in its 2009 Communication whereas in *Finland* and *Malta* the Council's *Resolution on Measures to be Adopted on the Combating of Marriages of Convenience* of December 4, 1997 serves as guidance.[39] *Austria* relies on Article 8 of the ECHR (family life) and does not bother Austrian citizens who marry an EU-citizen, who has an independent right of residence. Currently in *Belgium* every forthcoming marriage concerning a non-national justifies the exchange of information and the convening of a marriage can be refused when there is a suspicion that the marriage should be classed as a marriage of convenience. As far as marriages convened abroad are concerned the rules in the Brussels I Regulation and international private law apply, though the possibility of introducing stronger controls when a marriage is convened abroad is under examination. The *Bulgarian* rapporteur notes an incorrect implementation of Articles 30 and 31 of Directive 2004/38/EC where marriages of convenience are concerned. In *Cyprus*, assistance to and the convening of a marriage of convenience is a criminal offence carrying a penalty of 3 years imprisonment or a fine of up to 3000 pounds (5000 euro). In *Poland* assistance to the realisation of a marriage of convenience is classed as facilitating or enabling a third person to stay in Poland unlawfully in order to gain personal or property benefits and thus a criminal offence under Article 264a of the 1997 Polish Criminal Code (penalty or imprisonment for 3 months-five years). According to the *Czech* law interviews can be conducted when an application for a residence permit is made. When a person does not turn up for the interview without providing an appropriate justification, refuses to answer or gives false facts, this is a reason not to grant the residence permit, where this does not disproportionally impact on family life. Where there is a child involved, the execution of an expulsion measure is subject to consideration of the best interest of the child. In *Denmark* an application for a residence permit requires that both spouses/partners have to declare that the purpose of contracting the marriage or the partnership or establishing cohabitation was not solely to obtain a separate basis of residence for the person applying for the residence document. In addition, proof may also be required that the principal person has established genuine and effective residence in Denmark. The *German* Administrative Guidelines allow for an examination by the competent authorities, when there are facts, e.g. contradictory information provided at the time of application or other information at the disposal of the visa or immigration authorities, suggesting that there is a marriage of convenience. In *Greece* the presence of abuse should be established by a court decision. The *Irish* 2006 Regulations provide that the term 'spouse' does not include a party to a marriage of convenience and, more generally, that a person

39 *OJ EC* 1997, C 382/1.

found to have acquired rights or entitlements by fraudulent means – including marriages of convenience – would immediately cease to enjoy them. The prior lawful residence test was seen as a useful means of avoiding the issue of marriages of convenience which, in practice are hard to prove. Since January 1, 2009 the *Polish* Border Guard divisions can conduct investigations at the place where the spouse and where other family members or people with whom the non-national spouse has family ties are staying. The *Romanian* authorities verify the nature of a marital relationship with a view to establish whether it is a marriage of convenience when there is no prior right of residence in another Member State. Verification covers statements made by the spouses as well as by third parties, interviews and the consultation of documents In *Sweden* a marriage certificate merits the presumption that a residence permit should be issued. It is up to the authorities to prove that the marriage is not genuine. In the *United Kingdom* long questionnaires regarding the personal circumstances of the family members have to be completed when applying for a residence permit.

As a final remark, it must be mentioned that in a debate with the Dutch parliament (Second Chamber) the Dutch Secretary of State put forward the possibility of introducing a system of registration and notification between Member States as an additional instrument to combat fraud and abuse within the meaning of Article 35 of Directive 2003/38/EC. This EU-system for notification would allow a Member State experiencing an unaccounted increase in the number of applications made by nationals of another Member State or observing other unaccounted for developments to notify the Member States concerned.

5. ACCESS TO WORK

In most Member States access to the labour market is ensured for both EU citizens and their family members. The reports on *Austria, Bulgaria Cyprus, Denmark, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia* and *Sweden* explicitly mention that EU citizens and family members do not need a work permit to take up employment in those Member States. However, this does not mean that there are no problems in these Member States concerning access to work. In *Austria* the right to take up employment is restricted to the spouse and unmarried children and in *Bulgaria* there is an obligation for the employer to report to the local employment office within seven days when a family member of an EU citizen who has not acquired a permanent residence right is employed. In *Latvia* it might prove problematic for third-country national family members to take up employment before their residence permit has been issued. In *Lithuania* third-country national family members do not benefit from this exemption and still have to obtain a work permit, if they do not qualify as one of the categories exempted from this obligation by law. In *Slovakia* the exemption from the work permit requirement only covers third-country national family members with a permanent residence permit. In *Sweden* a permanent residence permit issued by another Member State also allows its holder to take up employment in Sweden without a work permit.

In *Belgium* questions concerning the requirement to obtain a work permit for employment imposed on third-country national family members of Belgium citizens (e.g parents of a Belgium child) have risen as a consequence of the fact that Belgium nationals also benefit from the rights set out in Directive 2004/38/EC. Currently pending is case C-34/09, *Ruiz Zambrano* that, however, does not include Article 24 of Directive 2004/38/EC in the list of provisions which the referring court has asked the ECJ to clarify.

The *Greek* report covers two cases in which the Ombudsman was requested to mediate. The first concerns a refusal to issue a licence for the operation of a private security company to a third-country national family member of a Greek citizen. In the other case, the Ombudsman expressed his opinion in January 2009 that the exception '(in)direct participation in the exercise of powers conferred by public law' cannot be invoked in the case of country medical doctors. Although both cases concern third-country national family members of Greek citizens, the outcome is considered relevant for third-country national family members of EU citizens.

According to the *Hungarian* report, all family members who want to take up employment in that Member State need a temporary work book. Where employment is confidential and requires Hungarian language skills, a position as a civil servant is restricted to Hungarian nationals.

In *Ireland* the position of third-country national family members is unclear. As far as a non-EEA national married to an EU citizen is concerned, the Department of Enterprise, Trade and Employment has expressly stated that a work permit will not be required once a residence card has been issued. In the intervening period, which can take several months, a work permit will be required, though the fee is waived. According to information provided by officials in the Department, a child is only recognised as dependant if he/she enters the State before his/her 18th birthday. Entry after this age requires an application for an independent work permit.

In 2008 the Administrative Tribunal ruled on a case concerning the denial of a work permit to a third-country national spouse of an EU citizen no longer resident in *Luxembourg*. Protective measures were not deemed necessary as her residence permit was still valid.

In *Malta* family members of EU citizen workers enjoy a right of residence and the right to take up employment or pursue an economical activity as a self-employed person. In general third-country nationals need a work permit to take up employment in Malta which are issued to third-country nationals who do not qualify as family members of EU citizens on the basis of a labour market needs-test at a price of € 139,76.

Problems have arisen for third-country national family members in terms of their access to the *British* labour market, through difficulties of not being able to document the right to work while an application is outstanding. Letters confirming applications are sent out and employers can rely on them to employ somebody, but they are only valid for 6 months despite the fact that the Home Office is currently taking significantly longer than that to deal with applications and give a final decision. This is particularly problematic in the light of legislation in the UK under which employers who are not able to show that their employees have a right to work at any given time face significant fines. There are documented cases of third-country nationals who have not been able to obtain work or have been sacked.

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

In the majority of Member States no rules are in place concerning the position of family members of EU job-seekers. The *Irish* rapporteur mentions a 'lack of transparency' in this respect. The general impression is that family members of job-seekers derive their right of residence from Article 6 Directive 2004/38/EC.

In *Bulgaria* registration as a job-seeker is possible under the same conditions as Bulgarian citizens, unless Bulgarian nationality is explicitly required.

Cypriote law provides for equal treatment regarding allowances and, as far as social security benefits are concerned, the enjoyment of these benefits depends on the contributions made to the system. Transferral of contributions is provided for as required by Regulation EEC (No) 1408/71.

In the *Czech Republic* EU citizens and their family members do not need a work permit but their employer is obliged to inform the Labour Office *(Sec. 87, 102 of Employment Act)*.

Danish law provides for a six month period for the purpose of seeking employment and the right to be accompanied by family members for the same period. The personal scope of this residence right is limited to spouses, registered partners or regularly cohabiting partners, children below 21 years of age, and other dependent family members.

In *Germany*, family members experience the same problems regarding the exclusion from the *Social Code* as the job-seeker who they accompany. The German rapporteur wonders whether the job-seekers allowance is a financial benefit facilitating the access to the labour market that does not fall within the scope of the exclusion clause found in Article 24(2) of Directive 2004/38/EC according to the ECJ in its recent ruling in the joined cases *Vatsouras and Koupatantze*.[40]

In *Greece* family members of workers and family members of job-seekers are treated alike.

In *Hungary* family members can register as a job-seeker and apply for financial support on the same footing as Hungarian nationals. They are also entitled to facilities that will enable them to take up employment in the future and they can also set up their own business. These rights are, however, restricted to the spouse and dependant children under 21.

In practice, it seems that in *Ireland* family members of job-seekers are in principle able to enter and avail of residence rights corresponding to those of the job-seeker but do not have a right to social assistance during the period where the job-seeker is seeking employment and has a genuine chance of being engaged.

Registration as a job-seeker is only possible in *Latvia* with a registration card or residence permit. Likewise, entitlement to social security benefits requires a registration card or residence permit.

In *Lithuania* the situation of family members of job-seekers is unclear, as they are not mentioned as such in Lithuanian law. Nevertheless, Lithuanian law can be read to cover job-seekers, as it allows EU nationals to stay in that Member State without registration for up to three months or for a longer period where they have sufficient financial resources. It is assumed that they are exempted from obtaining a work permit.

Family members of EU job-seekers may reside and move freely in *Malta* on the same footing as Maltese nationals for a period not exceeding three months calculated from the date of entry. This period can be extended up to six months were there is evidence that the job-seeker is genuinely seeking employment and has a genuine prospect of being employed by the end of this six month period. Registration as a job-seeker with the Employment and Training Corporation is required.

No explicit provision is made for family members of job-seekers in the *Dutch* rules. They are allowed to stay in the Netherlands for three months when they satisfy the conditions for short stays in Article 6 of the Directive (B10/5.2.2 Aliens Circular). Where the EU citizen finds a position or has sufficient resources to support himself and the family members, the general rules apply (B10/3.1 Aliens Circular).

40 ECJ joined cases C-22/08 and 23/08, June 4, 2009, n.y.r.

No specific rules and practices concerning family members of job-seekers are found in *Polish* law. General entry and residence conditions apply to both job-seekers and their family members. Benefits are granted to both EU citizens and their family members if they are resident in Poland under the *Act on Social Assistance*. They also benefit from the rights included in the *Act on Promotion of Employment and Labour Institutions*, e.g. assistance to find a job and to attend trainings and seminars aimed at facilitating access to the labour market.

Family members of EU citizens seeking employment in *Portugal* and *Slovakia* fall under the general rules for admission and residence.

The absence of special rules on the rights of job-seekers is understood by the *Spanish* rapporteur as a right to stay and look for work in Spain. The general rules on access to the labour market and educational facilities provide for access under the same conditions as those applicable to Spanish nationals, though it does exempt dependent descendants over 21 and dependent direct relatives in the ascending line.

In *Sweden* family members of job-seekers enjoy a right of residence as a family member. This right of residence encompasses the right to equal treatment. No residence card is issued to third-country national family members of job-seekers, but they do have to obtain a work permit that can be limited in time.

The *UK* report reveals that job-seekers are recognised by the Home Office as exercising Treaty rights, but increasing lengths of time as a job-seeker do lead the Home Office to ask for more documentation to prove their position.

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

The rapporteurs for *Austria, Cyprus, Estonia, Germany, Ireland, Lithuania, Luxembourg, Romania and the United Kingdom* have not expressed any concerns relating to equal treatment. The *Greek* report explicitly mentions that child allowances and parents' pensions are granted under the same conditions.

From the year 2004 persons without tax domicile (normally a person who does not habitually reside in the *Czech Republic*, i.e. mainly frontier workers) can require the tax reduction or tax bonus for a child and tax-relief for a spouse.

In *Finland* study grants are enjoyed by EU citizens and their family members under the same conditions as Finnish citizens, as long as their right of residence has been registered or a residence card has been issued and as long as the legal basis for their right of residence is not study (i.e. Article 7(1)(c) of Directive 2004/38/EC).

As access to social benefits requires legal residence, EU citizens in practice may experience difficulties proving legal residence without a residence permit in *France*. The CAF has the authority to verify residence conditions. .In *Hungary* 2008 witnessed various amendments that entitle family members to family, social and disability benefits. Further, the deletion of the reference to Regulation (EEC) No. 1612/68 in the Social Administration and Benefits legislation has turned all EU citizens into beneficiaries of the right to benefits in cash and kind. Although equal treatment is assured regarding housing, permission is still required when purchasing non-agricultural land housing.

In *Italy* there is no right to social security benefits during the first three months unless it is a social benefit that is associated with the activity pursued or otherwise granted by law. All workers are entitled to unemployment benefits and child and family allowances. In *Circular No. 46* dated February 23, 2007, the National Social Welfare Institution spelled out that Ro-

manians and Bulgarians are entitled to child and family allowances from the date of accession.

All residents of *Latvia* enjoy equal treatment for the purpose of tax law, although problems might occur in relation to family members of border workers.

The *Maltese* rapporteur mentions in a general fashion that long-term resident third-country nationals enjoy equal treatment with regard to education, vocational training and study grants, recognition of professional diplomas, certificates and other qualifications as well as with regard to social security, social assistance, social law and tax benefits.

Although it is recognised that integration measures cannot be imposed on beneficiaries of Directive 2004/38/EC, the ongoing debate on the integration of Polish workers in *the Netherlands* enticed the Dutch government to state explicitly that offers to participate in language and integrations course can be made to EU citizens as long as the offer is made under the same conditions as Dutch citizens. Whether this also covers their third-country national family members remains uncertain.

During the first five years of residence in *Poland* students are excluded from benefits unless they have acquired the status of economically active EU citizen.

In *Portugal* family members, irrespective of their nationality, are not entitled to non-contributory benefits during the first three months of residence and if they are family members of job-seekers.

The right of permanent residence ensures family members equal treatment with regard to social benefits and tax advantages. Where a family member becomes a burden to the health care or social security system, a residence permit can be revoked.

8. CONCLUDING REMARKS

The information provided on the implementation of the rules concerning EU citizens' family members reveals that – with some exceptions - the rules in Directive 2004/38/EC have been respected and are complied with in practice by the Member States. All Member States that required 'prior legal residence' for the admission of third–country national family members have amended their rules and/or practices following the Court's decision in either the *Eind* or the *Metock* case.

Family members of EU citizens, including family members of job-seekers, have access to the labour market of the host-Member State though in some Member States a labour market permit or registration is conditional to the exercise of this right. Where the pursuit of an economic activity is conditional to having obtained a residence permit, third country national family members are experiencing problems in taking up an economic activity as the processing of applications for a residence permit takes time.

Although the general impression is that the Member States are serious in implementing family members' rights as required by Directive 2004/38/EC, there are issues that require further attention. Firstly, in some Member States there is uncertainty as to the nature of the rights accorded to family members listed in Article 3(2) of Directive 2004/38/EC, as national implementing legislation does not provide for an obligation to facilitate but a right to enter and reside. A second point concerns the issue of reverse discrimination that has dominated the debate in a number of Member States since the ECJ's ruling in the *Akrich* case and has not been solved by the Court's ruling in the *Metock* case. Last but not least, there is the issue of abuse of rights and fraud. Although all Member States have adopted or are in the process

of adopting rules to address abuse of free movement rights and fraud, little is known of the scope and the true nature of this problem as there is not much information available.

Chapter VII
Relevance/Influence/Follow-up of recent Court of Justice Judgments

INTRODUCTION

The national experts were requested to give an in-depth analysis and interpretation of the importance and potential impact of the Court's recent judgments. For the 2008/2009 edition the Commission considered the following judgments of special interest:

- C-287/05 *Hendrix*
- C-527/06 *Renneberg*
- C-94/07 *Raccanelli*

The Commission's special interest in the *Hendrix* and *Renneberg* judgments reflects its growing concern about the situation of cross border workers.

In the *Belgium* reports any reference to, let alone an in-depth analysis of the above mentioned cases is lacking. According to information obtained from the relevant Ministries by the *Danish* rapporteur the above mentioned cases did not require any changes to the Danish legislation. In the *German* report only the *Raccanelli* judgment is discussed. According to the *French* rapporteur his research on the consequences of these judgments for France has not been fruitful at all.

FOLLOW UP TO: *HENDRIX* (C-287/05)

This case is about a Dutch frontier worker who worked and lived in the Netherlands. While continuing to work in the Netherlands, he transferred his residence to Belgium. Before his removal he was entitled to a benefit for handicapped people according to the Disablement Assistance Act for Handicapped Young Persons of 24 April 1997 (Wajong), which is listed in Annex IIa of Regulation 1408/71 as a non-exportable special non-contributory benefit. Therefore, once Mr *Hendrix* had left the country, the Dutch competent institution stopped paying that benefit applying the said provisions of Regulation 1408/71. However, as Mr *Hendrix* continued to be active as a worker in the Netherlands, the ECJ was asked whether the withdrawal of the benefit is not contrary to Article 39 or Article 18 EC Treaty.

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

The decision is not mentioned in the *Belgian, French, German* and *Luxembourg's* reports. In *Ireland* there is no benefit which is analogous to the Wajong benefit in the *Hendrix* case. The situation in that case has not apparently arisen in the Irish context. The same applies to *Italy, Portugal* and *Slovakia*. The *Hendrix* case is not mentioned in the *Spanish* jurisprudence either.

According to information by social law experts and labour law experts as well as to data base research and newspaper observation, this decision hasn't had any impact on the *Austrian* law and practice

According to the *Bulgarian* rapporteur the Law on the Integration of Disabled People and the Regulation for its Implementation, which regulate the provision of special non-contributory benefits to disabled people, do not stipulate an explicit requirement for residence in Bulgaria.

In the *Czech Republic* no concrete examples of follow-up actions of *Hendrix* judgment could be identified for 2008. Benefits to disabled persons, regulated in general by the Act No. 100/1988 Coll. on Social Security, are granted to persons with permanent residence in the Czech Republic, to citizens of other EU member States entitled to such benefits under the direct applicable EU law. In cases falling outside of this scope national laws apply, stipulating a requirement of a 3 months previous stay of EU citizens and their relatives in order for them to be entitled to benefits for disabled persons (and to social benefits in general on the basis of Act No. 100/1998 Coll., on Social Security). Nevertheless, a special non-contributory benefit payable to young persons suffering from total or partial long-term incapacity for work before joining the labour market still does not exist in the Czech Republic. Therefore appearance of a case similar to *Hendrix* is unlikely in the Czech context.

The issue in the *Hendrix* case has an important bearing on the provisions of non-contributory benefits in *Cyprus*. The fact that the ECJ stated that the provisions of Regulation 1408/71 must be interpreted in the light of the objective of Article 42 EC, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers is significant for a potential case in Cyprus on the subject of freedom of movement. Moreover, the ruling that the residence condition can be applied only if it is objectively justified and proportionate to the objective pursued is again a significant authority for future court cases in Cyprus: the current rules on non-contributory benefits have stringent residence tests attached to them, deliberately designed to exclude Union citizens exercising the right to freedom of movement, and in more so resulting in discriminatory effects against those Union citizens and their families resident in other EU countries. Furthermore, the rules are designed to exclude Union citizens who reside in the northern part of the country in 'the territories where the Republic of Cyprus Government does not exercise effective control'.

In *Estonia* the scheme of non-contributory benefits is very limited. Therefore there are only few benefits that are not exportable and that are connected with the state of the residence. According to the Annex II of the Regulation 1408/17 such benefits are benefits for disabled persons. Taking into account that there is only one benefit for disabled persons that is not exportable, it seems to be no difficulties concerning the equal treatment between the citizens of the EU Member States in questions of the non-contributory benefits.

In the *Finnish* system, the benefit comparable to that at issue in *Hendrix* is disability pension, the purpose of which is to secure minimum subsistence for persons who are unable to work. This benefit is covered by the Regulation 1408/71. Disability pension is exportable. The judgment in *Hendrix* has not had and is not likely to have any impact in Finland as the Finnish system is in line with it.

Granting of unemployment benefits in *Greece* is dependent on having at least fulfilled a minimum period of insurance and not only on the basis of residence in Greece. Therefore, the *Hendrix* judgment does not have particular influence.

Hungarian social law contains three types of special non-contributory benefits in terms of Reg. 1408/71/EEC: non-contributory old-age allowance, invalidity annuity and a benefit

for motor-disabled persons. These benefits are found in three pieces of legislation, the personal scope of which are, however, commonly regulated in the main Act, the SocialA (Act III of 1993 on Social Administration and Social Benefits). Pursuant to the Act persons being entitled to exercise the right to free movement (EEA nationals, Swiss nationals and their family members) can claim these benefits if they possess a Hungarian residence that is evidenced by an address card issued by the local authority. The address card is usually issued for an indefinite period in case of Hungarian nationals and for one year in case of EEA nationals. Both Hungarian and EEA nationals are obliged to notify the authorities of their change in residence and they are legally liable for the damage caused by the omission of the notification. Reading these provisions together it must be stressed that Hungarian law sets the objective criteria of Hungarian residence for these special non-contributory benefits that must be evidenced by a valid address card. The lack of lawful residence results in the withdrawal of the benefit. Hence the objective requirement of residence is set by the SocialA, the authorities are not allowed to exercise discretion in cases of persons who leave Hungary. The Act does not contain any general clause for persons in possible hardship who maintain their economic and social links to Hungary.

Latvian national law does not provide the right to benefits for the disabled persons in order to cover a reduction in income. However according to Annex IIa of Regulation 1408/71 Latvia has declared one benefit for disabled persons to be not exportable. It is the benefit for compensation of transportation for disabled persons. Looking to this provision from the perspective of Article 39 and Article 7(2) of Regulation 1612/68 there could be situations especially with regard to frontier workers and members of their family where application of residence clause with regard to the right to the transportation benefit for disabled persons could lead to 'unacceptable degree of unfairness'. The State Social Insurance Agency has not received yet respective claims from frontier workers so far.

On the issues mentioned in *Hendrix*, the Lithuanian legislation may be problematic too, because benefits for handicapped persons are related to permanent residence in Lithuania (Article 1(4) of the Law on State Benefits of 29 November 1994, new version of the law of 19 May 2005).

Malta has only listed the 'Supplementary Allowance' and the 'Age Pension' in Annex IIa of Regulation 1408/71. It is however difficult to foresee that the *Hendrix* judgment will have an impact on Malta: given its geographical situation, it is very difficult to have a frontier worker who commutes on a daily basis to and from his residence to go to work.

Following the *Hendrix* judgment of the ECJ, the Central Appeals Tribunal in the *Netherlands* which asked for the preliminary ruling, came up with a decision on 7 February 2008. The Tribunal could not apply the 'unacceptable degree of unfairness'-clause as suggested by the ECJ in this case because this provision was only introduced in the Wajong in 2001, while the issue at stake was situated in 1999. However, the circumstances in this particular case do not fulfil the condition of paras 54-56 of the ECJ judgment that the legislation must not entail an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. The Tribunal referred to the fact that Mr *Hendrix* stayed employed in the Netherlands after he moved to Belgium and the close relation between his working activities and receiving the Wajong benefit. So therefore the appeal was granted. In July 2008 the Central Appeals Tribunal used the 'disproportionality reasoning' from the *Hendrix* case to justify the entitlement to a Social Assistance Benefit to two British citizens, residing in The Netherlands during the period they would visit a rehabilitation clinic in Scotland. Withdrawal of the benefit because of the residence clause of the So-

cial Assistance Act during this period was seen as an unjustified obstacle to the free movement of services.

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

The *Romanian* Law no. 448/2006 about protecting and promoting the rights of persons with handicap grants allowances available to Romanian citizens living in Romania, and for citizens of other states and of persons without citizenship, if they are legally resident in Romania. The residency therefore is necessary to benefit from the provisions of the law. No similar practice occurred such as the *Hendrix* case yet.

According to the *Slovenian* rapporteur the domestic legislation does not include the 'unacceptable degree of unfairness' clause, as an exception to the rule of actual residence in a member state, obliged to provide such a non-contributory benefit. Nevertheless, despite this fact the rapporteur is of the opinion that the applicability of the Regulation 1612/68 in Slovenia is not eliminated.

The corresponding benefit *in Swedish* law is the disablement allowance (handikappersättning), and this benefit is listed in the Social security Act (1999:799) as a benefit based on residence. Hence, a preliminary conclusion is that in accordance with Swedish law the disablement allowance should not be paid if, for instance, a frontier worker living and working in Sweden moves to Denmark for residence but continues working in Sweden.

In the *UK* a 'right to reside test', which was introduced by the Social Security (Habitual Residence) Amendment Regulations 2004 became effective on May 1st 2004. Since then, a claimant for the means-tested benefits, as well as being present and habitually resident as required by the 1994 test, also has to have a 'right to reside' in the UK under UK or EU law. The right to reside test continues to give rise to legal challenges in the UK concerning who may rely on Article 7 of Regulation 1612/68; whether the residence test can be objectively justified and is proportionate to the objective pursued, and whether it goes further than what is required to achieve a legitimate objective pursued by national legislation as mentioned in the *Hendrix* case.

Concluding

The *Hendrix* case is not mentioned in the Belgian, French, German and Luxembourg's reports. The decision hasn't had any impact on the Austrian Law and practice. No follow-up was noted in Denmark and the decision is not likely to have any impact on the Bulgarian, Finnish and Greek situation while a residence clause does not exist. Most benefits in Estonia are exportable as well although one benefit for disabled persons is not exportable. Situations comparable to *Hendrix* have not yet arisen in the Czech, Irish, Italian, Maltese, Portuguese, Slovakian and Spanish context. Although a comparable situation has not yet arisen in the

Czech Republic the permanent residence clause in the relevant legislation most probably contravenes the *Hendrix* judgment. The same applies to the existing residence clauses in the Cypriot, Hungarian, Latvian, Lithuanian, Polish, Romanian, Slovenian, Swedish en UK legislation. In the Netherlands the court relied directly on the *Hendrix* judgment and set aside the residence clause in the *Hendrix* case while in the particular circumstances of this case the residence clause entailed 'an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation'.

FOLLOW UP TO: *RENNEBERG* (C-527/06)

This is an important judgment for cross-border workers in particular. Mr Renneberg was a Dutch citizen who went to live in Belgium while continuing to work in the Netherlands where he earned more than 90% of his total income. At that time, a resident of the Netherlands was eligible for tax relief in the Netherlands on the ownership of immoveable property. If the property was situated in the Netherlands, there was a tax deduction based on the difference between the rental value of the dwelling and interest paid on the mortgage (called negative income). If the property was situated outside the Netherlands, relief was still available, although much more limited.
Mr Renneberg applied unsuccessfully for deduction of the negative income relating to his Belgian dwelling against his income arising in the Netherlands.

The Supreme court of the Netherlands decided to refer the following question to the ECJ for a preliminary ruling:

> Must Article 39 EC be interpreted as precluding... a situation in which a tax payer, who in his Member State of residence has negative income from a dwelling owned and occupied by him, and obtains all of his work-related income in another Member State, is not permitted by that other Member State... to deduct the negative income from his taxable work-related income, even though the Member State of employment does allow its own residents to make such a deduction?

First of all, the Court granted the protection of Article 39 to workers who only became cross border worker by moving their residence. Mr *Renneberg* a Dutch resident became not a usual cross border worker by starting to work in Belgium, but just the other way around: he moved his residence to Belgium but continued to work in The Netherlands. The problem then is that his tax treatment in the Netherlands became less advantageous than that of resident workers.

The second question for the Court concerned the issue whether this unequal treatment derives from the bilateral tax agreement between the Netherlands and Belgium. The answer of the Court is negative for two reasons. Firstly, the distribution of the taxing powers in the bilateral tax treaty does not preclude the taking into account of negative income from immoveable property in Belgium. 'The taking into account of the relevant negative income, or the refusal to do so, thus depends in reality on whether or not those taxpayers are residents of the Netherlands'. Secondly, the rules of the Court with respect to the taxation of cross border work as derived from Article 39 EC have precedence over the allocation of taxing powers as agreed by the Member State. That is, when there is no objective difference between residents and non-residents, the latter group may not be denied the tax advantages available to residents. This is the case particularly where a non-resident taxpayer receives no significant income in his home state and derives the major part of his taxable income from an activity pursued in the work state. In such a situation discrimination arises from the fact that the per-

sonal circumstances of the taxpayer are taken into account neither in the home state nor in the work state.

Two conclusions emerge from the case law of the Court: Firstly, Article 39 EC is not only relevant where a worker become a cross border worker by changing jobs, but also by changing residence. Secondly, the taking into account of a non-resident worker's personal circumstances includes all tax advantages, including the possibility to deduct losses.

The decision is not mentioned in the *Belgian, France, German, Luxembourg* reports.

According to the *Austrian* rapporteur the *Renneberg* judgment does not call for any legal activity in Austria. The Austrian Income Tax Act makes it possible to take into account a loss abroad, if the person is subject to taxation without limitation. Tax experts confirm that the decision has no impact on Austrian legislation.

With reference to the *Renneberg* judgment the *Bulgarian* rapporteur mentions a pending infringement procedure. On 19 March 2009 the European Commission announced the issuance of a reasoned opinion (2007/4881) formally requesting Bulgaria to change its tax provisions according to which certain types of Bulgarian source income are subject to a withholding tax on a gross base when paid to non residents whereas Bulgarian residents may deduct expenses related to the same income. According to the Bulgarian rules (mainly the Law on Taxation of the Incomes of Physical Persons) certain types of Bulgarian source income of individuals and legal persons resident in other EU Member States and EEA/EFTA states are subject to withholding tax on a gross basis. However, the tax on similar income earned by Bulgarian residents is assessed on a net basis and Bulgarian residents may deduct expenses for the purpose of determining the basis of assessment of taxation of their income.

No concrete follow-up of *Renneberg* judgment in the activities of *Czech* authorities or courts could be identified. Under Czech income tax law, residential taxpayers and taxpayers, who stay in the Czech Republic more than 183 days a year, are subject to tax on their entire income, all other taxpayers (non-resident taxpayers) are subject o tax only on income received in the Czech Republic. Pursuant the provisions of Act. No. 586/1992 Coll., on Income Tax, mortgage interest relief may be claimed under certain conditions, however, these provisions do not specify, whether the dwelling concerned has to be located in the Czech Republic. Thus it appears that it is possible to claim a mortgage relief also for properties located outside the territory of the Czech Republic. However, the income tax law stipulates the requirement, that non-resident taxpayers may claim mortgage relief (and certain other reliefs) only if their income from the Czech Republic is at least 90 per cent of his/her entire income. This provision appears to be problematic, as such requirement is applicable only to non-resident taxpayers, but no such precondition is entailed for the resident taxpayers. Thus in a case of a person with e.g. 85 per cent income from Czech Republic, the right to claim mortgage relief under Czech income tax law would depend from the residency of that person or the fact, whether or not such person has stayed for at least 183 days of the particular tax period (year) in the Czech Republic. The *Renneberg* case concerned a person, inter alia, receiving 'all or almost all of its income' in a Member State, which he/she was not resident of. It remains questionable, whether a non-resident with e.g. 85 per cent income from the Czech Republic would still fall under this category. If the answer would be positive, it appears, that the provisions stipulating the precondition of 90 per cent income from the Czech Republic would be contrary to the ruling of the ECJ ruling in the *Renneberg* case and thus to Community law.

The *Cypriot* rapporteur has not identified any rule that is contrary to the findings or the broader principle of the *Renneberg* case.

According to the *Estonian* rapporteur the *Renneberg* decision has as a consequence that the bilateral tax agreements should be revised in order to avoid any unequal treatment or less favourable position of a migrant worker.

In *Finland* workers are entitled to claim tax deductions for payments of interest on a loan that is taken to finance the permanent owner-occupied home. Workers are entitled to make this deduction regardless of whether the home is located in Finland or abroad.

According to the *Greek* rapporteur the *Renneberg* decision had no particular influence on Greece. Greek tax legislation does not provide that if the calculation of net income (including the income deriving from occupying his own dwelling), results in a negative amount, this negative amount is deducted from taxable gross income. Therefore, concerning this issue, there is no discrimination between nationals and other EU citizens.

As the Estonian rapporteur, the *Hungarian* rapporteur refers to the applicable bilateral tax agreements as well. If a bilateral agreement so prescribes, a tax title emerging in another Member State has to be taken into account in the Member State liable for tax assessment.

The specific circumstances obtaining in the *Renneberg* case do not obtain in *Ireland*, since taxable income does not include the advantage which the taxpayer derives from occupying his own dwelling (and as a result will not enjoy the benefit of any tax deduction in respect of a negative amount).

In *Italy* the income tax act does not take into account the rental loss on immovable property in order to determine the basis of assessment of the income tax of a non-resident taxpayer, while interests paid on the mortgage are deducted form the gross income tax. On the contrary, resident taxpayers are entitled to both advantages.

In *Latvia* there is no right to negative income deduction with regard to the expenses relating to the dwelling in Latvia. There is only a right to negative income reduction for expenses relating to education and health service. The detailed Latvian regulations concerning the negative income deduction obviously does not envisage the situation of frontier workers. Firstly, expenses for medical services include expenses for health insurance, but regard only to such health insurance which is provided by insurance companies operating in accordance with Latvian Law. Therefore, a negative income deduction does not apply to such medical insurance which is provided by an insurance company outside Latvia. Secondly, although the applicable regulation does not explicitly refer to the medical services received in Latvia only, it is more likely that State Revenue Service would apply these regulations regarding only the medical services bought in Latvia. Both provisions neglect the situation of a frontier worker and his/her family members, who having residence in another member state and are more likely to receive medical services and medical insurance provided by local service providers. Although in 2008, the regulations were amended concerning the provision considering expenses for education services received in other EU and EEA member states as subject to the negative income deduction, the Latvian tax legislation with regard to the negative income deduction is still contrary to Article 39 of EC Treaty and Article 7(2) of Regulation 1612/68.

The *Lithuanian* rapporteur sees little relevance of the *Renneberg* judgment for the Lithuanian situation because no similar possibilities to deduct or not to deduct income exist according to the Lithuanian legislation. The same applies to *Malta*, *Romania* and *Slovenia.*

In the *Netherlands* the Supreme Court, who asked for the preliminary ruling, still has to issue a final judgment in this case. Answering parliamentary questions the State Secretary of Finance informed Parliament on 9 December 2008 that the consequences of this ECJ judgment are still subject of further investigation.

According to the *Polish* Act on personal income tax, there is a different position of individuals depending on their residence status. According to Article 3 of the Act, all individuals, whose place of residence is in Poland, are subject to unlimited tax liability in Poland, which means that they are liable to pay Polish taxes on the total of their income, irrespective of where it was generated. Individuals who do not have their place of residence in Poland are subject to limited tax liability, which means that they are liable to pay taxes only on income gained at the territory of Poland. Other rules may be subject of international agreements on elimination of double taxation. Therefore, according to Article 3 para. 2a of the Act, there is no possibility to cover also income or loses generated outside territory of Poland in cases of individuals subjected to limited tax liability in Poland.

Concerning the implementation at national level of the *Renneberg* judgment, the *Portuguese* rapporteur remarks firstly, that the Portuguese tax law foresees that the interest on a debt taken on to finance a personal dwelling is deduced from gross work-related income and, consequently, from the taxable income of a resident taxpayer, even if the interest exceeds the advantage the taxpayer derives from living in his own dwelling. Secondly, there is a Convention between the Portuguese Republic and the Kingdom of Spain for the avoidance of double taxation and for the prevention of fiscal evasion in the field of taxes on income. It is not clear if such convention allows the deduction, for the purposes of determining the basis of assessment of the income in one of the States, the negative income relating to a house owned by the taxpayer and used as a dwelling in the other State, even if the non resident taxpayer receives all or almost all of is taxable income in the State where he works. According to the rapporteur, due to Article 39 of the EC Treaty as interpreted by the Court of Justice in *Renneberg*, Portugal must accept in any case that the negative income related to a dwelling in Spain is taken into account by its tax authorities for the purposes of determining the basis of assessment of taxable income, whereas the taxpayer derives all or almost all of his taxable income from salaried activity carried out in Portugal. Therefore, the above mentioned convention must be interpreted in conformity with the *Renneberg* judgment.

According to the *Slovakian* rapporteur the national legislation on income tax does not provide for such differentiated treatment as mentioned in the *Renneberg* judgment. However, a permanent residence condition is included in Article 33 of the law which governs the so called tax bonus – the possibility to lower the tax base when having dependent children. Only individuals having permanent residence in Slovakia can apply the tax bonus.

Recently the *Spanish* government has presented a First Report on a Draft Taxation Act in order to transpose EU legislation on the subject of transnational professionals. The Draft Taxation Act intents to adapt Spanish legislation on taxation of non-residents in order to improve free movement of workers, services and capital. Regarding frontier services a new rule is introduced on taxation in the reception State while currently the Spanish rule is taxation in the State of origin. Concerning real estate taxes, the Draft includes rules on taxation in the MS in which the real estate is located. On the other hand, the Draft Act introduces especial rules for incomes obtained without a permanent establishment by tax payers residents in another MS.

In *Sweden* the *Renneberg* judgment has been considered in Swedish tax law and an amendment of the Income tax Act was coming into force on January 1, 2008. The intention was to adapt the Swedish legislation to EC law and to facilitate the movement on the labour market. The increased right to tax reduction for interest rate paid in another Member State should be granted people having residence in the EU and income solely (or almost solely)

from work in Sweden, if the interest rate has not been subject to tax reduction in the home Member State.

According to the *United Kingdom*'s rapporteur the first finding in the *Renneberg* case that a EU national who has always worked in his or her Member State of origin and only lives in another Member State is still a worker for the purposes of Article 39 EC is important for the UK. Such a situation arises not infrequently in Northern Ireland. The second finding regarding the right to deduct losses on immovable property in the Member State of residence from taxable income in the Member State of employment is also of interest in the UK. Taken on its very specific facts, mortgage tax relief, the judgment is not relevant to the UK as such a tax relief was abolished more than ten years ago. However, the wider principle regarding treatment of losses on immovable property in one Member State and the possibility to set these off against income earned in the UK cannot be dismissed so clearly are irrelevant. According to the UK's Inland Revenue from 2006 'Rent and other receipts from properties outside the UK continue to be taxed separately as foreign income. The profits or losses are computed using trading principles just like those of a UK rental business.' However, the IR continues 'Profits or losses of an overseas property business are not combined with the profits or losses of a UK rental business; they are taxed separately and losses on one can't be set against profits on the other.' This appears to indicate that the kind of problem which arose in *Renneberg* could arise in the UK though not in respect of mortgage tax relief. As appears from the judgment, the situation as regards double taxation agreements must also be taken into account.

Concluding

The *Renneberg* case is not mentioned in the Belgian, French, German and Luxembourg reports. The decision has no impact on the Austrian legislation. No follow-up was noted in Denmark and the decision is not likely to have any impact on Cyprus, Greece, Ireland, Lithuania, Malta, Romania and Slovenia, while similar possibilities to deduct or not to deduct do not exist. In Finland deductions are allowed regardless of whether the home is located in Finland or abroad. Although the Czech legislation seems in conformity with *Renneberg*, it is questionable whether the strict precondition of 90 per cent income from the Czech Republic is in conformity with the *Renneberg* requirement of receiving 'all or almost all of its income' in a Member State, which he or she is not resident of. The national reports of Italy, Latvia, Poland, Slovakia and the UK are not very clear on the subject, but due to the strict distinction between resident and non-resident taxpayers the Italian legislation seems contrary to *Renneberg*. The same applies to comparable tax legislation in Latvia, Poland (distinction between unlimited and limited tax liability), Slovakia and the UK. With reference to *Renneberg* the Bulgarian rapporteur refers to a pending infringement procedure. The Estonian, Hungarian, Polish, Portuguese and UK rapporteurs emphasize that the situation as regards double taxation agreements must also be taken into account. The consequences of *Renneberg* are still subject of further investigation in the Netherlands. In Spain a new draft Taxation Bill is pending. In Sweden the *Renneberg* judgment is already included in an amendment of the Income Tax Act which came into force 1 January 2008.

FOLLOW UP TO: *RACCANELLI* (C-94/07)

The case concerned Mr Raccanelli who was a student at the Max Planck Institute for Radio Astronomy, part of the Max-Planck-Gesellschaft zur Förderung der Wissenschaften in Germany. Mr Raccanelli was funded by a doctoral grant given by the Institute. Under this grant Mr Raccanelli was not placed under an obligation to work for the Institute, and could if he so desired devote his entire time to his thesis. Researchers formally employed by the Institute were required to work during normal working hours for the Institute, and could only work on their theses outside of these normal working hours. Grant funded researchers, like Mr Raccanelli, were exempt from income tax and were not affiliated to the social security system. Employed researchers were liable to pay income tax and social security contributions. Mr Raccanelli was Italian, and complained to the Arbeitsgericht (Labour Court) Bonn (comparing himself to German employees of the Institute) that he was being discriminated on the basis of his nationality in a working relationship, contrary to Article 7 of Council Regulation 1612/68 on freedom of movement for workers within the Community. The Arbeitsgericht Bonn referred various questions to the ECJ, including whether Mr Raccanelli was a worker. The ECJ said, inter alia

> 'a researcher preparing a doctoral thesis on the basis of a grant contract… must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain period of time under the direction of an institute… if, in return for those activities, he receives remuneration'.

The decision is not mentioned in the *Belgian, French and Luxembourg* reports.

According to the *Austrian* rapporteur the *Raccanelli*-decision (C-94/07) doesn't cause problems in Austria. As a doctoral student you are either a student only or an employee of the university (as a researcher or lecturer). Maybe there might be some misuse in specific disciplines where doctoral students have to work close together with the professor (e.g. because of the need to use a laboratory); then the student should be employed as a 'project staff': But usually doctoral students are not involved in university procedures in a way that calls for a qualification as 'employee'.

According to the *Bulgarian* rapporteur the ECJ judgment in the *Raccanelli* case has not brought any new legal developments in this regard yet. If a similar case arises in Bulgaria, general anti-discrimination legislation would apply. However it is hardly probable that even Bulgarian nationals who are PhD students are considered workers.

At the present, no concrete follow-up of this judgment could be found in the activities of *Czech* authorities or courts. As regards the eventual influence of the case, a situation similar to the *Raccanelli* case may occur also in the Czech Republic, i.e. a private association employs a researcher/provides a researcher with a grant enabling him to prepare a doctoral thesis on this bases. A researcher with an employment contract would be liable to income tax and social security contributions, whereas a grant recipient would be not affiliated to the social security and health insurance system, however, he would be liable to income tax. The Czech law, in general, does not contain any specific provisions on providing grants to students/researchers by private-law associations. In a case similar to *Raccanelli*, the Czech courts would be obliged to apply the Community law concept of a 'worker' on the basis of direct applicability of Community law in order to asses, whether the grant recipient can be regarded as a 'worker' under Art. 39 EC.

According to the *Cypriot* rapporteur the rules of the Research Promotion foundation (RPF) contain various discriminatory elements for researchers to be funded as employed researchers of Cypriot institutions or other institutions based in Cyprus, as workers exercising the right to free movement in the EU. For instance in the categories of eligible persons the term 'researcher' is defined as 'academic, scientists who work's permanently or has a contract of employment/cooperation with an institution' but the contract of employment/co-operation must be a contract of indefinite duration or a long duration that is not confined to a single task or research program'. Such a provision amounts (a) direct discrimination against workers of fixed term contracts, or even those on part-time contracts; (b) this provision is prima facie indirectly discriminatory against Union citizen researchers who would otherwise be allowed to exercise their right to be employed or contracted for services by an institution in Cyprus, when compared to Cypriots. The rapporteur assumes that the goal of the RPF rules would be to encourage 'local' research and infrastructural investment in 'developing' the institutions based in Cyprus, but such an aim in such means as provided in the provision is unlikely to be justifiable. Moreover, it is likely to be contrary to the ruling of *Raccanelli*, by both unduly restricting the definition of researcher as 'worker' and restricting free movement of workers. A complaint is pending before the Cypriot Equality body on the basis of this logic.

On the contrary the case of *Raccanelli* does not have any implications to the practice and to the legislation concerned in *Estonia*. There is no such practice that the same places of work for doctoral students are only reserved for domestic students and the other under the worse conditions are only meant for foreigners. On basis of the law the foreign and domestic doctoral students are treated equally.

The same applies to *Finland*: no information was found on that arrangements comparable to that in *Raccanelli* would be used in Finland.

In *Germany*, the Labour Court of Bonn by judgment of 19 November 2008 has rejected the claim of Mr. Raccannelli, since he has not been regarded by the Court as qualifying as a worker in the sense of EU legislation due to his particular contractual agreement with the Max-Planck-Society. Mr. Raccanelli has filed an appeal with the Labour Appeal Court. The appeal is still pending.

The *Raccanelli* judgment does not have particular influence in *Greece* as a special status of researchers does not exist.

In *Hungary* the granting of scholarships for young researchers falls within the competence of high-level educational and/or research institutions. A full time Ph.D. researcher has determined teaching and studying obligations, must obey the instructions of the appointed professor and gets remuneration as well. In this sense he would be 'Community worker' and would fall under the EC Treaty. Browsing the eligibility conditions of the ELTE University, Law Faculty (Budapest) we found that the Ph.D. candidate must have obtained his/her diploma in a Hungarian university in order to be eligible to apply. It means that students who obtained their diploma in another Member States are excluded from the possibility to apply and to become funded full time Ph.D. researchers.

According to the *Irish* rapporteur the issues as mentioned in the *Raccanelli* judgments have not come up in the Irish context.

The same applies tot *Italy*. A case similar to the *Raccanelli* could hardly have taken place in Italy, since there is only one kind of contract that doctoral students can sign with Universities or research institutions.

In *Latvia* and *Lithuania* too the issues as analysed in the *Raccanelli* judgment are not likely to arise in these countries.

In *Malta* the rapporteur is not aware of any particular action or follow-up taken by the Maltese authorities.

The judgment of the Supreme Court in the *Netherlands* in the case of a Dutch Ph.D. student working on a grant rather than an employment contract like his co-workers seems in accordance with the *Raccanelli* ruling of the EC Court of Justice. In its judgment of *14 April 2006* the Supreme Court decided that Ph.D. students working on a grant should be considered as working on a labour contract according to the Civil Code. Three elements are decisive: work, remuneration and authority. Ph.D. research is part of the core business of a university and should therefore be considered as work. The Supreme Court qualifies a study grant as remuneration and according to Article 7:610a Civil Code (BW) the relationship should be considered as based on a labour contract when the work continues during three consecutive months weekly or for at least twenty hours a month. In its decision 2008-106 the Equal Treatment Committee used the *Raccanelli* judgment to establish a labour relationship in a situation in which a labour contract according to civil law was lacking.

In *Poland*, there is no possibility to be both employed at a University and have a scholarship. However, employment concerns any employment taken by an individual. In the latter case, such a person, irrespective the fact of preparing a doctoral dissertation, shall be treated as a worker, as opposed to a not working doctoral student.

In *Portugal* there are some private-law associations, equivalent to that at issue in case *Raccanelli*, which contract with researchers preparing their doctoral thesis or grant them subsidies for that purpose. According to this judgment, such private-law associations must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 of the EC Treaty. An infringement of such principle can entitle the worker in question to claim compensation pursuant to the national legislation applicable in relation to non-contractual liability.

According to the *Romanian* rapporteur similar problems as analysed in *Raccanelli* could not be identified in the Romanian jurisprudence.

In *Slovakia* the provisions governing position of doctoral students in the Law on universities apply according to Article 113 of this Law equally to Slovak citizens and citizens of EEA countries. Therefore, the *Raccanelli* judgment should not have any influence on Slovak legislation.

In *Slovenia*, in case of a dispute on the existence of the employment relationship it shall be assumed that an employment relationship exists, if the core elements of employment are dominant. The role of the court is therefore focused on assessment of the actual content of the contractual relation of the parties. The wording of neither the contract nor the type of that contract has legal relevancy for the court's decision. In this respect it does not matter if the worker is a national of another member state.

In *Spain*, legislation regarding researchers 'in training' allows two different situations. The old system: four years of a grant as researcher in training (no labour contract) and a new system: two years of a grant as researcher in training (no labour contract) and two more years of a labour contract. In both models during the first two years there is not a recognised labour relation, with all the social security consequences of that situation.

According to *Swedish* law a criterion for being a worker is remuneration (wage), and a person having a scholarship should not be considered to be a worker (because then he would become subject to taxation). Further, it should be noted that scholarships granted to doctoral

students are not contrary to Swedish law, even if there is for different reasons a strive to engage doctoral students as employees.

In the *UK* doctoral students receive funding in a wide variety of different forms and from a wide variety of different sources. Often funding comes in the form of a bursary from the university where the student is studying, often from some other grant awarding institution. The treatment of doctoral students is very varied in UK institutions (almost all of which are public law institutions). Some are employees where they are on contract to carry out specific activities, others are treated as students. In 2004, the National Postgraduate Council, a UK association for postgraduate students, examined whether PhD students in the UK could claim worker status and if so whether this would be to their advantage. Certainly their conclusion at that time is that it is a very mixed question – some students might benefit from worker status while others would be disadvantaged. The question raised in *Raccanelli* is certainly relevant to the UK but the extent to which postgraduate students may wish to challenge their classification is less clear as the benefits for them are less apparent than in the German case.

Concluding

The *Raccanelli* case is not mentioned in the Belgian, French, German and Luxembourg reports. The decision does not cause problems in Austria. No follow-up was noted in Denmark, Bulgaria, the Czech Republic, Estonia, Finland, Ireland, Italy, Latvia, Lithuania, Malta, Poland and Romania. The relevant rules in Cyprus contain various discriminatory elements with regard to researchers from other Member States. A complaint is pending before the Cypriot Equality body. The principle of equal treatment in this respect is explicitly mentioned by the Estonian, Portuguese and Slovakian rapporteurs. In the Netherlands the Supreme Court decided that Ph.D. students working on a grant should be considered as working on a labour contract according to the Civil Code. The Slovenian rapporteur is of the opinion too that in case of a dispute it shall be assumed that an employment relationship exists, if the core elements of employment are dominant. The situation in Sweden (why should a scholarship under specific circumstances not being considered as remuneration?), Spain and Hungary is unclear. Nonetheless, the law faculty of the ELTE University in Budapest applies discriminatory criteria while students who obtained their diploma in another Member State are excluded from the possibility to apply and to become funded full time Ph.D. researchers. The question raised in *Raccanelli* is certainly relevant to the UK but the extent to which postgraduate students may wish to challenge their classification is less clear as the benefits for them are less apparent than in the German case. In Germany, the Labour Court of Bonn by judgment of 19 November 2008 has rejected the claim of Mr. *Raccanelli*, since he has not been regarded by the Court as qualifying as a worker in the sense of EU legislation due to his particular contractual agreement with the Max-Planck-Society. Mr. *Raccanelli* has filed an appeal with the Labour Appeal Court. The appeal is still pending.

Chapter VIII
Transitional Measures

1. EU-10

1.1 Transitional measures imposed on EU-8 Member States by EU-15 Member States

Eight of the ten Member States joining the European Union on May 1, 2004 were confronted with transitional measures regulating the right to free movement by workers. By 2009 these restrictions regulating access to the labour market of the 'old' Member States have been abolished by all Member States except Austria and Germany.

The *United Kingdom* still uses a registration scheme for workers from the EU-8 Member States which allows them to monitor the work done by nationals of these Member States and help local services plan and ensure that migration is working for the United Kingdom. According to the Registration Scheme there is no right to full access to benefits until paid employment has been pursued and taxes have been paid for twelve consecutive months. A number of EU-8 nationals have found themselves excluded from residence or income support although they had worked in the UK for twelve months as they had failed to re-register under the Workers Registration Scheme when they changed employer. As a consequence, their employment was no longer lawful and they did not accumulate the so needed twelve consecutive months of employment. In the *Zalewska* case no breach of Article 7 of Regulation (EEC) 1612/68 was established as this provision only applies to lawful employment. Neither was the measure classed as disproportional as the system was necessary to acquire up-to-date statistics.

Austria notified the Commission in April 2009 of its intention to maintain transitional measures for workers from the EU-8. Justification given was the fact that nearly half of its territory borders an EU-8 Member State, the high percentage of non-nationals in the country and an exceptionally difficult labour market. The decision was not subject to public debate, notwithstanding the fact that Poland had expressed its intention to take Austria to the ECJ if transitional measures were maintained. The prolongation of transitional measures enjoyed consensus at the political level, with only the Greens objecting. Although transitional measures are maintained, workers from EU-8 Member States can take up employment in those professions listed in the *Fachkräfte-Bundeshöchstzahlenüberziehungsverordnung*. The fact that the list in this *Verordnung* covers 65 professions with a shortage of labour is felt to imply that the main reason not to abolish transitional measures is to appease the public.

In 2009 *Germany* extended its transitional measures applicable to workers from EU-8 Member States until 30 April 2011. The justifications put forward were: serious disturbances of the German labour market and the danger of such disturbances for Germany. An amendment of the regulation on labour permits[41] has facilitated access to the labour market for EU-8 and EU-2 nationals. The social partners participated in the decision to prolong transitional measures and they are supported by the trade unions. Since January 1, 2009, Union citizens and family members entitled to free movement with an academic diploma or comparable employment are granted a labour permit without examination of the preference clause in the

41 Arbeitsgenehmigungsverordnung of 17 September 1998, *Official Gazette* I, p. 2899, amended by Art. 6 of the law of 7 December 2006, *Official Gazette* I, p. 2814; 2007 II, p. 127, as amended by law of 10 November 2008, *Official Gazette* I, p. 2210.

German Residence Act or other additional requirements.[42] The amendment exempts EU-8 and EU-2 nationals who have acquired a recognised German school diploma abroad from the obligation to obtain a work permit for qualified professional formation in a recognised or comparably regulated profession suitable for training. Restrictions, however, do remain possible regarding certain sensitive sectors, the provision of services (Article 49(1) EC) and temporary admission of trans-frontier workers for the entire territory of the Federal Republic of Germany. Access to the labour market is already possible for qualified occupations, seasonal workers, holders of EU labour permits after one year of occupation, academics, persons who have received a primary education at German schools abroad and general facilitations applicable to qualified workers, such as scientists with particular knowledge, persons teaching in special functions as well as specialists and employees with particular professional experience provided that they earn at least a salary in the amount of € 64.800 per year, remain in force.

Although no transitional measures are applied in *the Netherlands*, the presence of EU-8 workers, in particular Polish workers, has been a source for political and social debate. In *Sweden* the debate has focussed on free movement of services and posted workers' salaries and on the consequences for the Swedish industrial relations system.

1.2. Transitional measures imposed on EU-15 Member States by EU-8 Member States

The EU-8 Member States were permitted to apply reciprocal transitional measures. Only Slovenia, Hungary and Poland decided to use this option. By 2009 these Member States have lifted any reciprocal measure in force, thus allowing for full free movement of workers from the EU-15. Various EU-8 Member States report that they are actually experiencing labour market shortages due to their own nationals moving to an EU-15 Member State to take up paid employment there. They have had to attract labour from third-countries to fill vacancies.

1.3. Malta and Cyprus

Different from the transitional measures for the EU-8 Member States, Article 39 EC applies fully for EU citizens wanting to work in Malta, with the exception that Malta is given the possibility to invoke a safeguard clause according to which Malta, in case of serious disturbances of the labour market, may request the Commission to suspend Article 39 EC and Articles 1-6 of Regulation 1612/68. Exceptionally, in urgent and exceptional cases, it may even suspend the application of these provisions against a reasoned ex-post notification to the Commission. Until now, Malta has not made use of either safeguard clause so Article 39 EC applies fully, the only exception being that the transitional arrangements allow Malta, to have advance notice of disturbances of the labour market in view of the invoking the safeguard clause, may maintain its work permit scheme, provided it issues work permits automatically.

These transitional provisions will end when the transitional period ends in April 2011. A Joint Declaration regarding Malta annexed to the Final Act to the Accession Treaty states that should the accession give rise to difficulties to the free movement of workers, the matter can be brought before the EU institutions to obtain a solution to this problem which would,

42 Sec. 39 para. 2, No. 1 of the Residence Act (disadvantageous effects upon the labour market.

however, be in strict accordance with in particular provisions of EC law on free movement of workers.

2. EU-2

2.1. Transitional Measures imposed on EU-2 Member States

Like with the EU-8 Member States, the Member States negotiated transitional arrangements allowing them to regulate access to their labour market by nationals from the EU-2. Romanian and Bulgarian citizens are still subject to transitional measures in *Austria, Belgium, Germany, France, Ireland, Italy, Luxembourg, Malta, the Netherlands* and *the United Kingdom*. The following Member States either did not restrict access to their labour market by Romanian or Bulgarian nationals or have lifted these transitional arrangements since: *Denmark, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia,* and *Sweden*. The *Czech Republic* does grant EU-2 nationals access to their labour market, albeit under national law rather than the Community free movement rules.

2.2. Transitional Measures imposed by EU-2 Member States

Bulgaria and Romania were both granted permission to apply reciprocal restrictions to Member States imposing labour market restrictions to their nationals. Where Bulgaria chose not to apply such restrictions, Romania initially (2007) applied correlative transitional measures. These reciprocal measures were withdrawn in 2008. Currently no restrictive measures apply to EU citizens working as an employee in these Member States.

Chapter IX
Miscellaneous

INTRODUCTION

This chapter offers a brief overview of developments in Member States which impact on free movement of workers, focusing in particular on integration policies, changes to policies addressing the admission for employment and treatment of workers from third countries, and the return of EU-10 nationals. Information is also provided on mechanisms in Member States (in addition to national SOLVIT centres[43]), which EU citizens can approach for information about their rights under free movement law or to resolve difficulties in accessing these rights.

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

There have been a number of developments of a general nature in Member States worth noting that impact on the free movement of Community workers. An important development in *Bulgaria* is the clear distinction introduced into the Law on Foreigners between third-country nationals and EU citizens, EEA and Swiss nationals, who are no longer considered as foreigners.

In *Finland*, in accordance with the arrangements pertaining to the Common Nordic Labour Market, it is observed that other Nordic nationals benefit from more favourable provisions on entry, residence and departure than EU citizens.

In the *Czech Republic*, there have been complaints to the Ombudsperson concerning the lack of access to adequate information about visa requirements and the interview process for third-country family members of EU citizens, particularly in relation to the unavailable or outdated websites of Czech embassies. This has resulted in a new website established by the Ministry of Foreign Affairs, although much of the pertinent information is still in the Czech language.

An interesting development in *Estonia* is the increase in the exercise there of the right to establishment by nationals of Finland, Germany, Sweden and the United Kingdom because of the lower taxes in that country.

The entry of the new Member States which joined the EU in May 2004 into the Schengen system at the end of 2007 (with internal air borders lifted in March 2008) has been a significant development in those countries, clearly facilitating the free movement of workers, and is highlighted in the report of *Malta*.

Finally, another significant development in some Member States (e.g. *Netherlands*) of relevance to facilitating the free movement of workers has been the transposition of Directive 2005/36/EC on the recognition of professional qualifications, although *Greece* has not yet transposed this measure.

43 For more information on SOLVIT, see the European Commission's web site at http://ec.europa.eu/solvit/site/about/index_en.htm.

Integration measures

The Federal Ministry for Interior Affairs in *Austria* is working on a national action plan for integration and the introduction of a 'Red-White-Red Card', which will require prospective immigrants to gain knowledge of the German language to A1 level before coming to Austria. Presumably, EU citizens and their family members would not be covered by these rules, although this is not explicitly stated. In *Finland*, and as observed in previous reports, immigrants who moved to Finland after 1 May 1997 (including EU citizens and their family members), who have been entered into the population register system of their home municipality, and who are eligible for a labour market subsidy and/or social assistance are entitled to a personal (voluntary) integration plan for a maximum period of three years during which subsistence is secured through the provision of integration assistance. In *Portugal*, the Plan for immigrants' integration was approved in 2007 by a Council of Ministers Resolution, which sets out a national strategy concerning the reception and integration of immigrants including measures in the fields of employment, vocational training, residence, health, education, culture, sport, social benefits and justice.

Immigration policies for third-country nationals and the Community preference principle

Schemes to attract more highly skilled migrants from third countries are being developed in a number of EU Member States. In 2008, in the *Czech Republic*, a system of 'green cards' was introduced to facilitate access of third-country nationals to the labour market. Green cards are issued for vacancies that cannot be filled by Czech nationals and EU citizens (as well as their family members) within 30 days. The pilot project 'Selection of Qualified Foreign Labour' facilitating the access of integrated skilled third-country nationals to permanent residence (see the 2007 Report) continues. Similarly, in *Denmark*, the stated aim to increase the recruitment of highly qualified labour from third countries has resulted in a number of adjustments to the national legislation, and, in *Hungary*, there has been an observable inflow into the labour market of highly skilled foreign managers (mainly as intra-corporate transferees within multinational companies from the former EU-15).

The most radical changes regarding labour migration from third countries were introduced in December 2008 by new regulations in *Sweden*, which abolish the previous labour market test and leave the decision for hiring solely to the employer subject to a check by the Migration Board that the salary and other conditions of work are in accordance with existing collective agreements or what is customary in the trade in question. In the *United Kingdom*, the new Points-Based System (PBS) on primary migration from third countries came into effect in February 2008 with the aim of making the management of migration more transparent and simpler to administer. The PBS is divided into five tiers ranging from highly skilled migrants to students, and points are awarded for various criteria, such as educational attainment, previous employment and knowledge of the language, etc. In all categories, except self-employment, the third-country national must have a sponsor, which may be an employer or an educational institution if s/he is a student. The PBS does not apply to EU citizens, including Bulgarian and Romanian nationals who continue to be subject to transitional arrangements. One problem that has already arisen with the PBS is that the in-built flexibility to change the rules quickly has affected some third-country nationals who prepared their applications in accordance with the published rules only to discover that these applications are being assessed on the basis of different criteria.

As mentioned in the 2007 Report, in *Poland*, nationals of Belarus, Russia and Ukraine have privileged access to the labour market and can be employed for six months within a period of one year without the need to obtain a work permit. However, there have been calls by some employer associations and trade unions to tighten up these rules in the light of the economic crisis, particularly in regard to low-skilled employment in the agriculture and construction sectors. It is also possible for persons of Polish origin to apply for a document know as the Charter of a Polish National *('Karta Polaka'*), which is issued by Polish consulates after the person concerned has satisfied certain criteria. Possession of this document provides free access to the Polish labour market. Moreover, there is no legal obligation in Poland to give preferential treatment to EU citizens in respect of access to employment. In *Finland*, third-country nationals may only be issued with a residence permit for the purpose of employment if the employment office is satisfied that issuing such a permit would not prevent a person already in the labour market from finding work. Persons already in the labour market include Finnish citizens, citizens of other EU Member States and lawfully resident third-country nationals.

In *Ireland*, the Immigration, Residence and Protection Bill, introduced in 2008, is still under discussion in Parliament, although it is clear from a 'saver clause' in the Bill that its provisions, particularly those relating to entry, residence and expulsion, will not apply to persons covered by EU free movement rules.

In *Italy*, 2008 amendments to the consolidated law on immigration introduced *inter alia* penalties for persons who rent property to foreigners without a regular residence permit and possibilities for DNA testing to prove family relationships in family reunification cases where documents attesting such relationships cannot be produced or where there are doubts as to their authenticity. Moreover, a July 2009 law passed by Parliament criminalizes irregular migration by making irregular entry and stay subject to a financial penalty of EUR 5,000-10,000.

The economic crisis has reduced the perceived need in *Lithuania* to relax the rules relating to the admission of third-country nationals for employment, referred to in previous reports. Moreover, there is generally no promotion of active recruitment of workers from third countries, and the Community preference principle is applied in respect of EU workers and their family members.

Return of nationals to new EU Member States

In some of the Member States (*Estonia*, *Poland*), there are signs that their nationals are returning home after being employed in the former EU-15, a situation due to a combination of the economic crisis and the availability of higher salaries and better working conditions at home.

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

With regard to a number of Member States, the rapporteurs explicitly stated that there were no special non-judicial bodies to which complaints regarding violations of Community law could be launched. In some Member States, ombudspersons (*Czech Republic* – see also above, *Denmark*; *Finland*, *Greece* – where there is a particular section of the office special-

izing in immigrants' rights, *Hungary*, *Latvia* – but only if complaints concern human rights, which includes unequal treatment, and three such complaints from EU citizens were received in 2008 and 2009, *Portugal*), equality or anti-discrimination bodies (*Cyprus*, *France*, *Hungary* – although it is not possible to bring a complaint of discrimination on the ground of nationality) and the public authority supervising working conditions (*Finland*) or labour inspectors (*Slovenia*) play important roles in this regard. The Commissioner of Human Rights Protection in *Poland* is another key state body, and, in *Portugal*, it is also possible to make petitions to the Assembly of the Republic as well as complaints to the Ministry of Home Affairs.

In a number of Member States, assistance can be sought from trade unions, employer associations and NGOs (e.g. GISTI and CIMADE in *France*; Immigrant Council of *Ireland*; Legal Clinics Foundation, Stefan Batory Foundation and the Helsinki Foundation for Human Rights in *Poland*). In the *United Kingdom*, a series of advice centres can be approached, such as Community Advice Bureaux, community law centres, and the AIRE Centre, which is a specialist organization providing advice not only to individuals but also to first-level advisors with a particular reference to problems relating to free movement of workers. A further avenue in *Ireland* is the Eurojus consultant lawyer under the auspices of the European Commission.

SEMINARS, REPORTS, ARTICLES

Compared with previous years, it is noticeable that there are now more seminars, reports and articles relating to the free movement of workers in some of the new Member States that acceded to the EU in 2004 and 2007. There were a number of seminars and other events hosted in the *Czech Republic* in 2008 and 2009, including a seminar on 'Rules for Free Movement of Services and Freedom of Establishment', organized on 21 October 2008 by the Czech Confederation of Commerce and Tourism in cooperation with the Department on European Affairs Information of the Government of the Czech Republic, and the ministerial conference on 'Strengthening EU Competitiveness – Potential of Migrant Workers on the Labour Market', held in Prague on 26-27 February 2009. In *Hungary*, the Free Movement of Workers Network organized a regional seminar on the legal experiences with equal treatment and the status of EU workers and their family members at the University of Szeged on 14-15 May 2009, which enabled legal practitioners from a wide range of government departments and other stakeholders in Hungary and Romania to discuss the transposition of Community law on free movement of workers in the two countries concerned. In *Romania*, an international conference on 'Post-Communism and the New European Identity', to be held at the University of Oradea on 5-7 November 2009, will discuss inter alia questions of identity and mobility in Europe.

The Centre for Migration Law organised a conference entitled 'Celebrating 40 Years of Free Movement of Workers: Old Problems and New Issues', held at the Golden Tulip Rotterdam Centre, Rotterdam, The Netherlands, on 14 and 15 November 2008. The contributions to this conference have been published in: Paul Minderhoud and Nicos Trimikliniotis, *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishers, 2009, ISBN: 978-90-5850-464-7.

European Report on the Free Movement of Workers in Europe

Comments of Austria

Heinz Kutrowatz, from and on behalf of the Federal Ministry for Labour, Social Affairs and Consumer Protection of the Republic of Austria and in his capacity as Representative of the Austrian Government in the Advisory Committee on Free Movement of Workers provides the following comments to the „European Report on the Free Movement of Workers in Europe in 2008-2009 " by the network of independent experts (Rapporteur: Prof. Dr. Kees Groenendijk, etc) of October 2009 and on the "Report on the Free Movement of workers in Austria in 2008-2009" (rapporteur: Prof. Rudolf Feik, University of Salzburg) of October 2009.

I. Comments to the European Report 2008-2009

1) ad General Introduction, Point 3. „Application of transitional measures" (page 5):

Like for Germany the second paragraph should mention the Austrian liberalization steps taken in 2008 as follows:

*"The latest of those steps introduced facilitating work permits for skilled workers in 50 professions as of 1 January 2008, and for 17 more during the rest of 2008 (in total 67 professions), among them e.g. restaurant cooks and chefs, butchers, certain categories of technicians in diverse sectors. The principle of Community preference is applied strictly for all new admissions to the Austrian labour market.***"**

2) ad Chapter I " Entry, Residence, Departures and Remedies", pages 8 – 14 (and Chapter I in the national report, pages 4-6):

From the point of view of the Austrian Government the Union Citizens Directive (Directive 2004/38/EC) has been transposed into national law correctly and completely as well as in time in particular through the Settlement and Residence Act (SRA) and the Aliens Police Act (in effect beginning of 2006), though not always verbatim.

3) Ad Chapter VI, Subchapter „Access to work" , page 45:

The correct wording of Article 1 para 2 lit. l and m Act Governing Employment of Foreigners (Aliens Employment Act) for the family members of EU and Austrian citizens who have the right of free access to the labour market is the following: " Spouse as well as children up to the age of 21 or dependent children".

4) ad Chapter VIII Transitional Measures, Subchapter 1.1., page 64:

- The Austrian government has made full use of its right stipulated in the Athens accession treaty and has extended the transitional period regarding the EU-8 member states in April 2009 until the end of the seven-year maximum duration on **April 30th 2011** (third phase). The decision was founded on **serious** *disturbances* of the *labour market.*

- The **statement of grounds** focuses on Austria's specific **geographical situation**, its considerable **migration** and **commuter potentials**, the still massive **wage differential** between Austria and the new member states, the **limited intake capacity** of the Austrian labour market, the ongoing **integration** of a large number of migrants already settled in Austria and - last not least - the extremely tense situation on the labour market as a result of the **financial crisis**. Those grounds were based on scientific research.

- The **social partners** took part in the preparations leading to this decision. The **European Commission** has acknowledged the well-founded notification.

- Ever since the accession EU-8 in 2004, Austria has always given workers from the new EU member states preferred labour market access compared to third country citizens. The transitional arrangement was and is consequently being used to **control labour market access** of labour force from the new member states according to the **national demand**. There is facilitated or free access in those areas where additional workers are needed (scientists, researchers, top managers, outpatient care, key workers, skilled labourers in 67 professions). **With a view to unemployment developments**, restrictions remain in areas with sufficient available labour force (mostly unqualified workers).

- The **transitional period regarding Romania and Bulgaria** was extended in December 2008 until **December 31st 2011** (second phase).

NOTAT

January 2010

J.nr.

JAIC/LMN

Danish comments to Report on Free Movement of Workers in Denmark in 2008-2009

Vores sag

2009-0020067

5. kt./8. kt./2. kt.

BIF/BST/BEK/MNI

Below are listed the comments that the Ministry of Employment has received from relevant Danish authorities on the national report on free movement of workers in Denmark in 2008-2009 as received by the Commission by email of 10 November 2009. Some of the authorities have also given comments to those parts of the European report that concern Denmark.

The National Labour Market Authority (AMS)

"The National Labour Market Authority has the following comments on the report on the Free Movement of Workers in Denmark:

Chapter II: Access to employment

P. 14-15:

Instead of the following sentences:

> "*The job centres have an international Section, EURES, which is the co-operation between the European Commission and the Public Employment Services of the EEA countries and Switzerland and other partner organizations (such as unions, employers' associations and local/regional authorities) with the purpose of supporting the free movement of workers by facilitating information, advice and recruitment for citizens and companies.*
>
> *In 2008, the EURES special function was closed down. However, the tasks are now handled in 3 international centres, established on 1 October 2008. The 3 international centres have been established in the metropolitan area ('Høje Taastrup'), Aarhus and Odense, respectively. The purpose of the establishment of the centres is to strengthen and professionalize the recruitment of foreign labour in Denmark. Hence, the centres' core area are focused directly on assisting companies in recruiting workers from abroad and on assisting alien workers in their job seeking in Denmark in general*."

We would like to add some words and to use the words interpreted below to insure the text doesn't lead to misunderstanding:

> "*In 2008, the Danish Government launched a major Action Plan (the so-called Job Plan). The Plan included a range of measures to strengthen Denmark's ability to attract qualified manpower from other countries.*

On the service side, the existing set-up (launched 1 January 2007) with one EURES Specialist Unit in Aarhus and a EURES contact person in each of the 91 job centres was changed, taking effect as from 1 October 2009. In stead of a single specialist unit, three new service centres were established: Workindenmark East (Metropolitan area ´Høje Taastrup´, Workindenmark West (Aarhus) and Workindenmark South (Odense). The establishment of these tree centres should be seen as an overall strengthening of and a supplement of the existing efforts in relation to international recruitment and on assisting alien workers in their job seeking in Denmark in general.

The tree centres are all linked to EU's employment service EURES[1] and comprise of more than 30 recruitment experts who offer specialized information and service with regard to international recruitment in different languages, which the 91 job centres, companies and alien workers can draw upon. This includes:

- *helping companies and alien workers in general e.g.:*
    - *How to use www.jobnet.dk or www.workindenmarks's Job and CV bank*
    - *Be the link between an employer and a alien worker if the employer has a job vacancy*
- *work and residence permit/registration certificate, Civil Registration System number (CPR), tax card, language school and contact with the authorities;*
- *the ability to target sectors on the job market with the greatest labour shortages*
- *assisting in the implementation of major international recruitment initiatives*
- *promoting EURES (European Employment service)*
- *co-operation with authorities in Denmark and abroad, e.g. EURES*
- *Upon payment of a fee, the tree Workindenmark centres can also assist with the recruitment and retention process, including interviews, check of references, helping spouses, housing, activities for the family etc.*
- *info about working abroad.*"

P. 15:
We would also like to add following information concerning the new website www.workindenmark:

"*Along with the centres, a new comprehensive website www.workindenmark.dk (in Danish, English and German) has been launched. On the website, alien workers can set up a profile (CV) and*

[1] EURES (European Employment service) is the co-operation between the European Commission and the Public Employment Services of the EEA countries and Switzerland and other partner organisations (such as unions, employers associations and local/regional authorities) with the purpose of supporting the free movement of workers by facilitation information, advice and recruitment for citizens and companies.

search for vacant jobs. Likewise, Danish employers can post job adverts and seek new employees in the CV bank. Here you can also find important information about job opportunities, as well as about rules for working in Denmark, tax, social welfare, health insurance, unemployment insurance, unemployment benefits, living conditions, etc."

P 16-17:
It is now the municipalities in Denmark, which are responsible for the public employment service. The Circular to Act on *Prohibition of Differential Treatment on the Labour Market* is not aimed at the municipalities. But the municipalities of course have to follow the rules in the law about *Prohibition Differential Treatment on the Labour Market*.

Chapter IV: 2. paragraph, Jobseekers entitlement to social assistance

The Danish government can confirm that the guidelines concerning the right of EU/EEA citizens to social cash benefits under the Act on Active Social Policy will be updated in the near future. (Guidelines on EU/EEA citizens´ right to social cash assistance and starting assistance - No. 19 of 4. April 2008, National Directorate of Labour.)

Chapter IV: 3. paragraph, Social assistance to Danish citizens returning from another EU country

Section 11 (3) of the Act on Active Social Policy makes it a requirement for the payment of full social assistance ("kontanthjælp") that the recipient has resided in Denmark during a total period of 7 years within the past 8 years. If this requirement is not fulfilled, the so called starting assistance ("start-hjælp") will be paid out instead. This requirement does not apply for EU/EEA citizens in the extent those according to EU-law are eligible for social assistance.

Regarding this exemption the report states, that some decisions from the National Social Appeals Board have created doubts about the scope of the EU exemption in particular regarding Danish citizens who have resided under the EU rules in another Member State, and then move back to Denmark.

In this connection The National Social Appeals Board has stated the following:

"Besides the decisions mentioned, the National Social Appeals Board made two decisions, 180-09, which was published on September 1 2009, and 207-09, which was published October 30 2009.

In the decision 180-09 a Danish citizen was found eligible to receive social cash assistance as he was regarded to have obtained status of worker in Denmark when he was reported sick after 18 days of employment. Residence in another EEA country could be equated with residence in Denmark

The National Social Appeals Board judged that there was a real condition of employment without time limit and that the applicant had subsequently been unable to work due to illness.

In decision 207-09, the Danish citizen was only entitled to starting assistance after returning home from a longer stay with the purpose of education in another EU country.

The reason was that the applicant had not obtained status of worker in Denmark after his return.

The fact that the applicant had joined private studies at a Danish university during his residence in another EU country, could not be equated with residence in Denmark. Consequently the residence in the other EU country could not be included in the calculation of the period of residence in Denmark. It was the physical residence in Denmark, which was decisive for the calculation of residence period.

The regulation on the use of social security schemes to employees and their families moving within the Community could not be used in relation to entitlement to social cash assistance as social cash assistance is not part of a social security scheme.

In both the abovementioned decisions the National Social Appeals Board stressed that it is decisive that status of worker has been obtained after returning to Denmark, in order to include the period of residence in another EU/EEA country.

The National Social Appeals Board has not in any of these published decisions on the right to social cash assistance or starting assistance (A-1-06, A-34-06, 137-09, 138-09, 180-09 and 207-09) found that there were real doubts, whether the applicants could be considered as migrant workers. The main issue in the decisions have been the applicants' status as workers under Regulation 1612/68, and thus rights under Article 7. 2 of the Regulation.

With respect to the reference in the report to the National Social Appeals Board for not including the relevance of recent EU rulings, especially Collins, Trojani and Eind, the National Social Appeals Board states that it has not - on the basis of the information in the cases - found reason to involve these judgements in the grounds for the decisions.

The information in the report does not alter that assessment.

The EU rulings have along with other legal sources been included in The National Social Appeals Board's assessment in relation to decisions on this matter.""

The Ministry of Employment
"Concerning equal treatment (pp. 16-20 + 39-40) the Ministry has made the following observations and comments:

General observation
The titles of the acts have in other connections been translated as follows:

- *Lov om forbud mod forskelsbehandling på arbejdsmarkedet mv.* translates as *Act on Prohibition against Discrimination on the Labour Market etc.*
- *Lov om Ligebehandlingsnævnet* translates as *Act on the Board of Equal Treatment*

Specific observations:
1) p. 16 + 39/40, under the heading Draft legislation, circulars, etc.
Comment to the sentence "*The circular concerns employment agencies (…)*":

The circular concerns ArbejdsFormidlingen (today Jobcentres), which are public authorities.

2) p. 19, second paragraph:
Comment to the sentence "*Hence, the amendment results in a union of the two existing Committees (…)*:

As a consequence of the establishment of the Board of Equal Treatment, The Gender Equality Board and The Complaints Committee for Ethnic Equal Treatment have been abolished. Pending cases by 1st January 2009 were transfered to the new board.

3) p. 19, fifth paragraph:
Comment to the sentence: *"violation of Collective Agreements containing on obligation to equal treatment (…) provided the case is not brought before the Industrial Committees/Courts (…)"* should be amended to:

"Violation of Collective Agreements containing on obligation to equal treatment (…) provided it is established that the union will not bring the case for review in the dispute settlement system for the organized employees."

The Ministry of Taxation
"The Ministry has the following comments that should clarify a few facts in the report on free movement of workers:

Page 21, third paragraph: The second sentence ("*Furthermore, the person in question.*…") should be replaced with:

"*Furthermore, the person in question may not have been employed by his future employer for a period of three years before and one year after becoming a non-resident of Denmark.*"

Page 21, fourth paragraph: The last sentence ("*As a main rule, the person.*…") should be deleted.

Page 30, the chapter on "Researchers": In the first paragraph the words "*residing in Denmark for a maximum of 36 months at a time*" should be deleted."

The Danish Ministry for Culture

"The Ministry would like the following sentences in the report to be modified slightly: "*According to the most recent membership statement from 2008, DRU has 1,777 members. This makes DRU DIF's smallest federation and its activities are solely performed on an ama-teur basis. Thus, neither nationality quotas nor transfer fees exist in Danish rugby"* (page 27).

In order to give a more precise account of the situation in Denmark, the sentences should in stead read:

"*According to the most recent membership statement from **2009 from the Sports Confederation of Denmark**, DRU has **2011** members. This makes DRU **among** DIF's smallest **federations** and its activities are solely performed on an amateur basis. Thus, neither nationality quotas nor transfer fees exist in Danish rugby.*""

The Danish Maritime Authority
"The Danish Maritime Authority has the following comments to section 4.3 in the report, page 29:

In our view the report's descriptions and information on the maritime sector are not fully correct.

The original Act on the Danish International Register of Shipping, article 10, par. 2, constituted that collective agreements concluded by a Danish trade union can only cover persons, who are considered having residence in Denmark or who according to international obligations are to be treated as Danish nationals.

It follows from the judgement of the European Court of Justice in the so-called Da Veiga Case (C9/88) - which concerned a Portuguese seafarer whose primary centre of interest was in the Netherlands – that any European seafarer with a sufficiently close link to Denmark is to be treated as a person who is resident in Denmark. The seafarer can thus be covered by collective agreements concluded with Danish trade unions.

Already at an early stage of the Commission's infringement case against Denmark, the Danish government made it clear to the Commission that Denmark would respect the Lopes Da Veiga case. After intense negotiations and several meetings between the Danish Government and the Commission a revised article 10, par. 2, in the Act on the Danish International Register of Shipping (Law no. 214) was adopted by the Danish Parliament 17 March 2009 and entered into force 1 April 2009.

It now follows directly from the wording of art. 10, par. 2, that the Da Veiga case is respected.

The infringement case no. 2003/4827 against Denmark was officially closed by letter of 8 October 2009 from the Commission."

The Danish Educational Support Agency (on behalf of the Danish Ministry of Education)

“The Agency does not have any specific comments to the national report. However, the Agency would like make a single comment to the European report’s section 4.5 in which it says: "*The following problem areas were identified: in Denmark, Greece (where the limitation has been challenged by the ombudsman), the Netherlands and the Slovakia study grants are only available after five years residence.*" This does not correspond with the Danish rules and how these (correctly) are described in the national report.”

Danish Ministry of Refugee, Immigration and Integration Affairs
“After a review of Chapter VI: ”Members of the Worker’s Family and Treatment of Third Country Family Members”, the Ministry have in bullet 1 on page 42 found an inaccuracy.

There is in our view no doubt, that the former requirement of previous lawful residence in a Member State did not presume the residence permit involved had to be of permanent character. The word "permanent" is therefore not correctly used in this context and should consequently be deleted.”

Ministry of Labour and Immigration

State Secretariat for Immigration and Emigration

Directorate-General for Immigration

COMMENTS ON THE DRAFT EUROPEAN REPORT ON THE FREE MOVEMENT OF WORKERS IN EUROPE IN 2008-2009

The following observations relate only to the aspects of the report referring to Spain in matters over which this executive department has competence:

- **Chapter I. Entry, residence, exit and corrective measures.** (The term "exit" is proposed for the English text in order to be consistent with the terminology used in Directive 2004/38/EC, instead of ***"departure"***, which could relate more to the time of leaving than to the act of exiting the territory).

Introduction

In the second paragraph, in the summary of the transposition of the provisions mentioned in the first paragraph, reference is made to Spain in the last point (4), commenting that "*transposition of these provisions is virtually non-existent".* Since transposition of the provisions referred to in Chapter I in the first paragraph in the countries cited in point (3) is "*partial or incomplete"* and since *"gaps or serious deficiencies in transposition"* have been highlighted, the impression is given that Spain has not transposed any of the content of these provisions. It would be more correct to say that **Spain has satisfactorily transposed these provisions and grants more favourable treatment (Article 37 of the Directive) by giving all EU citizens the right of residence for more than three months,** without distinguishing between workers, people with their own means and students.

This is evidently the meaning of Article 7 of the implementing legislation (Royal Decree 240/2007 of 16 February), which must be interpreted in line with the content of Article 3 **(which grants the right to enter and reside freely on Spanish territory, and the right to take up any employed or self-employed activity, to provide services or to study under the same conditions as Spanish nationals to all persons included in its field of application, with the exception of dependent descendants over the age of 21 and dependent ascendants of a Community citizen).**

It appears that the draft report does not consider this to be the case, as it is stated in the last sentence of the second paragraph that *"interestingly, the lifting of the transitional arrangements as from January 2009 in respect of Bulgarian and Romanian nationals has resulted in official instructions referring specifically to 'workers'".* Indeed, the restrictions on free movement were limited to workers who moved to Spain to engage in employed activity. It follows that, when these restrictions were lifted, it was necessary to refer to workers from Bulgaria and Romania who, as of 1 January 2009, were granted the same freedom of movement under the same conditions as other EU citizens, irrespective of their reasons for moving to Spain.

Article 7(1) (a)

For the reasons stated above, **we disagree with the statement at the end of the second paragraph of the draft report, according to which Spain has not transposed this provision.** Spain has in fact transposed the provision in such a way that more favourable treatment is granted to all EU citizens, irrespective of whether they meet certain criteria (workers, persons with their own means or students). Any statement that Spain has not duly transposed this Article should be substantiated by an indication of the provisions which would be negatively affected by the more favourable treatment granted under Spanish legislation.

Article 7 (3) (a)-(d)
The **comments made on the previous points also apply here.** The content of this Article has been transposed and in a more favourable manner, since losing the status of worker would not affect the rights to reside and work in the country granted under Spanish legislation.

Article 8 (3), first indent

Spain should be mentioned as one of the countries which have correctly transposed this provision, as the obligation to register, the three-month deadline and the requirement to present only the registration request and identification (the applicant's passport or valid identity document) are completely in line with points 1, 2 and 3 of Article 8, given that the latter point is optional.

Article 17

At around the middle of the third paragraph, it is stated that *"In Spain, only Articles 17 (1)(b)-(c) and 17 (2) have been transposed".*

This is incorrect because Article 17(1)(a) of the Directive has been transposed almost word-for-word in Article 10.2.a) of Royal Decree 240/2007.

Likewise, the content of Article 17 (3) and (4) has been transposed in Article 10.3 and 10.5 respectively of the aforementioned Royal Decree.

Article 24 (2)

The statement that, under certain circumstances, the Member States are not obliged to grant the entitlement to either welfare benefits or certain types of aid or grants must be understood as meaning that **Member States which have not applied this provision,** which makes it possible to limit entitlement to certain benefits or types of aid to European citizens who have exercised their right to free movement, **have transposed the Directive correctly and with the most favourable content possible.**

4.4 Researchers and artists

At the end of the third paragraph, it is pointed out that failure to transpose the provisions on self-employed workers of Directive 2004/38 causes problems for artists and researchers. It would be useful to specify what these difficulties are in order to overcome them. We expect that this may be a problem of a practical or operative nature with no causal relationship with the transposition of the Directive.

Madrid, 3 December 2009

11 December 2009

Malta's Comments on the National and Consolidated Reports on the Free Movement of Workers for the year 2007

Comments on the National Report

Page 9: Education of Children of Migrant Workers second paragraph:

The following text should be added:

> With regard to training, the Employment and Training Services does not preclude children of non-Maltese EU nationals from being admitted to apprenticeship and vocational training courses which are organised by the Employment and Training Corporation.

Page 12: Section 4.5 Access to study grants:

The following text should be added:

> Training grants granted under the Business Promotion Act (Chapter 325 of the Laws of Malta) do not discriminate between Maltese and EU/EEA nationals**.**

Page 20: Section 2. Access to work second paragraph:

As from 1 October 2009, the fee quoted was changed as follows: €150.00 on application and €80 on the issue of the employment licence. This should, therefore, be reflected in the report.

Page 25: Section - The Schengen Agreement last paragraph:

> As of 1 May 2004, Malta fully adheres to the visa regime laid down in Council Regulations (EC) 539/2001 and third-country nationals may enter and travel to Malta, applying the Schengen provisions since 21 December 2007 (when border checks were lifted at the seaport followed by the lifting of such checks at the airport on 30 March 2008) for a maximum period of three (3) months within a six-month period, provided that they fulfil the entry conditions laid down in the Schengen *acquis.*

Comments on the Consolidated Report

Page 10: Article 8(3), first indent, second paragraph – In Malta, licence has first to be issued for employment, and although it is stated to be a formality, it may nonetheless constitute an administrative impediment to free movement of workers:

In accordance with the transitional arrangement agreed upon in the Accession Treaty, Malta retained its work permit system in the case of workers for the purpose of monitoring its sensitive labour market. The relative permits, which are issued in the form of an employment licence, are, however, issued automatically. EU nationals are, therefore, required to be in possession of an employment licence when exercising their Treaty right as workers in Malta. As stipulated in Article 8(3), a certificate of employment may be requested when the worker applies for a registration certificate. The said employment licence, which is issued automatically, is considered to constitute such certificate of employment and the worker does not have to produce any other document as evidence in relation to his/her employment in Malta. Malta does not, therefore, see such requirement as an administrative impediment to the free movement of workers.

Page 23 - first paragraph, under the Sections 2-3. Social and Tax Advantages and other obstacles to free movement of workers: …. In Malta the derogation regarding acquisition of immovable property causes frustration among EU nationals while…..:

Citizens of all European Union Member States, including also Maltese citizens, who have resided in Malta continuously for a minimum period of five years at any time preceding the date of acquisition may freely acquire immovable property without the necessity of obtaining a permit under the Immovable Property (Acquisition by Non-Residents) Act (Cap. 246) of the Laws of Malta.

Citizens of all EU Member States, including also Maltese citizens, who have not resided continuously in Malta for a minimum period of five years may only purchase, without the necessity of obtaining a permit under the Immovable Property (Acquisition by Non-Residents) Act (Cap. 246), their primary residence or any immovable property required for their business activities or supply of services.

Citizens of all EU Member States, including also Maltese citizens, who have not resided continuously in Malta for a minimum period of five years, require a permit under the Immovable Property (Acquisition by Non-Residents) Act (Cap. 246) to acquire immovable property for secondary residence purposes.

The derogation is, therefore, not as rigid.

Page 36: In the public service in Malta there is a common practice of making promotion to a higher salary scale or grade conditional on the attainment of a certain length of service in a particular grade, which may be incompatible with the case law of the ECJ in Schoning and in Kobler"

Malta points out that this is an incorrect interpretation of the European Court of Justice's conclusions on the Schoning-Kougebetopoulou and Kobler cases. Both these cases deal with

mechanisms for the recognition of work experience in collective staff classification systems which, *de jure* (Schoning) or *de facto* (Kobler), cover multiple employers. Nowhere in its case law does the European Court of Justice rule that a *single* employer cannot fill posts by promotion from among its own serving employees.

Page 46 - penultimate paragraph:

As from 1 October 2009, the fee quoted was changed as follows: €150.00 on application and €80 on the issue of the employment licence. This should, therefore, be reflected in the report

COMMENTS
to the Draft European Report on the free movement of workers in Europe in 2008-2009

I

Contents
Page 2 (line 5) and
Chapter IV – Relationship Regulation 1408/71 and Article 39 and Regulation 1612/68
Title:

The title of Chapter IV "Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68" should be completed with the words "**of the EC Treaty**", in order to be read as follows:
"Relationship between Regulation 1408/71 and Article 39 **of the EC Treaty** and Regulation 1612/68"

II

Chapter VI – Members of a Worker's Family

7. Other Issues concerning Equal Treatment (Social and Tax Advantages)

Eleventh paragraph:
We suggest that the sentence "Where a family member becomes a burden to the health care or social security system, a residence permit can be revoked", can be rewrite, for instance, as following: "**Where a family member doesn't fulfil the conditions, namely on the subjects of having sufficient resources and well as an health insurance, a residence permit can be revoked**".

23.Novembro.2009

2. Draft European Report on the Free Movement of Workers in Europe in 2008-2009

At page 8 of the Report regarding the Free movement of workers in the period between 2008-2009 in Europe, the introduction, we believe that considering Romania part of the other countries which have almost fully implemented the community provisions in the field except, for some flows or inadvertence, is correct considering the legal aspects of the statute of the EU citizens who are looking for employment presented at page 13 in the Report or those regarding the social protection presented at page 12 in the Report.

DRAFT EUROPEAN REPORT

on the Free Movement of Workers
in Europe in 2008-2009

Rapporteurs: Prof. Kees Groenendijk,
Prof. Roel Fernhout, Prof. Elspeth Guild,
Dr. Ryszard Cholewinski, Dr. Helen Oosterom-Staples
and Dr. Paul Minderhoud

October 2009 FMOW – EUROPE 2008-2009

Contents

Executive Summary

The assessment of the application of the EU workers' right free movement in the Member States in 2008 is surprisingly positive notwithstanding the turbulence in the markets which marked the year. In many areas, Member States have brought their legislation into line with their EU obligations and in others their practices have improved. However, new challenges and issues are clearly arising which will need close monitoring.

On the positive side:

Following the European Court of Justice judgment in *Metock* on the right to family re-unification, and notwithstanding the considerable political static which followed the judgment, virtually all Member States are correctly applying the judgment and made the necessary adjustments to their rules and practices;

Free movement of workers is virtually complete for EU 8 nationals (only Austria, Germany and the UK are maintaining transitional arrangements for the final two years); the main destination countries of EU 2 workers (with the notable exception of Italy) have opened up free movement of workers to them;

The Commission's action over the past decade to ensure proper implementation of the European Court of Justice's judgments on access to the public sector for workers from other Member States is really paying off; substantial progress was reported in many Member States in 2008.

On a more sombre note:

The economic turmoil has resulted in a number of workers returning to their Member State of origin and encountering difficulties in obtaining recognition for their work in other Member States and social benefits;

Far too few Member States recognise the rights of job-seekers as distinct from economi-cally inactive citizens of the Union; this results in job-seekers being subject to financial and health insurance requirements which are not permissible in EU law;

Frontier workers are forming an increasingly important part of the EU labour force but they still suffer many obstacles as a result of being resident in one Member State and economically active in another Member State. These problems are often related to the treatment of family members, access to social benefits and taxation;

Administrative delay is still dogging the enjoyment of free movement rights; too many Member States are failing to comply with their obligations to issue residence certificates immediately and residence cards as quickly as possible (and in any event within six months), documents verifying the acquisition of permanent residence etc. The practical problems which these delays cause can be enormous for workers and their families.

There is still plenty of room for improvement by Member State administrations in their ap-plication of EU workers' rights. One key aspect is that Member States must ensure that all the different government departments which have responsibility for various aspects of work-ers rights are fully informed of their obligations to ensure proper compliance.

General Introduction

The **Centre for Migration Law** of the Radboud University Nijmegen, The Netherlands, coordinates under the supervision of the European Commission a European Network on Free Movement within the European Union. One of the activities of this Network is the annual production of 27 national reports and one European report on the implementation of EU free movement law in the Member States.

This European report covers the period of 1 January 2008 - 1 July 2009. Previous reports can be found on the website of the Commission: http://ec.europa.eu/social/main. jsp?catId=475&langId=en.

In this introduction we mention six themes that are discussed in several national re-ports. For a more detailed discussion of those issues we refer the reader to the relevant chap-ters of this European report

1. EFFECTS OF THE ECONOMIC CRISIS

The economic crisis that became acute in the second half of 2008 clearly had far reaching effects on free movement of workers between Member States. The first and most visible effect has been a sharp reduction of workers using their free movement and an increased return to the Member State of origin. This effect of the crisis appears to affect especially workers from the EU-8 and EU-2 Member States. The number of Romanian and Slovak workers employed in Hungary at the end of 2008 was reduced with more than one third as compared with the end of the previous year. The number of workers from Poland and the Baltic States employed in Ireland and the UK also went down considerably.

The economic crisis has prompted budgetary measures in many Member States. Those measures may well work out negatively on free movement and on the rights of EU nationals having used their free movement rights. Examples are the tax reform adopted in Lithuania that may have negative effects for EU and EEA nationals. In Italy legislation was enacted restricting certain social benefits to Italian nationals and long-term resident non-citizens. Such reforms may not be targeted at EU/EEA nationals, but they may hit them more often than nationals not having used their free movement rights.

2. IMPLEMENTATION OF DIRECTIVE 2004/38 AND THE *METOCK* JUDGMENT

During 2008 and the first half of 2009 several Member States (e.g. Czech Republic, Estonia, Hungary, Italy, Malta and Poland) have amended their national legislation in order to extend, improve or complete the implementation of Directive 2004/38. Luxembourg was the last Member State to transpose the Directive in its national legislation in 2008. In Cyprus, Hun-gary and Lithuania changes in the national legislation contributed to the implementation of the provisions in the Directive on the rights of third-country family members or to making those rights more clear and accessible.

Whilst the judgment of the Court in the *Metock* case was subject of political and public debate in several Member States, the four Member States (Denmark, Finland, Ireland and the

UK) that had introduced previous lawful residence in another Member States as a require-ment for recognition of free movement rights of third-country family members at the time of the transposition of Directive 2004/38, all four complied with the Metock judgment and changed their immigration legislation, bringing it in line with the judgment. In Germany the requirement of third-country family members to have passed the integration test abroad be-fore a visa for family reunification was granted, was deleted from the circular of the Ministry of Foreign Affairs. The intention of the Dutch government to introduce a similar requirement in the immigration legislation for third-country family members of EU nationals, announced in 2005, was abandoned after the judgment. In the Netherlands the debate on the Metock judgment actually resulted in implementation of the 2007 judgment of the Court in the Eind case.

3. APPLICATION OF TRANSITIONAL MEASURES

By the end of 2008 eleven of the EU-15 Member States had abolished transitional measures and granted free access to employment to all EU-8 workers. The remaining four Member States (Austria, Belgium**,** Denmark and Germany) all had introduced measures reducing the obstacles to free movement for certain categories of EU-8 workers. Belgium and Denmark have lifted their restrictions as of 1 May 2009. Germany and Austria continue to require, also after 1 May 2009, a labor permit for EU-8 workers but have simplified the procedure for certain categories of those workers.

At the end of 2008 the majority of EU-15 Member States decided to continue transitional measures with regard to workers from Bulgaria and Romania. But Greece, Hungary, Portu-gal and Spain did abolish transitional measures for EU-2 workers, joining the eight EU-10 states and Finland and Sweden that granted free access to workers from Bulgaria and Roma-nia already in 2007. Denmark abolished these transitional measures as of 1 May 2009. In Germany highly qualified EU-8 and EU-2 workers may profit from the liberalization of the national rules of the admission of foreign workers with high qualifications for certain profes-sions. The details of the (non-)application of the transitional measures are presented in chap-ter VIII.

The issue of substandard pay and working conditions of workers from Member States that joined the EU in 2004 or 2007, especially for workers from those states posted in other Member States or employed through the intermediary of private employment agencies, is subject of debate in several Member States.

4. RETURNING MIGRANTS AND OTHER CATEGORIES WITH SPECIAL PROBLEMS

Several national reports mention problems encountered by nationals returning to their Mem-ber State of origin after having used their right to free movement. In Poland the recognition by employers of employment and experience acquired in another Member State raises prob-lems. Other problems are the treatment under national tax legislation (Latvia, Lithuania) or a temporary ban to leave the country (in Romania; the issue has been dealt with in the *Jipa* judgment). Both Denmark and the Netherlands amended their immigration rules explicitly

recognizing the right of their nationals to bring their third-country family members with them after having used their free movement rights in another Member State.

Special problems concerning the social and other rights of job-seekers or cross border workers are mentioned in the reports on Germany, Spain and other Member States. A de-tailed discussion of those categories is to be found in chapter III and VI. The special prob-lems of cross border workers are also reflected in the poor follow-up of the *Hendrix* and *Renneberg* judgments of the Court of Justice, while many Member States continue to apply strict residence clauses with regard to certain social and tax advantages (see Chapter VII).

5. EMPLOYMENT IN THE PUBLIC SECTOR AND LANGUAGES REQUIREMENTS

The constant action and pressure of the Commission, since the early 1980s, on the issue of access of EU nationals to employment in the public service of another Member State contin-ues to bear fruit. The national reports on Bulgaria, Finland, Poland and Portugal mention changes in the national legislation removing legal obstacles to the employment of EU na-tionals in certain jobs in the public service. For more details see chapter V of this report.

The issue of unjustified language requirements being a barrier to access to employment both in public service and with private employers is mentioned in several national reports. For more details see chapters II, IV and V. During 2008, Dutch MPs of various political parties repeatedly requested the introduction of a statutory obligation for Polish workers, who do not have basis knowledge of the Dutch language, to participate in Dutch language and integration courses.

6. OTHER OBSTACLES: ADMINISTRATIVE DELAYS AND COMPLEX LEGISLATION

Two practical barriers to the exercise of free movement rights have been mentioned in the national reports on 2008/2009: long delays in registration or issuing of EC residence cards and the complexity of the relevant national legislation. The report on Cyprus mentions a backlog of 27,000 pending application for registration as a resident EU national. The UK report mentions ten to twelve month delays in handling applications for an EC residence card. Those long delays are reported to have far reaching consequence for the EU nationals concerned, such as dismissal, treatment as illegal resident by employers and public agencies, difficulties when travelling abroad since the passport is with the immigration authorities, and the need to provide new documents since the documents originally provided are no longer valid or accepted by the immigration authorities by the time they finally deal with the appli-cation.

The other practical barrier mentioned in some reports is the complexity of the legislation transposing the EC free movement legislation in the national law. If the implementation does not take the form of a separate Act or decree, but is spread over the various chapters of the general immigration law, it is often hard for migrants and for immigration authorities or other officials to find and apply the relevant provisions granting privileged treatment in comparison with third-country nationals. This raises practical problems especially with re-gard to third-country family members of EU migrants. Such problems are mentioned in the

reports on Cyprus, Hungary and Lithuania, but this issue arises also in Member States that acceded to the EU before 2004.

Chapter I Entry, Residence, Departure and Remedies

INTRODUCTION

This chapter focuses on the transposition in the 27 EU Member States of specific provisions of the EU Citizens Directive (hereafter 'Directive 2004/38/EC')[1] concerning EU workers, namely: the right of residence for more than three months of workers or self-employed per-sons – Article 7(1)(a); retention of status of the worker or self-employed person by EU citi-zens who are no longer in employment– Article 7(3)(a)-(d); administrative formalities relat-ing to the residence of EU workers and self-employed persons – Article 8(3), first indent; prohibition on expulsion of EU citizens or their family members if they are workers or self-employed persons, or job-seekers – Article 14(4)(a)-(b); right of permanent residence for persons and their family members who are no longer in employment – Article 17; and the derogations from equal treatment – Article 24(2).

In summary, transposition of these provisions in most of the EU Member States can be assessed 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 almost verbatim (*Cyprus*, *Denmark*, *Estonia*, *Finland*, *Greece*, *Luxembourg*, *Portugal*); (2) generally complete, with the exception of one or two gaps or relatively minor inaccura-cies (*Belgium*, *Czech Republic*, *France*, *Hungary*, *Ireland*, *Italy*, *Malta*, *Poland*, *Romania*, *Sweden*); (3) partial or incomplete, where more gaps or serious deficiencies in transposition have been highlighted (*Austria*, *Bulgaria*, *Latvia*, *Lithuania*, *Slovakia*, *Slovenia*, *United Kingdom*); and (4) where transposition of these specific provisions is virtually non-existent (*Spain*). It should be noted, however, that in respect of (1) and (2) above, there is relatively little information available on how these provisions are applied in practice, particularly Arti-cles 7(3)(a)-(d) and 17. Only a few Member States have in place some more favourable rules relating to these provisions. In *Belgium*, EU workers and family members (but not students) acquire the right to permanent residence after three years rather than the five years stipulated in Directive 2004/38/EC (Article 16), while in *Sweden*, 'worker' has been defined more broadly than in previous legislation. In *Spain*, the non-transposition of many of these provi-sions is explained by the rapporteurs in positive terms as generally giving rise to a much more favourable position for EU citizens (including job-seekers), although, interestingly, the lifting of the transitional arrangements as from January 2009 in respect of Bulgarian and Romanian nationals has resulted in official instructions referring specifically to 'workers'.

This chapter also examines the specific situation of EU job-seekers in Member States with specific reference to pertinent provisions of the Directive, including recital 9 which requires Member States to grant more favourable treatment to this group with regard to the right of residence in accordance with the case law of the Court of Justice. Finally, it high-lights a number of pertinent issues of concern relating to substantial delays in issuing resi-dence certificates, residence cards and documents certifying permanent residence; the refusal of entry to and expulsion of EU citizens, particularly those coming from the new Member States; and remedies.

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

2 Although the need to possess a work 'licence' in *Malta* or a 'work permit' in *Slovenia* is problematic in terms of Article 8(3) – see below).

Article 7(1)(a)

This provision appears to have been transposed correctly in most EU Member States, i.e., *Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Sweden*, and the *United Kingdom*.[2]

In *Latvia*, however, the implementing regulations stipulate that a EU citizen is under no obligation to obtain a registration certificate if s/he resides in Latvia longer than 90 days *and* resides in the country for up to six months within a period of one year for the purpose of employment or is employed in Latvia but resides in another EU Member State where s/he returns on a weekly basis. The reference to 90 days is also questioned because the period of three months is usually longer than 90 days. In *Spain*, this provision has not been transposed in the Royal Decree 240/2007 (as amended) implementing the Directive, which merely states that 'citizens of the EU or of the EEA have the right to residence in Spain for a period longer than three months' without any reference to workers or self-employed persons.

Article 7(3)(a)-(d)

Article 7(3)(a)-(d) seems to have been correctly transposed in *Belgium*, *Czech Republic*, *Cyprus*, *Denmark*, *Estonia*, *Finland*, *France*, *Germany, Greece*, *Hungary*, *Italy*, *Latvia*, *Lux-embourg*, *Malta*, *Poland*, *Portugal*, *Romania* and *Sweden*. However, no transposition of these provisions has taken place in *Austria*, *Lithuania* and *Spain*, with the result that the status of EU workers and self-employed persons after the termination of the employment relationship is unclear.

As noted in previous reports, Article 7(3) has been incorrectly transposed in *Slovenia* be-cause the national legislation only permits retention of the right of residence in case of the circumstances stipulated in paragraphs (a)-(d) and not retention of the status of worker or self-employed person. In *Bulgaria*, transposition is generally accurate with the exception of Article 7(3)(d), in respect of which the national law expressly excludes vocational training related to previous employment in the case of involuntary unemployment, which is not the intention of this provision. Similarly, in *Slovakia*, there is inaccuracy in the transposition of Article 7(3)(a). If the EU citizen is no longer in employment, and s/he is temporarily unable to work as a result of an illness or occupational disease or work accident which was not the reason for the termination of the employment, according to Slovak law, such a person is not considered as possessing residence on the basis of the first residence permit in Slovakia unless there is an assumption that s/he will be employed. In the *United Kingdom*, there is a serious problem with the transposition of Article 7(3)(c) because the national regulations require the person to have been in employment for one year or more, a threshold not found in that provision which refers to involuntary unemployment after completing a fixed-term em-ployment contract of less than one year.

3 See Immigration (European Economic Area) (Amendment) Regulations 2009 (SI No. 1117). There also continue to be serious delays in the issue of registration certificates in the UK – see 'Other issues of concern' below.
4 This questionnaire is essentially aimed at extracting information from third-country nationals and with a view to including all persons with a residence permit in the Population Register.

Article 8(3), first indent

This provision has been transposed correctly in *Austria*, *Belgium*, *Bulgaria*, *Denmark*, *Esto-nia*, *Finland*, *France*, *Germany, Greece*, *Hungary*, *Luxembourg*, *Poland*, *Portugal*, *Romania*, and *Sweden*. In the *United Kingdom*, however, a number of administrative barriers have been introduced in new rules which entered into force on 1 June 2009.[3] In *Spain*, there is an obli-gation on EU citizens to register before the end of the first three-month period of residence, although no further administrative formalities are required, while in *Slovakia*, where registra-tion is optional, only a travel document is required and no certificate of employment or proof of self-employment needs to be provided.

While this provision has also been transposed in *Lithuania*, the rapporteur notes that all the documents to be provided in connection with Article 8(3) have to be translated into the Lithuanian language, which may serve as an obstacle to obtaining the residence certificate. In *Malta*, a licence has first to be issued for employment, and although this is stated to be a formality, it may nonetheless constitute an administrative impediment to free movement of workers. Similarly, in *Slovenia*, the additional requirement that both the worker and self-employed person hold a valid work permit is not in conformity with this provision. In the *Czech Republic*, some of the documents required to obtain a temporary residence certificate, such as the document confirming guaranteed accommodation, are not in compliance with Directive 2004/38/EC. In *Cyprus*, EU citizens working in the territory but where the com-pany base is abroad, have to meet minimum income requirements in respect of themselves as individuals and their family members, in order to proceed with the application for a resi-dence certificate. This condition is not in conformity with Article 8(3), first indent, and, in the view of the rapporteur is also suspect to discrimination on gender grounds. In *Italy*, where there is an obligation to register if the residence is for more than three months, in practice applications to do so have proven difficult because some municipalities request more documents than those permitted (e.g. birth certificate) or have added bureaucratic or unnecessary steps to the application process. Excessive information (including evidence of sufficient financial resources) is also requested in *Latvia* where EU citizens and their family members are required to complete an extensive questionnaire on registering their residence in the country.[4]

Article 14(4)(a)-(b)

Article 14(4)(a)-(b) has been transposed in *Belgium*, the *Czech Republic*, *Denmark*, *Estonia*, *Finland*, *France*, *Greece*, *Italy*, *Luxembourg*, *Malta*, *Portugal*, *Romania*, *Sweden* and the *United Kingdom*. Indeed, in *Finland*, the Government Proposal 205/2006 concerning the transposition of Directive 2004/38/EC explicitly states that an employee, self-employed per-son or a job-seeker cannot be removed from the country even if s/he would constitute a bur-den on the social assistance system. In *France*, the transposing provisions explicitly require EU job-seekers to provide evidence that they are seeking employment and have a really chance of being engaged. In *Latvia*, however, only Article 14(4)(a) has been transposed and

the Article 14(4)(b) derogation relating to job-seekers does not appear anywhere in the im-plementing regulations.

There are no national provisions in the laws of *Austria*, *Bulgaria*, *Ireland*, *Poland*, *Slo-vakia*, *Slovenia* and *Spain* transposing these provisions. However, the legal position in *Po-land* would appear to be that the mere fact of resort to social assistance benefits is insuffi-cient to substantiate the expulsion of EU citizens and their family members. In *Ireland*, the rapporteur observes that a possible difficulty arises in relation to residence for up to three months, which in the regulations implementing Directive 2004/38/EC is conditional upon the person in question not becoming an unreasonable burden on the social welfare system, and no specific derogations are foreseen for workers or self-employed persons, or job-seekers. However, this difficulty does not arise in respect of workers or self-employed persons enjoy-ing the right of residence for more than three months because there is no such condition.

Article 17

Article 17 has been fully transposed in *Belgium*, *Denmark*, *Estonia*, *Finland*, *France*, *Ger-many, Greece*, *Hungary*, *Italy*, *Luxembourg*, *Malta*, *Netherlands*, *Poland*, *Portugal*, *Roma-nia*, *Slovenia* and *Sweden*, but not in *Austria*.

In *Slovakia*, transposition of Article 17 is very weak. Paragraph 1(c) has been incorrectly transposed, paragraphs 2 and 3 have not been transposed at all and paragraph 4 relating to the right of permanent residence for family members after the death of the EU worker or self-employed persons is only applicable to EU citizens and not their third-country national family members under the Slovak legislation. Transposition of the Article 17 provisions has been completed in *Lithuania*, but, as observed above in relation to Article 8(3), first indent, all supporting documents have to be translated into the Lithuanian language. In *Bulgaria*, the legislator appears to have totally misunderstood this provision stating that EU citizens and their family members qualify for permanent residence if they have resided continuously in the country for five years *and* fulfil any of the requirements in Article 17 of the Directive. In the *Czech Republic*, transposition is essentially *verbatim* with the exception of Article 17(3), which is only partly transposed in respect of the right of permanent residence of family members of workers or self-employed persons acquiring permanent residence in accordance with Article 17(1). 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 this nationality by marriage to that worker or self-employed person. Similarly, in *Slovenia*, the rules for acquiring permanent residence are more favourable in respect of EU nationals of Slovenian origin and EU nationals whose residence is deemed to be in the inter-est of Slovenia.

While the transposition of Article 17 in *Ireland* is generally correct, two small discrepan-cies have been identified in the implementing regulations in relation to Article 17(1)(c) and Article 17(3). Similarly, in *Latvia*, where the regulations transposing Article 17(3) stipulate that the permanent residence permit issued to family members of a worker or self-employed is only for a period of ten years. In *Spain*, only Articles 17(1)(b)-(c) and 17(2) have been transposed, and, in the *United Kingdom*, the rapporteur refers to the continued restrictive interpretation of the right to permanent residence of nationals from the ten new Member States, in respect of which the UK Border Agency requires evidence that during the five years of residence they were exercising a right under Community law.

Article 24(2)

Denmark, *France*, *Greece*, *Ireland*, *Italy*, *Poland*, *Portugal* and the *United Kingdom* have transposed the derogations in Article 24(2), but there are no explicit national provisions transposing this provision in *Austria*, *Belgium*, *Bulgaria*, *Romania*, *Slovakia*, *Slovenia*, and *Spain*. In *Romania*, however, the Government Emergency Ordinance transposing Directive 2004/38/EC underlines that, as a general rule, EU citizens are entitled to the same social protection measures as Romanian citizens, and, in *Spain*, Royal Decree 240/2007 also con-tains a general equal treatment clause applicable to EU citizens, including third-country na-tional family members. In *Estonia*, this provision does not appear to be applied as all persons who have a right to stay also have the right to social assistance, study loans and vocational training.

On the other hand, in *Slovenia*, the situation in respect of Article 24(1) is rather problem-atic because there is no explicit provision in the national legislation assuring to EU citizens equal treatment with nationals in respect of social assistance, only a rule ensuring equal treatment between nationals and foreigners who are permanent residents. Transposition of Article 24(2) in *Latvia* lacks clarity with regard to social assistance and is only partial as far as education grants are concerned. In *Italy*, however, the legislative decree transposing this provision makes it clear that workers are entitled, during the first three months of their resi-dence, to those social benefits which are automatically connected to their employment or as otherwise provided by the law. In *France*, however, the NGO GISTI (*Groupe d'Information et du Soutien des Immigrés*) has questioned whether the application of the derogations to certain family benefits are permissible given that the provision refers specifically to 'social assistance'. In *Sweden*, for periods of stay of up to three months, persons (irrespective of their nationality) who are not resident in the local community are only entitled to social as-sistance in emergency situations.

SITUATION OF JOB-SEEKERS

The situation of job-seekers in EU Member States can be divided into two broad categories: (1) where there are rules recognizing their existence 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 Directive 2004/38/EC. Recital 9 in Directive 2004/38/EC has not been explicitly referred to in the transposing rules in any Member State, although its application is clearly implicit in some (e.g. *Malta*, *Sweden*). Moreover, the rapporteurs for *Lithuania*, *Luxembourg*, *Slovakia* and the *United Kingdom* expressly observed that there are no references to this recital in national legislation and/or in preparatory documents.

Residence registration requirements for job-seekers differ. In some Member States (*Es-tonia*, *France*, *Greece*, *Latvia*, *Lithuania*, *Netherlands*, *Poland*, *Portugal*, *Spain*), the general rules on residence apply to job-seekers, either expressly or implicitly, and they need to regis-ter their residence if they are going to stay longer than three months in the territory, while in other Member States (*Austria*, *Belgium*, *Czech Republic*, *Malta*, *Sweden*, *United Kingdom*) there is no such requirement. In *Austria*, however, job-seekers first have to report their pres-ence in the territory within three days, which does not appear to comply with the requirement of 'a reasonable and non-discriminatory period of time' in Article 5(5) of Directive

2004/38/EC and the judgment of the Court of Justice in C-265/88, *Messner*. In *Portugal*, registration of residence rules for EU job-seekers staying longer than three months require them to register within 30 days after the period of three months from the date of entry into the national territory and in addition to showing a passport or valid identity card, they have to make a declaration that they have sufficient resources for themselves and their family members as well as sickness insurance (if this is also required of Portuguese citizens in the Member State of their nationality).

In a number of Member States, registration is usually necessary to access the services of public employment/labour services (*Bulgaria*, *Czech Republic*, *Germany*, *Latvia*, *Poland*, *Sweden*) and may also be important when assessing the qualifying period for permanent resi-dence (*Czech Republic*). In some instances, it is possible after registration of residence to access social benefits/assistance (*Belgium*, *Poland*). In *Latvia*, it is in theory possible to ob-tain the status of an unemployed person or job-seeker without possession of a registration certificate, but in practice the State Employment Agency awards this status only if EU citi-zens have the certificate. The official status of an unemployed person or job-seeker allows the person concerned to unemployment benefit exportable from another Member State and to attend educational and vocational courses.

In *Denmark*, *Malta* 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, and, in *Denmark*, it is clear they may also stay longer if they apply for a residence certificate and can demonstrate that they are continuing to seek employment and have a genuine chance of obtaining it. In *Portugal*, there is also no time limit on the stay of job-seekers so long as they can prove they are looking for work. Similarly, in *Finland*, job-seekers may reside for a reasonable period of time beyond three months without the need to register their residence provided they continue to look for work and have a real chance of finding it. However, what is a 'reasonable period of time' is not defined.

The specific situation of job-seekers in a number of Member States is unclear and essen-tially appears to have been overlooked in transposing national provisions. In *Estonia*, there are no special rules applying to this group, and their situation is not regulated in *Lithuania*. In *Bulgaria*, the law implementing Directive 2004/38/EC is silent on the question whether registered job-seekers can stay longer than three months, and, in *Cyprus*, it is also uncertain how long job-seekers may stay without any formalities, although this period is presumed to be indefinite so long as they do not seek recourse to public funds. In *Ireland*, the rapporteur observes that the position of job-seekers who enter the country is very unclear, although in practice there is nothing precluding job-seekers who are EU citizens from entering because there is no requirement for them to prove their status to the immigration authorities (i.e. no obligation to register and no entitlement to social benefits – see also below). In *Italy*, it is unclear whether job-seekers should be treated as workers or non-workers (and therefore whether they are required to possess 'sufficient resources'), although their protection from expulsion is stated in relation to Article 14(4) (see above). Similarly, in *Romania*, there are no rules on job-seekers in the Government Emergency Ordinance transposing Directive 2004/38/EC, with the exception of the reference to the prohibition on their expulsion in those instances where they can prove that they are looking for work and have a genuine chance of being engaged. In *Slovakia* and *Spain* (in keeping with the general non-transposition of the specific provisions relating to workers above), there are not special provisions regarding the treatment of EU job-seekers, and, in *Slovenia*, while the legislation enables EU, EEA and

5 However, the report of *Luxembourg* refers to two cases in which EU job-seekers were denied unemployment benefits by that country's Employment Administration (*L'Administration de l'Emploi – ADEM*). Both per-sons have appealed on Community law grounds.

Swiss citizens to be recorded in the register of unemployed persons irrespective of their length of stay, the specific situation of job-seekers is not covered.

With the exception of unemployment benefit which is exportable under EU social secu-rity provisions,[5] it is generally not possible for job-seekers to access non-contributory public benefits, such as social welfare or social assistance benefits, in most Member States (*Austria*, *Cyprus*, *Denmark*, *France*, *Germany*, *Greece*, *Ireland*, *Italy*, *Lithuania*, *Malta*, *Portugal*, *Slovenia*, *United Kingdom*), although in *Belgium* this may be possible, though not automatic because of the requirement to possess sufficient means of subsistence. In *Spain*, job-seekers may in principle access social assistance or other benefits of the type recognized in the judgments of the Court of Justice in C-138/02, *Collins* or C-

258/04, *Ioannides*, and, in *Swe-den*, a public investigation in 2005 found that EU job-seekers most probably could have the right to equal treatment regarding social benefits provided that they are registered with the employment office and have a real chance to obtain employment. In *Slovakia*, there is no obligation for EU citizens (including job-seekers) to register their residence, but if they do register (and they only need to show a travel document to obtain a registration certificate – see Article 8(1), first indent, above) their residence is considered as a first residence and on this basis it is possible to request social assistance. In *Italy*, the legislative decree implement-ing Directive 2004/38/EC stipulates that EU citizens who entered the country to seek em-ployment are not entitled to social assistance for the first six months of residence unless such assistance is granted under the law. There is a similar rule in *Malta*. In *Lithuania*, because the situation of job-seekers is not regulated, it is difficult to see how they could access cer-tain social security benefits (e.g. maternity and sickness benefits) because of the specific conditions relating to previous employment or contributions. Their lack of an 'official resi-dence' status would also preclude their access to employment support (e.g. counselling, me-diation, active employment measures), although they would be entitled to basic health ser-vices.

In some Member States, EU job-seekers may have access to benefits connected with the employment situation. In *Finland*, EU job-seekers who have studied at degree level can be regarded as having links to the Finnish labour market and may claim a labour market sub-sidy. In *Ireland*, it is theoretically possible for EU job-seekers to access social benefits such as the Job-seeker's Allowance if the conditions for habitual residence are met and the reason for the person coming to Ireland are consistent with a genuine search for employment. In *Latvia*, nationals and EU citizens with the official status of unemployed person or job-seeker are entitled to a study grant and reimbursement of travel expenses during attendance at voca-tional training provided by the State Employment Agency for the purposes of retraining.

OTHER ISSUES OF CONCERN

Delays concerning the issue of residence certificates and residence cards for EU citizens and their family members continue to be serious problem in *Cyprus*, where the waiting-list for appointments to obtain residence certificates went up to one year, and in the *United King-dom*, where the average delay between application and receipt is ten to twelve months.

With regard to refusal of entry and expulsion of EU citizens, as also observed in the 2007 Report, concerns persist in a number of Member States that nationals of the new Member States are being treated less favourably in this regard. While in *France* there is now some recent case law applying Community law principles to the expulsion of Romanian nationals, the rapporteurs note that the figures concerning the voluntary return of Bulgarian and Roma-nian nationals for humanitarian reasons are still integrated into the general expulsion figures. Moreover, the 'voluntary nature' of some of these returns has been questioned by the organi-sation, *Collectif Romeurope*. In *Finland*, the procedural safeguards in the case of expulsion of EU citizens and their family members who have registered their residence or obtained a residence card are considerably stronger than in the case of those who did not, irrespective of the length of time they have spent in the country, in that the criteria in Article 28(1) of Direc-tive 2004/38/EC are applied to the former but not the latter. As documented in previous re-ports, the inclusion in *Hungary* of HIV infection as a disease endangering public health is problematic from the standpoint of Community law. In *Lithuania*, there continue to be no special provisions in the foreigners' legislation regulating the departure of EU citizens, with the exception of the application of different timelines, although there are now draft amend-ments to this law, which would, if adopted, introduce more precise rules on the expulsion of EU citizens in accordance with Directive 2004/38/EC. In the *Netherlands*, 2008 saw a sig-nificant increase in case law concerning declarations of EU nationals as 'undesirable aliens', indicating that many such declarations are not in conformity with Community law. In *Roma-nia*, the implications of the Court of Justice's judgment in C-33/07, *Jipa* concerning national legislation allowing for the imposition of restrictions on the travel of Romanian citizens abroad continue to reverberate in the domestic courts. In the *United Kingdom*, Bulgarian and Romanian nationals who are working in the country are asked to produce evidence at the border that they are lawfully employed which is contrary to Community law. Moreover, unauthorized employment cannot amount to a valid 'public policy' ground for their exclu-sion. The finding also by the H.M. Inspector of Prisons that five per cent of persons detained in UK-administered places of detention in Pas de Calais, France, were Lithuanian nationals raises serious questions in light of the judgment of the Court of Justice in C-215/03, *Oulane*.

In *Belgium*, the limited jurisdiction of the new CEE in respect of the residence of EU citizens and their family members (see the 2007 Report) continues to raise concerns as far the EU non-discrimination principle on the basis of nationality (Article 12 EC) is concerned. In *Italy*, the exclusion of suspensive effect in respect of challenges to expulsion decisions that are effectively based on public security grounds (and not, as stated, on 'imperative grounds of public security') is not in conformity with Directive 2004/38/EC. In *the Nether-lands*, the administrative court which has to decide the lawfulness of the detention (of EU citizens) cannot consider the legality of a decision to withdraw residence and to declare the person as an 'undesirable alien', with the result that continued detention is likely to be con-trary to Community law.

6 See www.workindenmark.dk, accessed on 19 March 2009.
7 Cf. information obtained from an official within the Ministry of Employment by e-mail of 17 June 2008 and http://workindenmark.dk/Contact.aspx, accessed on 19 March 2009.
8 Interview with officers of Department of Labour, 23.2.2009.
9 European Court of Justice of 11 January 2007, case –208/05 ITC Innovative Technology Centre/Federal Agency for Labour.

Chapter II Access to Employment

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT OUTSIDE THE PUBLIC SECTOR

In all countries equal treatment of EU citizens as regards access to employment is guaranteed by general legislation on equality and non-discrimination or specific labour law.

EU citizens and their family members are formally entitled to public employment ser-vices, including assistance of employment agencies. In some countries there are practical problems regarding the registration of EU job-seekers for this assistance (Bulgaria, Latvia, Slovenia). Another obstacle is the sole use of the national language by the employment agency (Cyprus, Latvia).

In *Bulgaria* there is a formal proclamation in labour law that documented job-seekers who are EU citizens or family members have the same rights and obligations as Bulgarian nationals. However, the national law transposing Directive 2004/38 does not envisage a right of residence over 3 months for EU citizens who are documented job-seekers.

In *Denmark* in 2008, the international section of the job centres, provided by EURES was closed down. However, the tasks are now handled in 3 international centres, established on 1 October 2008.6 The purpose of the establishment of these centres is to strengthen and professionalize the recruitment of foreign labour in Denmark. Hence, the centres' core area are focused directly on assisting companies in recruiting workers from abroad and on assist-ing alien workers in their job seeking in Denmark in general. In connection with the estab-lishment of the international centres, a special Polish hotline was established. The hotline provides guidance on job seeking and establishment in Denmark in Polish for Polish job-seekers only.7

An issue of concern is the fact that public employment agencies in *Cyprus* do not provide services in any language other than Greek which may be a barrier to many Union citizens who are non-Greek speakers. Despite assurances that there have been no problems or com-plaints of discrimination by Union citizens exercising the right to free movement of work-ers,8 trade unions claim that the problems on a daily basis as regard the procedures of con-sidering applications continue.

Following the decision of the ECJ9 in the *ITC* case, the *German* Federal Agency has changed its administrative regulations for issuing an employment voucher. Employment vouchers are now also granted for services providing employment offers in EU Member States. The Federal Agency for Labour, however, has emphasised that Union citizens who do not have a permanent residence or ordinary domicile within Germany and who want to take up employment on the German labour market under Sec. 30 Social Code I are not entitled to promotional measures for taking up employment according to the provisions of the Social Code III. According to the view of the Federal Agency for Labour the Court's decision of 11

10 This interpretation of the Federal Agency for Labour is provided in a letter to the author of 1 July 2008.

January 2007 is limited to the inadmissibility of a distinction between a provision of services for employment offers in Germany or an employment offer in other EU Member States.10

The *Dutch* parliament urged the Minister to be alert on the effects of flanking measures designed to secure that the rules on minimum wages for EU 10 workers are maintained and to investigate measures against mala fide employers using workers hired out by temporary work agencies. See also Chapter VIII.

In *Latvia*, EU and EEA citizens are formally entitled to any employment assistance and vocational training on equal basis without having a registration certificate, but in practice the State Employment Agency requires a registration certificate. Also insufficient knowledge of the Latvian language may

create obstacles, since all services and support is provided in Lat-vian only and it is almost impossible to get employment in Latvia without knowledge of the official language.

The *Lithuanian* report emphasizes the active role of the EURES network in providing employment assistance in Lithuania and the rest of the EU.

The 2007 report on *Slovenia* has drawn attention to the inconsistency between the provi-sions of the Aliens Act and the Employment and Work of Aliens Act regarding the kind of permit provided for as a condition on the basis of which the unemployed EU, EEA and Swiss federation citizens may record in the register of unemployed persons in Slovenia. According to unofficial information, this inconsistency is supposed to be abolished by the amendments to the Employment and Work of Aliens Act.

The *Swedish* report indicates that the most important restrictions for access to employ-ment – in the private as well as in the public sector – are the rules making access dependent on authorisation and/or the possession of a certain diploma, showing that the applicant has the necessary professional qualifications

2. LANGUAGE REQUIREMENTS

There are no explicit statutory language requirements for private employment in Austria, Belgium, Denmark, Finland, Greece, Ireland, Italy, Malta, The Netherlands, Portugal, Swe-den and the UK.

In practice, for most white collar jobs applicants will be required to have a good knowl-edge of language of the country they seek work. Language requirements are sometimes 'hid-den' in recognition of diplomas legislation. For several regulated professions a formal or a practical language requirement exists. In some states, as for instance Cyprus, Estonia, Latvia, Lithuania, Luxembourg and Slovakia, language requirements represent still a serious obsta-cle for EU migrant workers.

In *Bulgaria*, the Law on Health provides that the Ministry of Health and the high schools should provide EU citizens (whose medical professional qualification has been recognized) with conditions for acquiring the necessary language knowledge and professional terminol-ogy in Bulgarian 'when this is in their interest and in the interest of their patients'. In com-parison, the same provision stipulates that third country nationals are allowed to practice their medical profession in Bulgaria only after it has been established in accordance with the rules in a Minister's ordinance that they know Bulgarian language and the respective profes-sional terminology in Bulgarian. According to the Attorney's Act, membership in the Bul-garian Bar is allowed after a thorough exam in Bulgarian national law (in Bulgarian). That

possibility for membership of non-Bulgarian citizens is given only to persons who have ac-quired their professional qualification in an EU Member State, but it is conditioned by knowledge of Bulgarian law and language

Knowledge of the *Czech* language is required for some professions (o.a. doctors, dentists and pharmacists), where the language is so important that it constitutes the basic element of the profession.

In *Denmark*, according to a Circular a language requirement is formally a neutral re-quirement. However, in situations where an employer imposes a language requirement which is not reasoned/objectively justifiable, a language requirement may constitute indirect dis-crimination. This will be the case if the requirement to the person's ability to speak or write Danish is disproportionate and without relevance for the maintenance of the job in question.

The report on *Cyprus* mentions language requirements problems for nursing professions, real estate agents, building contractors, insurance brokers.

In July 2008 the *Estonian* government adopted new requirements for employees in order to be able to communicate in Estonian. According to the new rules there are three levels for understanding Estonian language: A, B, C.

In *Luxembourg* most jobs still require candidates to speak several languages fluently, in-cluding Luxembourgish, French, English and/or German.

In some areas there are regulations on language requirements in *Romania*. For example, in the area of credit institutions, if none of the directors holds Romanian nationality, at least one of them must speak Romanian.

New 2008 regulation in *Spain* establishes that

> 'Persons benefiting from the recognition of professional qualifications shall have knowledge of Spanish, or languages other than Spanish which have been declared an official language in the Autonomous Communities, which are necessary for practising the profession in accordance with Spanish legislation'.

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

In *Germany* some Länder have interpreted Directive 2005/36 as authorising language re-quirements for the recognition of professional certificates for instance in regulated medical professions and have therefore included into their laws that in order to receive a certificate a person must prove sufficient knowledge of the German language. Other Länder have abol-ished the language requirement as a requirement for recognition of a professional certificate arguing that under community law language requirements may only be admissible as a con-dition to exercise a professional activity.

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

In *Latvia* there are high levels of language knowledge required for the regulated profes-sions. In 2008 the list of professions has been extended substantially. According to the Lat-vian rapporteur the provisions requiring this language knowledge could be contested from the perspective of the indirect discrimination and principle of proportionality.

In *Lithuania* there is also a legal obligation for employees in some sectors to have suffi-cient knowledge of Lithuanian. This applies in the fields of communications, transport, health care and service provision to residents

The most significant development in 2008 in *Ireland* exists of a liberalisation of the 1929 legislation on Irish language competence for barristers and solicitors.

In order to establish a bank in *Poland*, at least two members of the management board shall prove their knowledge of Polish language. However, it is possible that the Polish Fi-nancial Supervision Authority in the form of decision issued at request of the founders, will depart from this requirement if it is not necessary for prudential supervision, taking into ac-count in particular level of permissible risk or the scope of the activity of bank. Language requirements apply also to some regulated professions (advocates, legal counselors, doctors, dentists, midwives, nurses, veterinary surgeons, medical assistants, and barber-surgeons). There are no distinctions between language requirements in the private sector in comparison with public sector.

The *Slovak* report indicates that some difficulties regarding the language requirement in employment relations may arise from the fact that all written legal acts in employment rela-tions have to be in Slovak. A 2009 amendment to the National Language Act stressing strongly the need to use Slovak language may also affect the issues of free movement of workers according to the Slovak rapporteur.

3. CONCLUSIONS

Formal equal treatment is afforded for EU citizens in all Member States, including assistance of employment agencies, but there are practical problems in some Member States (i.e. Bul-garia, Latvia, Slovakia) concerning the registration of EU job-seekers for this assistance. Moreover, in some Member States, employment agencies only use the national language.

On the subject of language requirements for private employment, in a number of Mem-ber States there are no explicit language requirements, but in practice language knowledge is needed. Language requirements are also hidden in the regulations on recognition of diplomas in some Member States.

Chapter III Equality of Treatment

Over the period 2008/09 most Member States have suffered turmoil in their financial mar-kets resulting in concerns about job losses and economic retrenchment, as we discuss in the general introduction to this report. In some Member States by mid 2009, economies had contracted by significant amounts. Equal treatment for nationals of one Member State work-ing in another is a core entitlement of the fundamental freedom of workers. In times of eco-nomic contraction special attention needs to be paid to the delivery of equality in the market place as such periods are ones where a temptation to discriminate against non nationals often manifests. 2008 was also the final year of the transitional arrangements for nationals of EU 8 countries leaving aside the exceptional possibility of a further two year exclusion from la-bour market access for these nationals. Three Member States used the exceptional provision to extend existing transitional arrangements – Austria, Germany and the UK (though the later had already opened its labour market to EU 8 nationals so the restriction is limited to a continuation of the worker registration scheme). According to the rapporteurs the situation in 2008 appeared as follows:

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Rapporteurs in a number of Member States indicated that discrimination against EU national workers had not been an issue in their state over the reporting period. Specifically, *Austria, Cyprus*, *Germany* and *Latvia.* In *the Netherlands* and *Slovenia* no change from 2007 was reported.

In a number of Member States there is a formal prohibition on discrimination against EU nationals though this is not universally the case. Member States with no such a prohibition include *Estonia, Poland* and *Sweden*. States with a prohibition include *Hungary*, *Portugal, Romania* and *Spain*. As mentioned in the Swedish report, where there is no express provision in national law, the direct effect of Regulation 1612/68 in this regard is particularly impor-tant.

Discrimination on the basis of nationality in social benefits arose in a number of reports. While there is a separate chapter on the issue of social and tax advantages in this report, it is worth mentioning here that changes to the *Czech Republic's* health care system is creating discrimination against family members of Czech nationals in comparison with those of EU nationals. In *Finland* the two tier system of benefits with a two year contribution period is often harder for EU workers to fulfil than Finnish ones. In *Italy*, the removal of EU nationals from the immigration law has resulted in the loss of health care entitlements for the EU eco-nomically inactive.

In three Member States, discrimination on the basis of ethnic origin has been an issue for EU nationals. In *Denmark* formal discrimination against EU nationals on the basis of nation-ality does not appear to be a problem. Discrimination on the basis of ethnic origin is more problematic and has given rise to judicial consideration. A new Committee on Equal Treat-ment has been established. In *France* the anti-discrimination authority criticized a nationality requirement regarding transport workers. *Ireland* has had a number of tribunal decisions on ethnic discrimination in respect of EU workers. On a similar point, in *Belgium* the cap on

access to higher education for EU nationals (30%) and an obligation in some areas to learn Flemish for access to housing do not appear to be consistent with the equality right.

A number of Member States rapporteurs have noted problems in practice for EU work-ers. This is particularly the case, according to the reports, in *Finland, Ireland* and *the UK*.

In *Lithuania* there is equality now for EU workers in access to trade unions while in *Lux-embourg* dual nationality is now permitted.

In the *Czech Republic* the risk of reverse discrimination against Czech nationals as re-gards family reunification with third country national family members has led to many dis-cussions and also activities which are aimed at improvement of the position of Czech nation-als to family life with third country national family members..

2-3. SOCIAL AND TAX ADVANTAGES AND OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

Increasingly in the area of social and tax advantages, the issues regarding social advantages have become clearer (though not always resolved) over the past few years while the issue of tax advantages has emerged as a source of friction. One of the consequences of increased cross border mobility, particularly for those EU nationals who live in one Member State but carry out economic activities in another Member State, is that differential tax treatment by their Member State of residence and economic activity is resulting in disadvantage (as well as advantage in some cases). The complexity of Member State tax arrangements has started to have a real impact on migrant EU workers. The increasing number of issues in this area which have come before the ECJ recently is further testimony of this change. Further details on the impact of recent ECJ judgments in the tax field can be found in the chapter on the ECJ decision. In this part of the synthesis report we will deal with the general issues.

No problems were reported either as regards social or tax advantages in *Austria, Bul-garia, Estonia, Portugal* and *Romania*. Changes in the law were signalled in a number of countries where national legislation has been brought better into line with EU obligations. These include the *Czech Republic* where rules permitting anyone who pays tax to claim de-ductions for children and spouses are applied; *Denmark* where EU nationals (frontier work-ers) are now permitted access to integration programmes (previously reserved for third coun-try nationals – with reference to Art. 7(2) Regulation 1612/68 it is stated that the expenses for these courses will be covered); *Hungary* where the law has been changed to permit EU nationals access to social benefits; *Ireland* where national guidance now makes it clear that EU workers are eligible for social benefits without the application of a 'habitual residence' test. In *Spain* a measure is under discussion to extend maternity grants but problems will still arise as regards discretion against EU nationals. In *Sweden,* in 2008 tax relief on insurance payments made to insurers in other Member States were approved by the *Riksdag* while in the *UK* a change to tax legislation will place EU nationals on a more equal basis with British citizens.

The courts of a number of Member States have handed down decisions which correctly implement Article 7(2) of the regulation. For instance in *Belgium* a court held that discrimi-nation on the basis of ethnic origin in employment is contrary to EU law. In *Italy* the oppo-site has happened - a tribunal upheld a housing requirement which legal authorities have criticised as contrary to EU law. In *Latvia* the ombudsman has been engaged in a complaint by a German national whose invitation to a Russian to come for a visit was not accepted for

the issue of a visa. In the *Netherlands* the Equal Treatment Commission found indirect discrimination against EU 8 nationals in wages.

Continuing problems in social advantages were signalled in the following Member States: in *Denmark* long residence requirements for access to social benefits; in *Finland* dif-ferential treatment of EU 8 posted workers; in *France* legislation on social benefits still re-quires the production of residence documents; in *Germany* frontier workers are disadvan-taged (see below); in *Italy* long residence requirements (ten years) have been added to eligi-bility to social benefits and EU nationals are excluded, or subject to lengthy residence re-quirements, from a number of social benefits such as a social card and access to public hous-ing in a number of regions. In *Latvia* access to social benefits is dependent on possession of a personal code and permanent residence in the country. Our rapporteur doubts that the ad-ministration applies article 7(2) of 1612/68 directly instead of the national rules. In *Luxem-bourg* there are continuing problems with reimbursement of medical cost incurred in other Member States; in *Slovakia* some social benefits are subject to a permanent residence permit and family benefits are limited to family members resident in Slovakia with the worke; in *Slovenia* however, there is access to non-contributory social benefits without permanent residence. In the *UK* a number of studies have indicated serious problems with access to social benefits and housing in particular for EU 8 nationals.

In *Greece* there is direct discrimination against nationals of other Member States regard-ing special pensions and access to free medical care for persons over 68 years. A residence requirement for maternity benefits was held by a Greek court to constitute indirect discrimi-nation against EU nationals

As regards tax advantages, there is a more disparate overview. In *Cyprus* and *Poland* tax liability is on the basis of residence but in the later losses generated outside the country by individuals generating income in *Poland* but not resident there cannot be offset. In *Finland* there is a differentiation between workers who work more than six months and those who work less in the country. There tax treatment is different privileging those working short permits. Mortgage tax relief on foreign property is permitted but car taxes are still a problem as regards compliance with EU obligations. In *Greece* a tax provision on exemption in re-spect of transfer of real property in specified circumstances which is subject to a residence requirement applies but our rapporteur considers this proportionate. In *Hungary* deductible expense for tax purposes are an issue in that voluntary contributions to funds formed abroad do not give rise to relief (while such payments to Hungarian formed funds do). There are also problems regarding tax liability in Hungary of Hungarians working in other Member States. In *Italy* an obligation on persons not resident in the country to notify the authorities of various fiscal acts has brought action by the Commission. In *Lithuania* everyone now has to pay tax on Lithuanian arising income, while EU nationals must pay VAT as soon as they commence economic activities in the country, Lithuanians only must do so when they sur-pass a turnover threshold. In general the administrative burdens in tax matters are substantial. In *Poland*, however, where 75% of a couple's income is arising in the country they are deemed tax resident. In *Slovenia*, on the other hand, if 90% of taxable income is Slovenian arising for a non resident the individual can claim deductions and allowances.

Other issues which were signalled in the reports under this heading include: problems re-garding recognition of diplomas in *France.* In *Greece* and *Luxembourg* a nationality re-quirement still applies to notaries. In *Hungary* rules on placement agencies are not obviously compatible with EU law. In *Italy* the census on travellers' camps has caused concern as re-

gards discrimination against one group of residents on the basis of ethnicity. In *Malta* the derogation regarding acquisition of immovable property causes frustration among some EU nationals while in *Cyprus* it is the lack of access to property as a result of the division caused by the Green Line which is problematic. In the *Netherlands* a financial scheme to assist mi-grants to return to their country of origin is not open to EU nationals. However, a new Swedish identity card for persons registered in Sweden should be available from June 1, 2009.

The part above is not correct. It is true, that the company Swedish Cashier Service was closed down, and as a result stopped issuing identity cards. Other issuers (i.e. banks, major employers etc.) were however still on the market. For EU nationals, passports or national identity cards were accepted for identification purposes when opening bank accounts or receiving registered mail. For nationals of other countries, passports could be accepted. Refugees without national identification documents from their country of origin, however experienced the problems mentioned above.

4.1. Frontier workers

As is evident from the information on the application of article 7(2) Regulation 1612/68 re-garding tax advantages, the issues which are arising and the cases which are coming before the ECJ revolve around EU nationals whose economic activities and residence are in differ-ent states. While frontier workers form a major part of such individuals they do not cover the totality (for instance not all persons living in cross border situations are workers). The infor-mation which we have regarding frontier workers tends to be partial. Issues which may ap-pear important in one Member State do not figure in another – for example the new tax agreement between France and Belgium which gains prominence through the publicity ac-tivities of actors in Belgian but primarily in France where no actors appear to be promoting knowledge of the agreement. Further, it is increasingly difficult to capture information about frontier workers as the traditional figure of the frontier worker – an individual who moves back and forth across borders which have geographical proximity – is challenged by alterna-tive realities for frontier workers – for instance individuals who live and work in Member States with little geographical proximity. The new Dutch/UK taxation agreement evidences pressures to regulate this rather less traditional group of frontier workers between these two states. Once again, prominence to the agreement appears in the Netherlands while in the UK there appears to be little attention to it.

In a number of Member States no issues regarding frontier workers were reported. These include *Austria* (though when the transitional arrangements on movement of workers are eventually lifted in 2011 there is likely to be more attention to this); *Bulgaria* (though there are questions about the numbers of such workers in Greece); *Cyprus* (though here the Green Line problem arises again).

There are no special arrangements regarding frontier workers in the *Czech Republic*, *Es-tonia, Malta, Romania* and *Slovenia*.

In *Denmark* there is a marginal rise in frontier workers as some EU nationals move to Sweden to live but continue to work in Copenhagen and surrounds. The tax regime for such workers permits them to choose to seek tax relief in Denmark if 75% of their income arises there. In *Sweden,* the country of residence of many Danish frontier workers it is noted that the two countries are in discussions regarding the diminution of tax revenues in the most affected parts of the country. Child care allowances are the responsibility of local authorities but the state authorities are seeking to ensure that Hartmann type issues do not arise. Simi-larly, in *France* the taxation of and access to benefits for frontier workers (with Belgium) has been the subject of a new agreement. Similarly, in *The Netherlands* a new tax agreement

with the UK is signalled as valuable for frontier workers. A government report on *frontier workers* between Germany, Belgium and the Netherlands has suggested a variety of recom-mendations to resolve outstanding problems in tax, insurance and benefits. See for an overiew of these problems: http://www.euresemr.org/index.php?option=com_docman&task= cat_view&gid=73&Itemid=34.

Changes in health insurance have resulted in substantial increases in costs for frontier workers living in the Netherlands.

In *Germany* also the tax treatment of frontier workers has been an issue. In this case, however, it came before the courts in the form of a claim to deduction of illness insurance and the scope of coverage of insurance in respect of a fund based in another Member State. The claim was rejected by the court.

In *Finland,* attention is given to the developed mechanisms for the treatment of frontier workers across the Nordic area which permits the regulation of access to social benefits as well as tax treatment (in tandem with Regulation 1612/68).

In *Greece* the question of the treatment of frontier workers from Bulgaria has arisen pri-marily as regards concerns regarding access to social benefits however no specific action or measure has been taken. Similarly, in *Hungary*, frontier workers have been considered in the context of access to social benefits. The approach which has been adopted is to provide fairly complete access to social benefits to frontier workers in particularly regarding family bene-fits. In *Italy* frontier workers have access to a one off maternity benefit. In *Ireland* as well access to social benefits has been an issue. It appears that which the habitual residence test would exclude frontier workers from access to benefits, officials have assured the rapporteur that in practice they do not apply the test to such workers. The *UK/Irish* border is the source of most state activity on frontier workers. A cross border agency has been established to seek to ensure the correct application of social benefits entitlements. However, the *UK/Spanish* frontier workers continue to be an issue for the UK authorities as their treatment for social security purposes is less advantageous than that of residents in Gibraltar.

In *Latvia* it seems likely that the national measures on frontier workers do not comply with the ECJ's judgments in *Hartmann* and *Geven*, while in *Lithuania* as benefits are allo-cated on the basis of country of work no problem is anticipated. But in *Poland* as child rais-ing allowances are allocated on the basis of residence there is likely to be an inconsistency with the *Hartmann* decision of the ECJ. In *Slovakia* a similar situation arises as frontier workers are not eligible for social benefits as they do not have permanent residence in the country. In *Spain* no *Hartmann* type of problems are foreseen.

The large percentage of frontier workers in *Luxembourg* (42.3% of the labour force) makes this country particularly interesting in this regard. Once again, it is delays in benefits payments that seem to be causing difficulties.

Car tax has been an issue for frontier workers in *Portugal*. There has been a change to the regulation which now exempts from the tax cars temporarily entering the country.

4.2. Sportsmen and -women

For the 2008 period, the rapporteurs produced special reports on various sports and the com-patibility of their organisation with EU law. These reports are the subject of a separate analy-sis which the Commission has undertaken. In this section, we analyse the information on sport which the rapporteurs included in their national reports.

The reports fall within two main categories – those where no general or specific problem as regards discrimination against sportsmen and women with the nationality of another Member State has been identified and those where problems are either evident or suspected. Almost without exception, problem areas are around quotas and inscription – which can be either direct or indirect forms of discrimination.

Member States where *no problems* were identified include: *Belgium* where football rules do not appear to discriminate against EU nationals, the rules are those established by the private organisations which regulate sports; the *Czech Republic*, *Estonia, Ireland*. In *Hun-gary* changes to the sports regimes have ended a number of discriminatory practices. In *Germany* it is not clear whether there are problems or not as untangling the complexity of the legal regimes applicable to different sports is not yet complete. In *Sweden* there are no quo-tas though there are preferences for home trained young players. In the *UK* no quotas were uncovered.

Member States where there are *problems* include: *Austria* where the Austrian system ap-plicable to football cause some concern as access to subsidies is dependent on the nationality of team members of clubs. An Austrian court has held that the basketball rules offend EU law as regards nationality discrimination. However, volleyball and handball present no prob-lems. Ice-hockey is regulated by a new set of rules which seem compliant with EU law. In *Bulgaria* there appears to be discrimination in the rules of volleyball, basketball, handball and ice-hockey. With regard to membership fee, a problem has arisen with the FIBA (Inter-national Basketball Association), which treats every sportsperson with a non-Bulgarian pass-port as a foreigner, regardless of his/her EU citizenship. In *Cyprus* it is the rules on young players which privilege nationals over other EU citizens. In general in *Denmark* there do not appear to be problems but a levy on transfers of football players may be problematic, as is a residence requirement in volleyball. The highest Danish football league is covered by home-grown players regulation. A quota is under consideration in handball while there is already a transfer fee arrangement in place. In ice-hockey there are both nationality quotas and transfer fees applicable. In *Finland* the matter is complicated by the fact that many sports are regu-lated by unwritten rules. However, where there are written rules there are nationality quotas in volleyball. In *France* there is appending preliminary reference to the ECJ on the treatment of football players.

In *Greece* there is discrimination in the form of nationality quotas in basketball while the new football rules appear to discriminate against non national coaches. In *Italy* basketball rules privilege nationals in the training of young players. In water-polo, handball and rugby there are rules which act as obstacles to non national players. *Latvia* and *Lithuania* both have nationality quotas in ice-hockey and transfer payments. In *Malta* while there has been a clari-fication of water-polo transfer fees, There are nationality quotas in handball, basketball and volleyball. In *Poland* nationality quotas apply in ice-hockey and women's basketball. Simi-larly, in *Portugal* both nationality quotas apply in volleyball, football (though here the re-striction is to locally trained players) and a difference between registration and transfer fees of 4000% (which was condemned by the national ombudsman). In *Slovakia* nationality quo-tas apply in ice-hockey. In the formal rules the number of foreigners is limited to 2 per game. However, the governing body of a particular competition (league) may allow a higher num-ber of foreigners playing in one game. In the major league, the governing body decided to allow 20 foreigners in a game. In volleyball some leagues ask for extra fees for foreigners who exceed certain quotas. In *Spain* there are nationality quotas in handball and basketball and in football Bulgarian and Romanian players are counted as non EU foreigners.

In the *Netherlands* the sporting authorities, through the government, in a number of sports are seeking changes to the rules to apply nationality quotas. In field hockey there is a gentlemen's agreement to limit non national players to three.

4.3. The maritime sector

The key issue in the maritime sector identified this year was the application of nationality requirements to seamen on flag bearing ships. Quite a diverse picture emerges between those states where there are such quotas and those where there are not.

Nationality requirements exist in the following states: *Estonia, Finland* and *Hungary* for ships' captains; in *Greece*, *Italy* and *Spain* the posts of master and chief mate are reserved for nationals. Further in *Spain* rebates of harbour fees on the basis of nationality has been at-tacked by the Commission as discriminatory.

No unlawful nationality requirements apply in *Bulgaria*, the *Czech Republic*, *France, Germany* where the law has been changed to achieve this end. There are no problems in the sector in *Cyprus, Malta, the Netherlands, Poland, Portugal, Slovenia* and *Sweden* . In *Latvia* there are no restrictions nor in *Lithuania* but here a language requirement applies to at least one of the captain's assistants. Also, in the later state, a change to the taxation of sailors' income now creates discrimination based on the sailor's circumstances. In *Slovakia* while a provision states that the crew of ships in the national register is usually composed of Slovak citizens there is no restriction on membership to Slovaks.

In *Ireland* the re-flagging of a main ferry company to the Bahamas to avoid EU and na-tional regulation caused turbulence. There has been a diminution of wages and a worsening of working conditions following the change. In *Sweden* contracting requirements regarding collective agreements may constitute an obstacle to other EU nationals seeking to participate in the sector. In the *UK* the problem is the non-application of minimum wage rules in the sector.

4.4. Researchers and artists

The problems around the treatment of researchers and artists often come in the category of tax and benefit arrangements. Because these workers tend to work for short periods in Mem-ber States – often only a matter of days – withholding taxes on their income arising causes particular problems. Reclaiming withheld taxes can be difficult and offsetting withheld taxes against tax obligations in the country of residence may be complicated or impossible.

In the following Member States no problems were signalled as regards these two sectors: *Austria, Belgium, Bulgaria, Czech Republic, Greece, Hungary, Latvia, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia*. In *France* a new regulation has been adopted to bring the law on researchers and artists into conformity with EU requirements. Similarly, in The Netherlands withholding tax on artists has been abolished. In *Germany*, regarding re-searchers and artists, the debate is about withholding tax. The German courts, following the ECJ, have upheld claims by artists against rejection of deductions for expenses. The Federal Ministry of Finance considers the law consistent with the ECJ's jurisprudence and forwards the decisions to the local offices to be applied.

relating to the activities. The artists union is not aware of discrimination problems against EU nationals. In the *UK* changes to the taxation of non-residents is likely to improve the position of artists and researchers.

No information was available on the sector in *Cyprus*. In *Denmark* as a main rule re-searchers must work at least 10-12 hours a week to qualify as Article 39 workers but all con-tracts are examined on a case by case basis. Tax incentives for foreign researchers to work in Denmark exist though the rules are complex and require, for instance no involvement in management for the preceding five years. There are three main options in respect of re-searchers: first, they are workers employed by Finnish institutions, secondly they are post workers of a foreign institution and thirdly they are students with grants. How the researcher is categorised has consequences of his or her access to social benefits. In *Lithuania* the taxa-tion of artists has been changed and while the rate is relatively low (15%) the rules may give rise to an obstacle. In *Spain* the failure to transpose the self employed provisions of Directive 2004/38 causes problems for artists and researchers.

4.5. Study grants

Access to study grants has been the subject of some judicial consideration over the past few years. The ECJ's decision in *Bidar* opened the door to the possibility that EU national stu-dents could obtain study grants after three years residence if they were integrated into the Member State; the limitation on access to study grants to EU nationals who have resided for five years in a host Member State in Directive 2004/38 found favour with the ECJ in its deci-sion in *Förster*. However, where workers go back to studies and seek study grants, whether or not they have lived and worked in a Member State for one three or five years, Article 7(3) Regulation 1612/68 may come into play as well. For the children of EU migration workers, whether they are still working or not in the host Member State Article 12 Regulation 1612/68 requires the children's admission to studies under the same conditions as nationals. Thus the way Member States permit access to study grants is of importance to migrant workers and their family members.

No problems were signalled in the following Member States: *Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France* (where it is clear that the difference between the categories to which the five year requirement can be applied and those where it cannot, is respected), *Germany, Hungary, Ireland, Lithuania, Malta, Sweden,* and *the UK*. In *Slovenia* the law was changed to permit EU nationals access to study grants but they are not permitted aid for student accommodation. A new study grant programme was announced in *Spain* but it is not yet clear if it is limited to Spanish nationals or not.

The following problem areas were identified: in *Denmark, Greece* (where the limitation has been challenged by the ombudsman)*, the Netherlands and Slovakia* study grants are only available after five years residence. In *Luxembourg* study grants are available only to those domiciled in the country. In *Poland* there is more favourable access to study grants for peo-ple with Polish ancestry.

5. CONCLUSIONS

There is quite a varied picture of issues related to working conditions. In more than one Member State problems in this field are dealt with on the basis of race discrimination rather than nationality discrimination even as regards EU nationals. Tax treatment of EU nationals presents something of a challenge – it seems that quite a number of Member States have yet to address the issue of deductions from income where those deductions related to expendi-ture in other Member States. Access to social benefits continues to be contentious in a num-ber of Member States.

The treatment of frontier workers reveals quite a varied picture. Many Member States with long borders and centres of population density along them indicate no difficulties while others have substantial issues. Access to social benefits and tax treatment are among the most consistent of problems for this group of workers. The rules of sports are very varied across the Member States with plenty of examples of questionable quotas restricting access for Union citizens and transfer fees constituting obstacles. A substantial number of Member States still have nationality requirements in place for captains of ships registered in their state though there has been some progress on this issue. Researchers and artists seem to have the most difficulties in tax treatment while most Member States have brought their rules on access to study grants into conformity with the directive and the European Court of Justice jurisprudence though there are some which continue only to provide study grants to EU na-tionals with permanent residence avoiding their obligations to workers and the children of workers.

In all the fields considered in this chapter there have been positive moves by at least one if not more Member State to bring its legislation and practice into line with EU obligations and the ECJ jurisprudence. It is hoped that this trend will intensify in 2009/10.

11 Official report SOU 2005:34 Socialtjänsten och den fria rörligheten, p. 57.

Chapter IV Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68

The problem of this relationship is best shown in the judgment of the ECJ in the *Hendrix* case (C-287/05). The ECJ stated that Article 39 EC and Article 7 of Regulation 1612/68 must be interpreted as not precluding national legislation, meaning that a special non-contributory benefit listed in Annex IIa to Regulation No 1408/71 may be granted only to persons who are resident in the national territory. However, implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. This case show that residence clauses for social benefits are probably only allowed under strict circumstances. See for a follow up of the *Hendrix* judgment in the Member States Chapter VII.

Some reports give a classification of the benefits which fall within the scope of Regula-tion 1408/71 and which fall within the scope of Regulation 1612/68. On the relation between both Regulations (and Article 39 EC) there is not much specific information.

Regarding classification the *Spanish* report mentions the problem that it is not always clear when a benefit falls under the scope of 1408/71. The *Finnish* Government argues, con-trary to the Commission, that the disabled children's benefit, paid to parents of a disabled child under 16 years, is a special benefit that can be restricted to those residing in Finland. According to the Commission this benefit is a family benefit within the meaning of the Regulation 1408/71 and should thus be exportable.

In *Sweden* a social benefit that is not covered by Regulation 1408/71 and residence should be granted to a worker referring to Regulation 1612/68, article 7.2, and the principle of equal treatment, even if the worker is not settled in Sweden (for instance if he or she is a frontier worker working in Sweden but living in another Member State).[11]

In the *Czech Republic* the system works the other way around. If an EU citizen is not en-titled to the social benefits pursuant to Regulation 1612/68, he/she is entitled to the social benefits pursuant to Regulation 1408/71. If Regulation 1408/71 is not applicable, then na-tional laws apply. The laws then usually use the condition of residence in the Czech Repub-lic. (e.g. three month stay for granting of

the assistance in need allowances or social security allowances) and the test of unjustifiable burden on social system is done.

In *Ireland*, the government has made a clear distinction between payments caught by the Regulation 1408/71 regime, which (with certain exceptions) are payable by the Member State of employment and social welfare payments which are caught by Regulation 1612/68, so that the habitual residence condition cannot apply to frontier workers and others benefit-ing from the free movement provisions.

In the *UK* the right to reside test continues to give rise to legal challenges concerning who may rely on Article 7 of Regulation 1612/68; whether the residence test can be objec-tively justified and is proportionate to the objective pursued, and whether it goes further than what is required to achieve a legitimate objective pursued by national legislation seen in the light of the ECJ judgment in the *Hendrix* case (C-287/05)

12 This is the text of Act I of 2007 (FreeA).

For the *Dutch* follow up of the ECJ judgment in the *Hendrix* case (C-287/05) see Chapter VII. Here it is worthwhile mentioning that in July 2008 the Dutch Central Appeals Tribunal used the 'disproportionality reasoning' from the *Hendrix* case to justify the entitlement to a Social Assistance Benefit to two British citizens, residing in The Netherlands during the period they would visit a rehabilitation clinic in Scotland. Withdrawal of the benefit because of the residence clause of the Social Assistance Act during this period was seen as an unjus-tified obstacle to the free movement of services.

The Slovenian report emphasizes that its social benefits legislation is in conformity with the *Hendrix* judgment.

In *Hungary,* in various social benefits legislation in 2008 references to Regulation 1612/68 have been deleted and the wording has been changed to 'persons being entitled to exercise the right to free movement'.[12] This includes not only workers but also self-employed, students and also economically inactive persons if they are residing in Hungary with the aim of a permanent living. It means the extension of rights to every union citizen in the social sphere. This change has influenced the interrelationship between Reg. 1612/68 and Reg. 1408/71 according to the Hungarian report.

An interesting opinion is given by the *Belgian* rapporteurs regarding the follow up of the ECJ judgment in the Flemish care insurance scheme (Case C-212/06). In this case the ECJ did refuse to condemn reverse discrimination but made (in § 40) a strong invitation to the national court to condemn it, using the 'interpretation of provisions of Community law'. But the Belgian Constitutional Court did refuse to do so arguing (in § B16) that this is to be made not by the Court, but by a regional or federal legislation. In consequence, reverse discrimina-tion remains tolerated. The judgment of the Belgian Constitutional Court refusing to make the issue from a strictly internal one to an issue covered by EC law is, strictly speaking, in conformity with the ECJ decision but does not follow the proposition made by the ECJ to the national court to use also for the national question the same interpretation as for the commu-nity question. In consequence, in the view of the rapporteurs of the Belgian report, the (lack of) follow up of this ECJ decision on a purely internal situation confirms that the Advocate General's conclusions to give clear interpretation for the Constitutional court to apply the non discrimination principle as well for a community situation with free movement of work-ers as for a purely internal situation and reverse discrimination should have been followed by the ECJ.

On 1 July 2008 *Lithuania* ratified the agreement with the Government of Estonia con-cerning calculation of the insurance periods acquired in the territory of former Soviet Union. A similar agreement with Latvia was planned for signature in 2008, however the process has not been completed yet.

Chapter V Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

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

During 2008 and the first half of 2009, major changes in the legislation or other rules on the access to positions in the public sector did occur in *Bulgaria, Luxembourg, Poland* and *Por-tugal*. Minor changes are reported in the legislation of certain *German* Länder and in *Spain*. In both cases these changes are related to the transposition of Directive 2005/36/EC. Minor changes also occurred in the relevant guidelines published in 2008 by the government agency responsible for the public service in *Denmark* and *France*.

In some Member States appointment in the civil service is partly of fully reserved for na-tionals but EU nationals may be employed on the basis of a labour contract. The status of those employees is similar to that of civil servants (e.g. in *Denmark, Estonia* and *Lithuania*). This begs the question whether relevant differences remain between employment with and without the civil service status. Employment in the public service in *Lithuania* remains re-stricted to Lithuanian citizens except a few jobs that are available to non-citizens on the basis of a labour contract and without performing any public administrative function.

Basically, Member States use one of two systems with regard to the nationality condi-tion: in the first system all functions in the civil services are reserved for nationals and cer-tain exceptions to that general rule are made for posts; in those exceptional cases EU nation-als are exempted from the requirement or assimilated with nationals; in the second system the general rule is that EU citizens can be appointed in the public service both at the national and local level in all functions except it those functions where the relevant legislation explic-itly requires that the appointed or chosen person is national. The exemption or the explicit requirement may be codified in the special legislation concerning that function or in a list of (all) functions concerned codified in one single instrument incorporated in or annexed to the general law on the civil service. Moreover, in many Member States the nationality require-ment applies for all functions designated as security functions.

Certain Member States, however, do not list the functions that require the nationality, but list the agencies, departments of ministries concerned. This implies that for all functions within such institutions, irrespective of the tasks to be performed, the nationality of the state is required and nationals of other Member States are excluded. This raises questions as to the compatibility with EC law, since in those states, such as *Estonia, Finland, Hungary*, *Poland* and *Slovakia*, the nationality requirement often is not related to the task to be performed by those employed in that part of the public service. In *Estonia* exemptions of the nationality requirement for EU nationals are decided on a case by case basis. In *Hungary* the minister or the head of the department has a wide discretion in granting or refusing to exempt EU na-tionals from the nationality conditions. This implies that EU nationals are not entitled to equal treatment as Hungarian nationals even for jobs where there is no relation with the ex-ercise of public authority or state power whatsoever. Similarly, in *Greece* the 35 presidential decrees that specify the government agencies where only Greek nationals can be appointed also cover posts such as firemen, software specialists and journalists.

Practical problems and *de facto* barriers to access to employment in the public sector are mentioned in several reports: for instance, the nationality requirement in advertisements without mentioning that EU nationals are exempted (*Luxembourg*). In *Denmark* job adver-tisement may not impose a requirement of Danish citizenship in a manner discouraging na-tionals from EAA countries from applying for the position, unless the position is encom-passed by restrictions justified by regard for public order, public security and public health. Other practical problems are mentioned in the reports on *Cyprus*, *Estonia, Hungary* and *Po-land*. In *Luxembourg* the government and the public service trade union reached a compro-mise in March 2009 which will allow a modification of the law enabling a wider access for nationals of other Member States a wider access to employment outside the six areas that were opened some years ago: research, education, health care, transportation, post and public utilities. However, in advertisements of vacancies in those areas Luxembourg nationality is still mentioned as a requirement. In *Poland* the new legislation that came into force, does not change the principle that only Polish nationals can be appointed as civil servants. It allows that on a case by case basis, after consent of the Head of the Civil Service, a post may be opened for EU nationals as well, if it is not related (in)directly to the exercise of public power. The new legislation does not delete the nationality requirement for any post in the national or local public service, it only opens the way to exemptions in individual cases. A national of another Member State who wants to apply for a vacancy may first have to con-vince the competent Polish authorities that the job in question is not covered by the excep-tion of Article 39(4) ECT. By the time that dispute is resolved another person may well be appointed in the vacancy.

In *Romania* there is no discussion on opening up certain functions in the public sector to nationals of other Member States: the civil service is still considered to be 'a territory be-longing to the national sovereignty'.

In *France* and *Italy* a complete reorganization of the status of persons employed in the civil service, including the entry procedures is under way. Such comprehensive revisions of the system may have major consequences for the access of nationals of other Member States to jobs in the public sector in those two Member States.

In the relevant *UK* legislation the exemption of the nationality requirement for EEA na-tionals is extended to Swiss nationals and to Turkish nationals by virtue of the Articles 6 and 7 of Association Council Decision 1/80. All three groups are defined as 'relevant Europeans' for this purpose.

Several national reports provide information on the position of notaries. In many Mem-ber States notaries are self-employed, but in other Member States they are employed in the public service. In 2007 the Commission decided to bring infringement procedures before the Court against seven Member States concerning the nationality requirement for appointment as a notary. The judgment(s) of the Court may be relevant for the application of Article 39(4) as well. The nationality requirement for notaries is referred to in the reports on *Belgium, Latvia, Netherlands, Poland, Slovenia* and *Spain*. An explicit statutory language requirement for notaries is mentioned in the reports on *Estonia, Luxembourg* and the *Netherlands*. In the last country the bill, proposing to delete the nationality requirement and introduce an explicit language requirement was introduced in 2007 but met with strong opposition in the Senate. It was decided to postpone further discussion on the bill until the Court would have decided the pending infringement cases. In *Spain* a test case on the legality of a reorganization of the legislation on notaries was decided by the Supreme Court in 2008, but the judgment did not relate to the nationality requirement in the legislation in force.

1.2. Language requirements

In the legislation of most Member States there is an explicit requirement that a person to be employed in the public sector or to be appointed as a civil servant should have sufficient knowledge of the national language. In some Member States it is explicit required that the applicant speaks and writes the official language of the country, e.g. in *Austria, Estonia, Finland, Latvia* and *Germany*.

In seven Member States, *France, Hungary, Ireland* (with regard to English), *Nether-lands, Poland, Sweden* and the *UK*, an explicit language requirement has not been codified or only for a few special functions. In those states the language requirement is applied in practice or it is implied or indirectly imposed by other rules. In *Hungary* there is a rule pro-viding for additional remuneration for civil servants if they master certain foreign languages besides the Hungarian language and the admission exam for the civil service is conducted in the Hungarian language.

In at least four Member States proof of knowledge of more than one language may be re-quired for appointment in the public service. *Luxembourg* requires knowledge of three lan-guages (Lëtzebuergesch, German and French) and requires applicants for positions in the public service to pass a test of Luxembourg history as well. Two languages are required in *Malta* (Maltese and English), *Finland* (Finnish and Swedish) and for certain teaching jobs in *Ireland*. Interestingly, the Irish report mentions that on the job training in Gaelick (the Irish language) is provided after appointment in the national police and the military. In *Spain* the Supreme Court in 2007 has struck down requirements to speak the regional language in the legislation of certain autonomous communities for appointment in certain public service jobs. Justification for requiring knowledge of more than one language are the necessity to communicate with members of the public (in all four Member States) and constitutional ob-ligation or the government's policy to promote use of the national language (*Ireland* or *Malta*). In *Italy* and *Romania* in certain border regions the knowledge of the language of minority population living in those areas may be required. In *Belgium* no language require-ments are mentioned in the vacancies for public service posts published on the website of Public recruitment office.

In *Sweden* for certain public service jobs the requirement of knowledge of Swedish lan-guage does not apply to person having another Scandinavian language as their mother tongue.

In *Estonia, Finland, Greece* and *Latvia* the language requirements are particularly rigid and developed. Different levels of knowledge of the national language are required for dif-ferent functions. The *Estonian* legislation distinguishes between three different levels of knowledge of the Estonian language. In *Finland* the required level is not related to the tasks to be performed but to the level of education required for the job. In *Lithuania* de facto the same level of knowledge is required for naturalization is required for employment in the public service.

In some Member States a statutory provision on language knowledge was introduced or existing provisions extended in other federal or regional legislation at the occasion of the implementation of Directive 2005/36/EC, e.g. in *Germany* and the *Netherlands*. In *Latvia* in 2008 the required level of knowledge of Latvian for firemen was raised.

In several reports (e.g. the reports on *Latvia* and *Poland*) questions are raised with regard to the proportionality of the statutory language requirements and the lack of justification of the required (level of) knowledge considering the tasks to be performed. In *Cyprus* the Anti-

Discrimination Authority and the Cyprus Equality Body has dealt with several complaints concerning the application of the Greek language requirement both with regard to the level of knowledge required and the language requirement as such. The Commission has issued a reasoned opinion against Greece with regard to the requirement of 'excellent knowledge' of the Greek language for EU nationals qualified as teachers in another Member State.

In the *Polish* report the interesting observation is made that a comparative analysis of the formal entry condition for the regulated professions revealed that in the professions where no nationality requirement applies there is a language requirement for entry in the profession. It may well be that the two requirements de facto are functional alternatives barring access to migrants.

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

Many Member States do not have special legislation on the recognition of professional ex-perience for access to the public sector (*Czech Republic, Finland, Germany, Latvia, Malta, Netherlands, Portugal, Slovenia, Sweden* and the *UK*). The general rules on recognition of diplomas and experience acquired in other Member States apply to jobs both in the private and the public sector.

In *Denmark* and in *France* the recognition of professional experience acquired in other Member States is explicitly referred to in the general circular with instructions on employ-ment in the public service. The reports on *Poland, Portugal* and *Sweden* mention the rele-vance of the national equal treatment legislation as the legal basis for this recognition. *Polish* labor law explicitly allows for the recognitions of qualifications acquired by Polish or for-eign workers abroad to be taken into account for entitlement to extra holiday rights and for additional remuneration. In Portugal the employment of an increasing number of Spanish nationals in the public health sector has been facilitated by a practice of recognition of their qualifications and experience obtained in Spain.

The reports on *Greece, Italy, Luxembourg* and *Spain* reveal case law of national courts applying Community law on this issue. The *Greek* report refers to a 2004 judgment of the State Council. The *Italian* report mentions a 2008 judgment annulling the exclusion of a Spanish national from the competition for the post as teacher of Spanish language on the ground that the professional diploma and the experience had been obtained in Spain. A *Lux-embourg* court reversed the decision of the Minister of the Public Service and held that the full period of professional experience of a Portuguese medical specialist acquired in Portugal (but not the experience in Switzerland) should be taken into account. The Spanish Supreme Court in two judgments refused claims for damages caused by non-recognition of profes-sional qualifications acquired in other Member States caused by the delay of transposition of the relevant EC directives and in a third case illustrated the limited scope of judicial review of decisions on (partial) recognition of foreign qualifications due the sometimes rather tech-nical nature of those decisions.

In two Member States legislation on this issue entered into force in 2008. In *Bulgaria* a provision was enacted allowing for the recognition of professional experience of nationals of other Member States and their family members. In *Italy* the judgment of the ECJ of 26 De-cember 2006 (C-371/04) was implemented providing for the recognition of professional qualifications, even when acquired in a Member State before its accession to the EU.

On the other hand, in *Slovakia* no professional experience is taken into consideration, ei-ther acquired abroad, or in Slovakia and in *Lithuania* and *Romania* this issue has no practical relevance, since the civil service in those countries is restricted to nationals of those coun-tries.

In *Estonia* several government bodies are competent to deal with request for the recogni-tion of foreign qualifications. In *France* several decrees have been adopted in 2008 specify-ing the conditions for recognition of qualification obtained in other EU Member States for jobs in public health institutions and for technical or specialist jobs in the military. A *Ger-man* administrative court has ruled on the incompatibility of the statutory requirement of having obtained the first German state exam for certain posts in the judiciary. In *Sweden* an official report on the access to teaching jobs proposed to that rules on the recognition of for-eign qualifications applying both to the private and the public sector should be introduced in the new legislation.

1.4. Other issues concerning access to posts in the public sector

The *Hungarian* government has announced the introduction of a system of entry exams for access to the public service similar to the system of the concours applied in France and other Member States.

The *UK* report mentions that the system of public service recruitment is open to criticism for the lack of published requirements as regards the recognition of qualifications and ex-perience. However, there is the possibility of redress if it is thought that a refusal of recogni-tion amounts to unjustified indirect nationality discrimination under the 1976 Race Relations Act. The relevant provision of that Act applies to non-exempt jobs in the public service.

2. WORKING CONDITIONS

2.1. Recognition of professional experience for determining working conditions

In several Member States no change of legislation or practice in 2008 and the first half of 2009 was reported. In some Member States, such as *Lithuania* and *Romania*, this issue is not relevant, since *de iure* or *de facto* only nationals have access to employment in the public service. In *Finland, Hungary, Netherlands* and *Slovakia* there are no specific rules on the working conditions of non-nationals employed in the public sector. In the reports on *Cyprus, Germany, Netherlands* and the *UK* the relevance of the national equal treatment legislation that also covers the position of non-nationals employed in the public sector is mentioned. In *Denmark* and *Sweden* the working conditions of persons employed in the public sector are to a large extent determined by collective labor agreements that apply both to national and to foreign workers. According to the reports on *Bulgaria* and *Cyprus* the national legislation is in conformity with Community law, but it is questioned whether this applies to the actual application of the legislation as well. In *Slovenia* all public authorities are instructed by a circular of the Minister of Public Administration that the length of service and professional experience acquired in other Member States should be taken into account in decisions on professional advantages, such as supplementary payment for years of service and the length

of the annual leave. In the *Czech Republic* qualifications and experience acquired in another Member State may be taken into account.

In some Member States the scope of the equal treatment is severely restricted. In *Latvia* and *Malta* only employment in the national public service is considered relevant when calcu-lating seniority. In *Denmark*, this applies regarding grade (a single reward for loyalty with the same employer) but not regarding level of payment. In *Ireland* experience in other Mem-ber States is only taken into account for the level of payment, not for seniority, whilst only previous employment in the public service not private employment is considered relevant. In *Italy* an Act adopted in 2008 explicitly provides for the consideration of professional experi-ence in the public sector in other EU states or in EU institutions whilst deciding on seniority of the worker.

In the public service in *Malta* there is a common practice of making promotion to a higher salary scale or grade conditional on the attainment of a certain length of service in a particular grade, which may be incompatible with the case law of the ECJ in *Schoning* and in *Kobler*.

The report on *France* mentions two decrees adopted on the grading of civil servants in a range of public service jobs. Both decrees provide for the experience acquired in other EU/EEA states to be taken into account. However, the decree on the grading of high teaching jobs in university hospitals provides that only half of the foreign experience up to12 years and only one quarter of the experience of more than 12 years will be taken into account.

After recent amendments the *Austrian* legislation explicitly provides for the recognition of professional experience acquired in other Member States, in Switzerland and in EU insti-tutions for the level of the salary. The position of Turkish nationals under this law still is unclear. The Administrative Court in 2008 made an new reference to the ECJ on the statu-tory limitation of the recognition of non-Austrian university professors.

2.2. Other aspects of working conditions

The report on *Cyprus* mentions various administrative and bureaucratic barriers to access to equal treatment and social benefits for those employed in jobs in the public service. In *Hun-gary* the planned general reform of the system of recruitment for the public service is post-poned and the political climate is not favorable for opening the public service or improving the working conditions for non-national workers. In *Lithuania* there is a clear difference in working conditions of civil servants and those employed in public sector jobs on the basis of a labor contract. The remuneration of civil servants, generally, is higher and they are entitled to longer holidays.

Chapter VI Members of a Worker's Family

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

Although not specifically requested, a number of national reports include interesting infor-mation on the definition of family member in Article 2(2) and Article 3(2) of Directive 2004/38/EC. On the basis of the information provided, the following issues merit separate consideration: the position of registered partners and *de facto* partners, the obligation to fa-cilitate entry and residence of the family members listed in Article 3(2) in those Member States and the issue of reverse discrimination. But first, the following observations made by the national rapporteurs on the definition of family members deserve to be mentioned.

In *Bulgaria* a partner's direct descendants and direct ascendants are not included as family members, where partners are included as beneficiaries of the free movement rules.

A proposal to abolish the current restriction of the right to be accompanied by family members that applies to students under *Finnish* law is pending.

In *Latvia, Lithuania* only the family members listed in Article 2(2) of Direc-tive 2004/38/EC benefit from Community free movement rights. Comment: this is not correct since in Sweden a cohabiting partner of the EU citizen is equated with the spouse. The situation in *Portugal* is the same, but there *de facto* partners are included as a family member of an EU citizen.

The *Slovenian* rapporteur mentions that a child has to be unmarried to benefit from Di-rective 2004/38/EC and that registered partners do not benefit from free movement rights in that Member State.

Registered partnership and de facto partners

Registered partners benefit from the rights in Directive 2004/38/EC in some, but not all Member States. Various rapporteurs report problems concerning partners.

In *Bulgaria* it is unclear what the difference is between registered partners (Article 2(2)) and de facto partners (Article 3(2)), but this should change when a legislative act, currently pending, will amend Family law in the sense that both registered and non-registered partner-ships are recognised. Partners, include same sex relationships in *Cyprus*. Partners who co-habit continuously in an adequately documented relationship enjoy a right of residence along the same lines as other family members.

A circular issued by the CNAF has clarified the position of registered partners in *France*, as it expressly includes in its enumeration of family members 'partenaires de PACS'.

In *Slovakia* registered partnerships are not equated to marriages; registered partners are treated as family members for the purpose of Directive 2004/38/EC if they are a member of the EU citizen's household. The Slovakian rapporteur feels that this might prove problematic in individual cases.

In *Latvia* admission of partners (unmarried or in duly attested durable relationships) and family members with a serious health problem is subject to the following conditions 'de-pendency' and 'common household in the country of previous residence'.

On July 10, 2009, a Royal Decree (1161/2009) was adopted exempting third-country na-tional family members of EU or EEA citizens residing lawfully in Bulgaria, Cyprus, Ireland,

13 Appl. 33655/08 and Appl. 20116/08.
14 ECJ case C-200/02 [2004] ECR I-9925.
15 Jdo Contencioso Administrativo number 1 of Lleida (Catalonia) November 27, 2008, 00378/2008.

the UK or Romania from the visa obligation when entering *Spain*. Registered partnerships established under Spanish law are not considered to qualify as partners for the purpose of Directive 2004/38/EC as 'the possibility of two simultaneous registrations in this State' is not precluded (Instruction General Director for Immigration, March 22, 2007, DGI/SGRJ/ 03/2007). The Spanish rapporteur discusses various cases involving registered partners and presents a decision of the High Court, resolving the issue of the inexistence of a Central Reg-ister for partners in Spain in favour of the individual, establishing that the absence of such a register cannot be an obstacle to the exercise of an individual right legally established. It ruled that the creation of a Central Register for partners is the responsibility of the Spanish authorities and does not justify the denial of an individual right derived from Directive 2004/38/EC.

In the *United Kingdom* a durable relationship requires two years of residence together. The courts, however, have still to express their opinion on this requirement. The position of durable partners once they have made an application to the Home Office requires clarifica-tion as, until recently they were not given a letter confirming their application enabling them to work pending their application. The British rapporteurs feel that this suggests that the Home Office is unsure whether they are able to maintain their position that a person in a durable relationship must be granted a right to remain (rather than having a right per se).

Position of family members listed in Article 3(2)

From the *Bulgarian*, *Czech* and *Dutch* reports it appears that where Member States have chosen to equate the position of family members listed in Article 3(2) of Directive 2004/38/EC to that enjoyed by the family members listed in Article 2(2) of the Directive this has raised the question of the nature of the right to enter and remain (national or European based right).

Reverse Discrimination

The issue of reverse discrimination is addressed in the *Bulgarian, Czech, German, Hungar-ian, Italian, Latvian, Lithuanian, Spanish and Swedish* reports.
The *Bulgarian* report mentions two cases currently pending before the European Court of Human Rights concerning residence rights of third-country national family members of Bul-garian citizens. In both cases infringement of Articles 8 and 14 of the ECHR are claimed.[13]

In *Belgium, Hungary, Spain* reverse discrimination is, in general, not a problem as the national implementing measures extend the rights in the Directive to nationals.

In *Belgium* and *Spain*, assimilation does not include family members in the ascending line. In *Belgium* parents have to prove that they have stable, regular and sufficient financial resources. In practice this has caused problems for parents of Belgium children. The *Chen* case[14] is not considered to apply to their situation. The distinction made in Spanish law was found to violate Article 14 of the Spanish Constitution (equal treatment and non-discrimination).[15]

16 ECJ case C-291/05 [2007] ECR I-10719.
17 Press release of January 15, 2008 from the Ministry of Refugee, Immigration and Integration Affairs.
18 Administrative Appeal Court of North-Rhine Westphalia, March 17, 2008, 18 B 191/08, ZAR 2008, 197.
19 Administrative court Munich, September 27, 2007, M 10 K 06.1564, ZAR 2008, 144.
20 ECJ case C-459/99, [2002] I-6591.
21 Belgium CE, 31 March 2009, No. 192-061, not published.

The restriction of the personal scope of Directive 2004/38/EC to third-country spouses of *Danish* citizens returning to Denmark after having pursued an economical activity in another Member State and continuing such activity or retiring on return to Denmark was debit to the issue of reverse discrimination in that Member State. Following the ECJ's decision in *Eind*,[16] new guidelines were adopted by the Ministry of Refugee, Immigration and Integration Af-fairs, thus extending the personal scope of Directive 2004/38/EC to all family members of Danish citizens returning to Denmark after having exercised free movement rights in another Member State. In November 2008 the Parliamentary Ombudsman issued a report on the al-leged failures of the Danish Immigration Services regarding the guidance on residence rights under Community rules in particular for third-country national spouses of Danish citizens.[17]

The *German* rapporteur mentions a decision by the Administrative Appeal Court of North-Rhine Westphalia that excludes EU citizens with dual nationality residing in the coun-try of origin (where nationality is acquired at birth) as beneficiaries of Directive 2004/38/EC in the Member State.[18] He expresses his doubts whether this judgment will be upheld by the ECJ. The Administrative court of Munich relied on the *Chen* case to justify a residence right of a relative of a child born in that country even if there is no proof of sufficient resources.[19] The French report reveals that third-country national family members of French nationals can apply for their long stay visa with the Prefecture if they can prove they have entered France legally (by showing a short stay visa). In practice a joined application is made for a long stay visa and a residence permit.

In *Hungary* a parent or guardian of a minor who is a Hungarian citizen does not have to establish that (s)he has sufficient financial resources. In Hungary a child born to a parent with a permanent right of residence also has a permanent right of residence in that country.

2. ENTRY AND RESIDENCE RIGHTS

The implementation of entry, including visa obligations, and residence conditions is gener-ally considered correct. Likewise there are no real concerns regarding the issuing of registra-tion certificates to family members who themselves are EU citizens or residence permits to third-country national family members. The following remarks were made.

In *Belgium* visa requirements are applied in accordance with the ECJ's *MRAX*-ruling.[20] Various parents who had started legal proceedings against a refusal to issue a visa to their third-country national child found their application declared inadmissible. The Conseil d'Etat has now recognised a Belgium parent's interest to instigate legal proceedings against a deci-sion refusing to issue a visa to a third-country national daughter.[21]

In the *Czech Republic* the obligation to issue a visa 'as soon as possible on the basis of an accelerated procedure' has been implemented as 14 days, which is labelled by the rappor-teur as 'questionable' who also expresses concerns regarding the available information on the acquisition of visa.

The *Hungarian* report reveals that the Schengen Borders Code applies to entry and the issuing of visa. There is no right to appeal a refusal to issue a visa. There is, however, an

22 COM (2009) 313, p. 7.

obligation to allow an EEA national or family member who does not satisfy entry conditions 72 hours to acquire the required documents. Residence during the first three months is sub-ject to the requirement that the person does not become an unreasonable burden on the Hun-garian social assistance system, which is in line with Article 14 of Directive 2004/38/EC.

The issuing of a registration certificate by the *Latvian* authorities to family members re-quires the presentation of legalized documents ascertaining the family relationship, which is both costly and time consuming. In addition, an official questionnaire has to be completed. This is also the case when the

application concerns a (permanent) residence permit. Accord-ing to *Romanian* law, a third-country national family member applying for a residence per-mit must submit a legalized copy of marital or other documents establishing the relationship with an EU citizen. According to the Commission's guidelines, however, legalisation of documents can only be required if the national authorities cannot understand the language in which a document is drafted, or where there are suspicions concerning the authenticity of the issuing authority.[22] In *Spain* documents establishing the family relationship, matrimonial or registered partnership, have to be translated, an apostille or legalisation is only required 'when necessary'.

In *Lithuania* the *Order on Issuance, Extension and Withdrawal of EU Residence Permits for Family Members of EU Nationals* was adopted on July 25, 2008 (Ministry of Interior, Order No. 1V-290). It addresses the validity of residence permits and the documents to be submitted along with an application for a residence permit. Residence permits are valid for five years, but if issued to a child, the validity is linked to the formal education period, where this is shorter than five years. EU permanent residence permits are issued for a period of ten years and extended once they expire. For children in education the validity is once again linked to the period of formal education.

Decisions on an application for a residence permit are taken within a month and valid for six months. In this six months period a second procedure formalising this right is required. Documental proof of legal residence is required in the second procedure. If the second pro-cedure is not completed within the six months, the first decision is repealed. The *Lithuanian* rapporteur feels that the so-called 'double stage system' is unnecessary and it creates an ad-ditional bureaucratic hurdle in the dealings with the immigration officials.

Family permits are granted for six months giving the applicant time to travel to the *United Kingdom*. This causes problems in relation to the ability of the third-country national to work once in the United Kingdom. In reality, given the strict employer sanctions third-country nationals have to obtain a five year residence card for which they have to apply to the Home Office before being able to work. This is highly problematic as applications for a residence permit take six months and in some cases even longer to be dealt with. Although certificates of application are generally sent out quickly, the rapporteurs have experienced that employers are more and more reluctant to accept them. In particular, if a residence card is not granted within the six months, employers are unwilling to continue their employment relationship with third-country nationals. In addition, third-country nationals are being asked for documents by the Home Office which they should not have to provide (e.g. evidence of cohabitation since their marriage or civil partnership and civil partnership ceremony photo-graphs). In addition, as these applications are outstanding for so long, the Home Office is then writing to ask for updated information about e.g. the EEA national working. Also, the procedure for retrieving passports is difficult and haphazard.

23 ECJ case C-127/08 [2008] ECR I-6241.
24 ECJ case C-109/01 [2003] ECR I-9607.
25 ECJ case C-127/08 [2008] ECR I-6241, cons. 58.
26 ECJ case C-127/08 [2008] ECR I-6241, cons. 99.
27 ECJ case C-127/08 [2008] ECR I-6241, cons. 46.
28 ECJ case C-551/07, December 19, 2008, n.y.r.
29 Executive Order No. 984 of 2 October 2008 amending the EU Residence Order.
30 Press release of January 15, 2008 from the Ministry of Refugee, Immigration and Integration Affairs.

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

The preliminary reference from the Irish High Court in the *Metock* case[23] addresses the issue of admission of third-country national family members following the ECJ's ruling in the *Akrich* case.[24] The ECJ explicitly reconsiders the latter ruling where it decided that third-country national spouses of EU citizens must be lawfully resident in a Member State before they benefit from the rights set out in Directive 2004/38/EC.[25] As a result of the *Metock* rul-ing Member States are no longer permitted to require prior lawful residence from third-country national family members, nor can they impose conditions concerning the moment when (*ex ante* or *ex poste* entry) or the country where the marriage was convened.[26] The case does not, however, provide a further clarification on the issue of abuse of rights, i.e. mar-riages of convenience as the national court had explicitly stated that none of the cases con-cerned a marriage of convenience.[27] The *Metock* ruling was confirmed by the *Sahin* case.[28] The *Austrian* report reveals that following *Sahin* national procedures are decided in line with the ECJ's ruling as now it is recognised that Articles 9 and 10 of Directive 2004/38/EC have direct effect and thus take precedence over conflicting national law. In a different case (2008/18/0507), the Austrian Administrative Court has requested the Austrian Constitutional Court to revoke section 57 of the Austrian *Settlement and Residence Act* that allows for less-favourable treatment of Austrian citizens, i.e. the issue of reverse discrimination that, accord-ing to consideration 77 of the *Metock* ruling, does not fall within the scope of Community law. The Constitutional Court has still to decide on the merits of the case.

In the following Member States the *Metock* judgment has had no impact on national law or practice mostly because 'prior legal residence' was not required from third-country na-tionals *Belgium*, *Bulgaria*, *Czech Republic, Greece, Hungary, Italy, Latvia, Lithuania, Lux-embourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain* and *Sweden.* In *Lithuania* though, the requirement of previous residence in the EU still applies with regard to family members of Lithuanian nationals.

In *Cyprus* a Circular was issued by the director of the Migration Department dated Janu-ary 14, 2009, referring to an interdepartmental meeting where the legal significance of the *Metock* judgment was discussed. However, to date there has been no action to reconsider cases decided *ex ante* the *Metock* judgment along the lines set out by the ECJ in that deci-sion.

Following the ECJ's decision in the *Metock* case, *Denmark* abolished the requirement of prior lawful residence in an EU/EEA Member State and various measures were taken in or-der to prevent abuse of the EU rules on residence rights for family members.[29] Although not addressed in the *Metock* case, the political agreement of September 22, 2008 on the imple-mentation of the EU rules on free movement in the light of the *Metock* judgment, has meant that third-country national spouses of Danish citizens can rely on Community law upon their return from another Member State to Denmark..[30]

31 Soveltamiskäytännön muutos unionin kansalaisen perheenjäsenen maahantulossa. Vapaan liikkuvuuden direktiivin suora soveltaminen ulkomaalaislain sijasta SMDno/2009/54, 8 January 2009.
32 Visumhandbuch Unionsbürger Freizügigkeit 1.8.2008, as quoted in ANA ZAR 2008, 35.
33 European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (S.I. No. 310 of 2008).
34 See the August 2008 notice 'European Court Judgment on Free Movement of Persons (the '*Metock*' case) (http://www.inis.gov.ie/en/INIS/print/PR08000027).
35 COM(2009) 313 final.

Although 'prior lawful residence' was not required in *France*, Prefectures have been known to request a long term visa to be applied for in the country of origin. The *Metock* case has been relied on by French courts on various occasions.

On May 29, 2009 the *Finish* Government submitted a proposal that will remove the re-quirement of 'prior legal residence' from the Aliens Act. In January 2009 Guidelines were issued by the Police Department of the Ministry of Interior instructing the police to apply the Directive rather than national law when registering EU citizen's family members or issuing residence permits to third-country national family members.[31] The Guidelines for the issuing of visa to third-country national family members have not been amended following the *Me-tock* ruling. Information received from the Ministry for Foreign Affairs shows that the *Me-tock* judgment is understood in this context very narrowly in the sense that it only concerns cases where third-country nationals were married in another Member State and then enter Finland directly from there. The *Metock* judgment is not regarded to preclude application of the condition for previous lawful residence in other cases. This narrow reading is not without implications for procedural safeguards where visa applications are turned down.

The *German* Foreign Office of the Federal Republic has amended the administrative regulations for the visa authorities.[32] Now the German visa authorities issue visas to family members of Union citizens regardless of where they have previously resided and without considering the legality of residence in another EU Member State or a third state. The *Me-tock* judgment has also meant that family members of Union citizens no longer have to prove that they dispose of a basic knowledge of the German language when they apply for a visa. The *Metock* judgment has not resulted in guidelines on the abuse of free movement rights.

The *Irish* government adopted Regulations amending the offending part of the 2006 Regulations within four working days of the ECJ delivering its judgment bringing Irish law in line with the ECJ's ruling.[33] The Department of Justice, Equality and Law Reform stated that all applications for a residence card made after April 28, 2006 which were refused as there was no 'prior lawful residence' will be reviewed. It was envisaged that this process would take three or four months to complete.[34] At the same time it instigated a campaign, joined by Denmark, to amend the Directive which has culminated in the recent Commission Communication.[35]

The *Metock* judgment meant that the *Dutch* government had to abandon its desire to ex-tend integration conditions to third-country national family members of EU citizens and that long term visa (*machting tot voorlopig verblijf*) requirements cannot be imposed on these family members. 2008 did see the government explicitly stating that language and integra-tion courses can be offered to EU citizens under the same conditions that apply to Dutch nationals and certain third-country nationals. It also led to the introduction of a new require-ment for unmarried partners not in a registered partnership who now have to provide evi-dence that their relationship has lasted for at least six months and that the partners share a common household. The latter is not required if a child has been born out of their relation-ship. When applying for a residence permit, unmarried partners have to sign a so-called *samenwoningsverklaring* (a document attesting cohabitation, use of the same address and

36 This occurred in January 2009.
37 *[2008] UKAIT 00075.*
38 [*2008] WCA Civ 13.*

registration in the GBA (municipal population register) as living at that address). The immi-gration officials have been instructed to establish the existence of family ties before issuing a residence document 'family member of a citizen of the Union' (B10/5.2.2 of the Aliens Cir-cular). A further amendment, which can actually be traced to the ECJ's decision in the *Eind* case, concerns Dutch citizens returning to the Netherlands after exercising free movement rights who no longer have to pursue an actual and real economical activity to benefit from free movement rights for their third-country national family members.

The *United Kingdom*'s authorities have failed to amend Regulation 12(1)(b) EEA Regu-lations 2006 which in its current wording is contrary to the ECJ's judgment in *Metock* where it requires family members to meet the national immigration rules rather than the family reunification rules in the Directive. During the week of 8 December 2008 guidance was is-sued to the Entry Clearance Officers informing them that the Entry Clearance Guidance which is the guidance which Entry Clearance Officers would be referring to and the Euro-pean Casework Instructions which Home Office officials refer to would be updated in due course.[36] The guidance fully implements *Metock*. It does, however, put significant emphasis on the fact that a marriage or civil partnership must not be for reasons of convenience, stresses the three reasons allowed for refusing an application (public policy, security or health) and reiterates the importance of checking the authenticity of documents and the right of the government to take appropriate measures to guard against the abuse of rights or laws. In practice family permits appear to be given priority over other applications and after the issuing of the guidance after *Metock*, most cases were dealt with swiftly. In the case *SM (Sri Lanka)*[37] *Metock* was considered to have no direct relevance to the interpretation of Article 3(2) i.e. for extended or other family members. The case of *KG (Sri Lanka)*[38] was stated to be 'good law' and within the meaning of Article 3(2) and therefore Regulation 8 of the Im-migration (European Economic Area) Regulations 2006.

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

In most Member States steps can be taken culminating in a refusal, termination or with-drawal of a residence permit when fraud or abuse of free movement rights has been estab-lished. In the three Member States (*Italy, Luxembourg and Spain*) where abuse and fraud are not provided for proposals that will allow their officials to take measures to combat fraud and abuse are pending.

There is little empirical information establishing the number of cases concerning abuse and fraud. Only the *Irish* report provides information regarding the number of marriages of convenience, or fraud. The *Dutch* report does, however, mention research on this issue that is currently being conducted. An increase in the number of marriages of convenience with Lat-vian nationals following that Member State´s accession to the European Union is mentioned by the *Latvian* rapporteur.

In the *United Kingdom*, although there have been requests for interviews with married couples for the purpose of establishing a marriage of convenience, the rapporteurs are not aware of an increase in house raids for this purpose. Concerning the scope of the problem, the observation by the *Irish* rapporteur that it is extremely difficult to prove a marriage of

39 *OJ EC* 1997, C 382/1.

convenience as it 'is very resource-intensive and can be intrusive' might explain, on the one hand, why so little factual information is available and, on the other hand, why references to case law addressing the issue of abuse is only found in a few reports.

The *Belgium* report is one of the reports that includes a number of decisions, albeit it on the application of the *Baumbast* and *Chen* rulings in cases concerning parents of Belgian children. No decisions on marriages of convenience are included. In *Hungary* the Ombuds-man has received a complaint from a Hungarian national married to an Egyptian national concerning a refusal to issue an entry visa as their marriage was assumed to be 'false', where no examination had taken place nor did the refusal provide a justification for this conclusion. In the Netherlands, the District Courtin the Hague had to decide on a case concerning the checks on unmarried no-registered partners which where

introduced to tackle the problem of abuse of free movement rights. The *Romanian* rapporteur mentions that a number of cases concerning marriages of convenience are pending before the courts, but all cases concern national rules rather than Article 35 of Directive 2004/38/EC. In *Sweden, even though article 35 has not been transposed, marriage of convenience is not allowed in administrative practise and may lead to refusal, termination or withdrawal of rights by the directive.* In spite of this the Migration Court of Appeal has denied the right to free movement and residence in a case of marriage of convenience. .

Abuse and fraud are addressed in general immigration law or special rules in *Austria, Belgium, Bulgaria, Cyprus, Denmark, France, Greece, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden* and *the United Kingdom*. The details in the individual reports reveal that although the consequence of abuse and fraud (refusal, termination or withdrawal of residence permission) is the same, the approaches and rules differ from Mem-ber State to Member State. Thus, in *Cyprus* and *Poland*, the situation is assessed along the lines of the conditions listed by the Commission in its 2009 Communication whereas in *Finland* and *Malta* the Council's *Resolution on Measures to be Adopted on the Combating of Marriages of Convenience* of December 4, 1997 serves as guidance.[39] *Austria* relies on Arti-cle 8 of the ECHR (family life) and does not bother Austrian citizens who marry an EU-citizen, who has an independent right of residence. Currently in *Belgium* every forthcoming marriage concerning a non-national justifies the exchange of information and the convening of a marriage can be refused when there is a suspicion that the marriage should be classed as a marriage of convenience. As far as marriages convened abroad are concerned the rules in the Brussels I Regulation and international private law apply, though the possibility of intro-ducing stronger controls when a marriage is convened abroad is under examination. The *Bulgarian* rapporteur notes an incorrect implementation of Articles 30 and 31 of Directive 2004/38/EC where marriages of convenience are concerned. In *Cyprus*, assistance to and the convening of a marriage of convenience is a criminal offence carrying a penalty of 3 years imprisonment or a fine of up to 3000 pounds (5000 euro). In *Poland* assistance to the realisa-tion of a marriage of convenience is classed as facilitating or enabling a third person to stay in Poland unlawfully in order to gain personal or property benefits and thus a criminal of-fence under Article 264a of the 1997 Polish Criminal Code (penalty or imprisonment for 3 months-five years). According to the *Czech* law interviews can be conducted when an appli-cation for a residence permit is made. When a person does not turn up for the interview without providing an appropriate justification, refuses to answer or gives false facts, this is a reason not to grant the residence permit, where this does not disproportionally impact on family life. Where there is a child involved, the execution of an expulsion measure is subject to consideration of the best interest of the child. In *Denmark* an application for a residence permit requires that both spouses/partners have to declare that the purpose of contracting the marriage or the partnership or establishing cohabitation was not solely to obtain a separate

basis of residence for the person applying for the residence document. In addition, proof may also be required that the principal person has established genuine and effective residence in Denmark. The *German* Administrative Guidelines allow for an examination by the compe-tent authorities, when there are facts, e.g. contradictory information provided at the time of application or other information at the disposal of the visa or immigration authorities, sug-gesting that there is a marriage of convenience. In *Greece* the presence of abuse should be established by a court decision. The *Irish* 2006 Regulations provide that the term 'spouse' does not include a party to a marriage of convenience and, more generally, that a person found to have acquired rights or entitlements by fraudulent means – including marriages of convenience – would immediately cease to enjoy them. The prior lawful residence test was seen as a useful means of avoiding the issue of marriages of convenience which, in practice are hard to prove. Since January 1, 2009 the *Polish* Border Guard divisions can conduct in-vestigations at the place where the spouse and where other family members or people with whom the non-national spouse has family ties are staying. The *Romanian* authorities verify the nature of a marital relationship with a view to establish whether it is a marriage of con-venience when there is no prior right of residence in another Member State. Verification covers statements made by the spouses as well as by third parties, interviews and the consul-tation of documents In *Sweden* a marriage certificate merits the presumption that a residence permit should be issued. It is up to the authorities to prove that the marriage is not genuine. In the *United Kingdom* long questionnaires regarding the personal circumstances of the fam-ily members have to be completed when applying for a residence permit.

As a final remark, it must be mentioned that in a debate with the Dutch parliament (Sec-ond Chamber) the Dutch Secretary of State put forward the possibility of introducing a sys-tem of registration and notification between Member States as an additional instrument to combat fraud and abuse within the meaning of Article 35 of Directive 2003/38/EC. This EU-system for notification would allow a Member State experiencing an unaccounted increase in the number of applications made by nationals of another Member State or observing other unaccounted for developments to notify the Member States concerned.

5. ACCESS TO WORK

In most Member States access to the labour market is ensured for both EU citizens and their family members. The reports on *Austria, Bulgaria Cyprus, Denmark, Italy, Latvia*, *Lithua-nia, the Netherlands, Poland, Portugal, Slovakia, Slovenia* and *Sweden* explicitly mention that EU citizens and family members do not need a work permit to take up employment in those Member States. However, this does not mean that there are no problems in these Member States concerning access to work. In *Austria* the right to take up employment is restricted to the spouse and unmarried children and in *Bulgaria* there is an obligation for the employer to report to the local employment office within seven days when a family member of an EU citizen who has not acquired a permanent residence right is employed. In *Latvia* it might prove problematic for third-country national family members to take up employment before their residence permit has been issued. In *Lithuania* third-country national family members do not benefit from this exemption and still have to obtain a work permit, if they do not qualify as one of the categories exempted from this obligation by law. In *Slovakia* the exemption from the work permit requirement only covers third-country national family members with a permanent residence permit. In *Sweden* a permanent residence permit issued

by another Member State also allows its holder to take up employment in Sweden without a work permit.

In *Belgium* questions concerning the requirement to obtain a work permit for employ-ment imposed on third-country national family members of Belgium citizens (e.g parents of a Belgium child) have risen as a consequence of the fact that Belgium nationals also benefit from the rights set out in Directive 2004/38/EC. Currently pending is case C-34/09, *Ruiz Zambrano* that, however, does not include Article 24 of Directive 2004/38/EC in the list of provisions which the referring court has asked the ECJ to clarify.

The *Greek* report covers two cases in which the Ombudsman was requested to mediate. The first concerns a refusal to issue a licence for the operation of a private security company to a third-country national family member of a Greek citizen. In the other case, the Om-budsman expressed his opinion in January 2009 that the exception '(in)direct participation in the exercise of powers conferred by public law' cannot be invoked in the case of country medical doctors. Although both cases concern third-country national family members of Greek citizens, the outcome is considered relevant for third-country national family members of EU citizens.

According to the *Hungarian* report, all family members who want to take up employ-ment in that Member State need a temporary work book. Where employment is confidential and requires Hungarian language skills, a position as a civil servant is restricted to Hungarian nationals.

In *Ireland* the position of third-country national family members is unclear. As far as a non-EEA national married to an EU citizen is concerned, the Department of Enterprise, Trade and Employment has expressly stated that a work permit will not be required once a residence card has been issued. In the intervening period, which can take several months, a work permit will be required, though the fee is waived. According to information provided by officials in the Department, a child is only recognised as dependant if he/she enters the State before his/her 18th birthday. Entry after this age requires an application for an inde-pendent work permit.

In 2008 the Administrative Tribunal ruled on a case concerning the denial of a work permit to a third-country national spouse of an EU citizen no longer resident in *Luxembourg*. Protective measures were not deemed necessary as her residence permit was still valid.

In *Malta* family members of EU citizen workers enjoy a right of residence and the right to take up employment or pursue an economical activity as a self-employed person. In gen-eral third-country nationals need a work permit to take up employment in Malta which are issued to third-country nationals who do not qualify as family members of EU citizens on the basis of a labour market needs-test at a price of € 139,76.

Problems have arisen for third-country national family members in terms of their access to the *British* labour market, through difficulties of not being able to document the right to work while an application is outstanding. Letters confirming applications are sent out and employers can rely on them to employ somebody, but they are only valid for 6 months de-spite the fact that the Home Office is currently taking significantly longer than that to deal with applications and give a final decision. This is particularly problematic in the light of legislation in the UK under which employers who are not able to show that their employees have a right to work at any given time face significant fines. There are documented cases of third-country nationals who have not been able to obtain work or have been sacked.

40 ECJ joined cases C-22/08 and 23/08, June 4, 2009, n.y.r.

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

In the majority of Member States no rules are in place concerning the position of family members of EU job-seekers. The *Irish* rapporteur mentions a 'lack of transparency' in this respect. The general impression is that family members of job-seekers derive their right of residence from Article 6 Directive 2004/38/EC.

In *Bulgaria* registration as a job-seeker is possible under the same conditions as Bulgar-ian citizens, unless Bulgarian nationality is explicitly required.

Cypriote law provides for equal treatment regarding allowances and, as far as social se-curity benefits are concerned, the enjoyment of these benefits depends on the contributions made to the system. Transferral of contributions is provided for as required by Regulation EEC (No) 1408/71.

In the *Czech Republic* EU citizens and their family members do not need a work permit but their employer is obliged to inform the Labour Office *(Sec. 87, 102 of Employment Act)*.

Danish law provides for a six month period for the purpose of seeking employment and the right to be accompanied by family members for the same period. The personal scope of this residence right is limited to spouses, registered partners or regularly cohabiting partners, children below 21 years of age, and other dependent family members.

In *Germany*, family members experience the same problems regarding the exclusion from the *Social Code* as the job-seeker who they accompany. The German rapporteur won-ders whether the job-seekers allowance is a financial benefit facilitating the access to the labour market that does not fall within the scope of the exclusion clause found in Article 24(2) of Directive 2004/38/EC according to the ECJ in its recent ruling in the joined cases *Vatsouras and Koupatantze*.[40]

In *Greece* family members of workers and family members of job-seekers are treated alike.

In *Hungary* family members can register as a job-seeker and apply for financial support on the same footing as Hungarian nationals. They are also entitled to facilities that will en-able them to take up employment in the future and they can also set up their own business. These rights are, however, restricted to the spouse and dependant children under 21.

In practice, it seems that in *Ireland* family members of job-seekers are in principle able to enter and avail of residence rights corresponding to those of the job-seeker but do not have a right to social assistance during the period where the job-seeker is seeking employment and has a genuine chance of being engaged.

Registration as a job-seeker is only possible in *Latvia* with a registration card or resi-dence permit. Likewise, entitlement to social security benefits requires a registration card or residence permit.

In *Lithuania* the situation of family members of job-seekers is unclear, as they are not mentioned as such in Lithuanian law. Nevertheless, Lithuanian law can be read to cover job-seekers, as it allows EU nationals to stay in that Member State without registration for up to three months or for a longer period where they have sufficient financial resources. It is as-sumed that they are exempted from obtaining a work permit.

Family members of EU job-seekers may reside and move freely in *Malta* on the same footing as Maltese nationals for a period not exceeding three months calculated from the date of entry. This period can be extended up to six months were there is evidence that the job-seeker is genuinely seeking employment and has a genuine prospect of being employed by

the end of this six month period. Registration as a job-seeker with the Employment and Training Corporation is required.

No explicit provision is made for family members of job-seekers in the *Dutch* rules. They are allowed to stay in the Netherlands for three months when they satisfy the condi-tions for short stays in Article 6 of the Directive (B10/5.2.2 Aliens Circular). Where the EU citizen finds a position or has sufficient resources to support himself and the family mem-bers, the general rules apply (B10/3.1 Aliens Circular).

No specific rules and practices concerning family members of job-seekers are found in *Polish* law. General entry and residence conditions apply to both job-seekers and their family members. Benefits are granted to both EU citizens and their family members if they are resi-dent in Poland under the *Act on Social Assistance*. They also benefit from the rights included in the *Act on Promotion of Employment and Labour Institutions*, e.g. assistance to find a job and to attend trainings and seminars aimed at facilitating access to the labour market.

Family members of EU citizens seeking employment in *Portugal* and *Slovakia* fall under the general rules for admission and residence.

The absence of special rules on the rights of job-seekers is understood by the *Spanish* rapporteur as a right to stay and look for work in Spain. The general rules on access to the labour market and educational facilities provide for access under the same conditions as those applicable to Spanish nationals, though it does exempt dependent descendants over 21 and dependent direct relatives in the ascending line.

In *Sweden* family members of job-seekers enjoy a right of residence as a family member. This right of residence encompasses the right to equal treatment. No residence card is issued to third-country national family members of job-seekers, but they do have to obtain a work permit that can be limited in time.

The *UK* report reveals that job-seekers are recognised by the Home Office as exercising Treaty rights, but increasing lengths of time as a job-seeker do lead the Home Office to ask for more documentation to prove their position.

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

The rapporteurs for *Austria, Cyprus, Estonia, Germany, Ireland, Lithuania, Luxembourg, Romania and the United Kingdom* have not expressed any concerns relating to equal treat-ment. The *Greek* report explicitly mentions that child allowances and parents' pensions are granted under the same conditions.

From the year 2004 persons without tax domicile (normally a person who does not ha-bitually reside in the *Czech Republic*, i.e. mainly frontier workers) can require the tax reduc-tion or tax bonus for a child and tax-relief for a spouse.

In *Finland* study grants are enjoyed by EU citizens and their family members under the same conditions as Finnish citizens, as long as their right of residence has been registered or a residence card has been issued and as long as the legal basis for their right of residence is not study (i.e. Article 7(1)(c) of Directive 2004/38/EC).

As access to social benefits requires legal residence, EU citizens in practice may experi-ence difficulties proving legal residence without a residence permit in *France*. The CAF has the authority to verify residence conditions. .In *Hungary* 2008 witnessed various amend-ments that entitle family members to family, social and disability benefits. Further, the dele-

tion of the reference to Regulation (EEC) No. 1612/68 in the Social Administration and Benefits legislation has turned all EU citizens into beneficiaries of the right to benefits in cash and kind. Although equal treatment is assured regarding housing, permission is still required when purchasing non-agricultural land housing.

In *Italy* there is no right to social security benefits during the first three months unless it is a social benefit that is associated with the activity pursued or otherwise granted by law. All workers are entitled to unemployment benefits and child and family allowances. In *Circular No. 46* dated February 23, 2007, the National Social Welfare Institution spelled out that Ro-manians and Bulgarians are entitled to child and family allowances from the date of acces-sion.

All residents of *Latvia* enjoy equal treatment for the purpose of tax law, although prob-lems might occur in relation to family members of border workers.

The *Maltese* rapporteur mentions in a general fashion that long-term resident third-country nationals enjoy equal treatment with regard to education, vocational training and study grants, recognition of professional diplomas, certificates and other qualifications as well as with regard to social security, social assistance, social law and tax benefits.

Although it is recognised that integration measures cannot be imposed on beneficiaries of Directive 2004/38/EC, the ongoing debate on the integration of Polish workers in *the Netherlands* enticed the Dutch government to state explicitly that offers to participate in language and integrations course can be made to EU citizens as long as the offer is made under the same conditions as Dutch citizens. Whether this also covers their third-country national family members remains uncertain.

During the first five years of residence in *Poland* students are excluded from benefits unless they have acquired the status of economically active EU citizen.

In *Portugal* family members, irrespective of their nationality, are not entitled to non-contributory benefits during the first three months of residence and if they are family mem-bers of job-seekers.

The right of permanent residence ensures family members equal treatment with regard to social benefits and tax advantages. Where a family member becomes a burden to the health care or social security system, a residence permit can be revoked.

8. CONCLUDING REMARKS

The information provided on the implementation of the rules concerning EU citizens' family members reveals that – with some exceptions - the rules in Directive 2004/38/EC have been respected and are complied with in practice by the Member States. All Member States that required 'prior legal residence' for the admission of third–country national family members have amended their rules and/or practices following the Court's decision in either the *Eind* or the *Metock* case.

Family members of EU citizens, including family members of job-seekers, have access to the labour market of the host-Member State though in some Member States a labour market permit or registration is conditional to the exercise of this right. Where the pursuit of an eco-nomic activity is conditional to having obtained a residence permit, third country national family members are experiencing problems in taking up an economic activity as the process-ing of applications for a residence permit takes time.

Although the general impression is that the Member States are serious in implementing family members' rights as required by Directive 2004/38/EC, there are issues that require further attention. Firstly, in some Member States there is uncertainty as to the nature of the rights accorded to family members listed in Article 3(2) of Directive 2004/38/EC, as national implementing legislation does not provide for an obligation to facilitate but a right to enter and reside. A second point concerns the issue of reverse discrimination that has dominated the debate in a number of Member States since the ECJ's ruling in the *Akrich* case and has not been solved by the Court's ruling in the *Metock* case. Last but not least, there is the issue of abuse of rights and fraud. Although all Member States have adopted or are in the process of adopting rules to address abuse of free movement rights and fraud, little is known of the scope and the true nature of this problem as there is not much information available.

Chapter VII Relevance/Influence/Follow-up of recent Court of Justice Judgments

INTRODUCTION

The national experts were requested to give an in-depth analysis and interpretation of the importance and potential impact of the Court's recent judgments. For the 2008/2009 edition the Commission considered the following judgments of special interest:

C-287/05 *Hendrix*
C-527/06 *Renneberg*
C-94/07 *Raccanelli*

The Commission's special interest in the *Hendrix* and *Renneberg* judgments reflects its growing concern about the situation of cross border workers.

In the *Belgium* reports any reference to, let alone an in-depth analysis of the above men-tioned cases is lacking. According to information obtained from the relevant Ministries by the *Danish* rapporteur the above mentioned cases did not require any changes to the Danish legislation. In the *German* report only the *Raccanelli* judgment is discussed. According to the *French* rapporteur his research on the consequences of these judgments for France has not been fruitful at all.

FOLLOW UP TO: *HENDRIX* (C-287/05)

This case is about a Dutch frontier worker who worked and lived in the Netherlands. While continuing to work in the Netherlands, he transferred his residence to Belgium. Before his removal he was entitled to a benefit for handicapped people according to the Disablement Assistance Act for Handicapped Young Persons of 24 April 1997 (Wajong), which is listed in Annex IIa of Regulation 1408/71 as a non-exportable special non-contributory benefit. Therefore, once Mr *Hendrix* had left the country, the Dutch competent institution stopped paying that benefit applying the said provisions of Regulation 1408/71. However, as Mr *Hendrix* continued to be active as a worker in the Netherlands, the ECJ was asked whether the withdrawal of the benefit is not contrary to Article 39 or Article 18 EC Treaty.

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

The decision is not mentioned in the *Belgian, French, German* and *Luxembourg's* re-ports. In *Ireland* there is no benefit which is analogous to the Wajong benefit in the *Hendrix* case. The situation in that case has not apparently arisen in the Irish context. The same applies to *Italy*, *Portugal* and *Slovakia*. The *Hendrix* case is not mentioned in the *Spanish* jurisprudence either.

According to information by social law experts and labour law experts as well as to data base research and newspaper observation, this decision hasn't had any impact on the *Aus-trian* law and practice

According to the *Bulgarian* rapporteur the Law on the Integration of Disabled People and the Regulation for its Implementation, which regulate the provision of special non-contributory benefits to disabled people, do not stipulate an explicit requirement for resi-dence in Bulgaria.

In the *Czech Republic* no concrete examples of follow-up actions of *Hendrix* judgment could be identified for 2008. Benefits to disabled persons, regulated in general by the Act No. 100/1988 Coll. on Social Security, are granted to persons with permanent residence in the Czech Republic, to citizens of other EU member States entitled to such benefits under the direct applicable EU law. In cases falling outside of this scope national laws apply, stipulat-ing a requirement of a 3 months previous stay of EU citizens and their relatives in order for them to be entitled to benefits for disabled persons (and to social benefits in general on the basis of Act No. 100/1998 Coll., on Social Security). Nevertheless, a special non-contribu-tory benefit payable to young persons suffering from total or partial long-term incapacity for work before joining the labour market still does not exist in the Czech Republic. Therefore appearance of a case similar to *Hendrix* is unlikely in the Czech context.

The issue in the *Hendrix* case has an important bearing on the provisions of non-con-tributory benefits in *Cyprus*. The fact that the ECJ stated that the provisions of Regulation 1408/71 must be interpreted in the light of the objective of Article 42 EC, which is to con-tribute to the establishment of the greatest possible freedom of movement for migrant work-ers is significant for a potential case in Cyprus on the subject of freedom of movement. Moreover, the ruling that the residence condition can be applied only if it is objectively justi-fied and proportionate to the objective pursued is again a significant authority for future court cases in Cyprus: the current rules on non-contributory benefits have stringent residence tests attached to them, deliberately designed to exclude Union citizens exercising the right to freedom of movement, and in more so resulting in discriminatory effects against those Union citizens and their families resident in other EU countries. Furthermore, the rules are designed to exclude Union citizens who reside in the northern part of the country in 'the territories where the Republic of Cyprus Government does not exercise effective control'.

In *Estonia* the scheme of non-contributory benefits is very limited. Therefore there are only few benefits that are not exportable and that are connected with the state of the resi-dence. According to the Annex II of the Regulation 1408/17 such benefits are benefits for disabled persons. Taking into account that there is only one benefit for disabled persons that is not exportable, it seems to be no difficulties concerning the equal treatment between the citizens of the EU Member States in questions of the non-contributory benefits.

In the *Finnish* system, the benefit comparable to that at issue in *Hendrix* is disability pension, the purpose of which is to secure minimum subsistence for persons who are unable to work. This benefit is covered by the Regulation 1408/71. Disability pension is exportable. The judgment in *Hendrix* has not had and is not likely to have any impact in Finland as the Finnish system is in line with it.

Granting of unemployment benefits in *Greece* is dependent on having at least fulfilled a minimum period of insurance and not only on the basis of residence in Greece. Therefore, the *Hendrix* judgment does not have particular influence.

Hungarian social law contains three types of special non-contributory benefits in terms of Reg. 1408/71/EEC: non-contributory old-age allowance, invalidity annuity and a benefit

for motor-disabled persons. These benefits are found in three pieces of legislation, the per-sonal scope of which are, however, commonly regulated in the main Act, the SocialA (Act III of 1993 on Social Administration and Social Benefits). Pursuant to the Act persons being entitled to exercise the right to free movement (EEA nationals, Swiss nationals and their family members) can claim these benefits if they possess a Hungarian residence that is evi-denced by an address card issued by the local authority. The address card is usually issued for an indefinite period in case of Hungarian nationals and for one year in case of EEA na-tionals. Both Hungarian and EEA nationals are obliged to notify the authorities of their change in residence and they are legally liable for the damage caused by the omission of the notification. Reading these provisions together it must be stressed that Hungarian law sets the objective criteria of Hungarian residence for these special non-contributory benefits that must be evidenced by a valid address card. The lack of lawful residence results in the with-drawal of the benefit. Hence the objective requirement of residence is set by the SocialA, the authorities are not allowed to exercise discretion in cases of persons who leave Hungary. The Act does not contain any general clause for persons in possible hardship who maintain their economic and social links to Hungary.

Latvian national law does not provide the right to benefits for the disabled persons in or-der to cover a reduction in income. However according to Annex IIa of Regulation 1408/71 Latvia has declared one benefit for disabled persons to be not exportable. It is the benefit for compensation of transportation for disabled persons. Looking to this provision from the per-spective of Article 39 and Article 7(2) of Regulation 1612/68 there could be situations espe-cially with regard to frontier workers and members of their family where application of resi-dence clause with regard to the right to the transportation benefit for disabled persons could lead to 'unacceptable degree of unfairness'. The State Social Insurance Agency has not re-ceived yet respective claims from frontier workers so far.

On the issues mentioned in *Hendrix*, the Lithuanian legislation may be problematic too, because benefits for handicapped persons are related to permanent residence in Lithuania (Article 1(4) of the Law on State Benefits of 29 November 1994, new version of the law of 19 May 2005).

Malta has only listed the 'Supplementary Allowance' and the 'Age Pension' in Annex IIa of Regulation 1408/71. It is however difficult to foresee that the *Hendrix* judgment will have an impact on Malta: given its geographical situation, it is very difficult to have a fron-tier worker who commutes on a daily basis to and from his residence to go to work.

Following the *Hendrix* judgment of the ECJ, the Central Appeals Tribunal in the *Nether-lands* which asked for the preliminary ruling, came up with a decision on 7 February 2008. The Tribunal could not apply the 'unacceptable degree of unfairness'-clause as suggested by the ECJ in this case because this provision was only introduced in the Wajong in 2001, while the issue at stake was situated in 1999. However, the circumstances in this particular case do not fulfil the condition of paras 54-56 of the ECJ judgment that the legislation must not en-tail an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. The Tribunal referred to the fact that Mr *Hendrix* stayed employed in the Netherlands after he moved to Belgium and the close rela-tion between his working activities and receiving the Wajong benefit. So therefore the appeal was granted. In July 2008 the Central Appeals Tribunal used the 'disproportionality reason-ing' from the *Hendrix* case to justify the entitlement to a Social Assistance Benefit to two British citizens, residing in The Netherlands during the period they would visit a rehabilita-tion clinic in Scotland. Withdrawal of the benefit because of the residence clause of the So-

cial Assistance Act during this period was seen as an unjustified obstacle to the free move-ment of services.

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

The *Romanian* Law no. 448/2006 about protecting and promoting the rights of persons with handicap grants allowances available to Romanian citizens living in Romania, and for citizens of other states and of persons without citizenship, if they are legally resident in Ro-mania. The residency therefore is necessary to benefit from the provisions of the law. No similar practice occurred such as the *Hendrix* case yet.

According to the *Slovenian* rapporteur the domestic legislation does not include the 'un-acceptable degree of unfairness' clause, as an exception to the rule of actual residence in a member state, obliged to provide such a non-contributory benefit. Nevertheless, despite this fact the rapporteur is of the opinion that the applicability of the Regulation 1612/68 in Slo-venia is not eliminated.

The corresponding benefit *in Swedish* law is the disablement allowance (handikap-persättning), and this benefit is listed in the Social security Act (1999:799) as a benefit based on residence. Hence, a preliminary conclusion is that in accordance with Swedish law the disablement allowance should not be paid if, for instance, a frontier worker living and work-ing in Sweden moves to Denmark for residence but continues working in Sweden.

In the *UK* a 'right to reside test', which was introduced by the Social Security (Habitual Residence) Amendment Regulations 2004 became effective on May 1st 2004. Since then, a claimant for the means-tested benefits, as well as being present and habitually resident as required by the 1994 test, also has to have a 'right to reside' in the UK under UK or EU law. The right to reside test continues to give rise to legal challenges in the UK concerning who may rely on Article 7 of Regulation 1612/68; whether the residence test can be objectively justified and is proportionate to the objective pursued, and whether it goes further than what is required to achieve a legitimate objective pursued by national legislation as mentioned in the *Hendrix* case.

Concluding

The *Hendrix* case is not mentioned in the Belgian, French, German and Luxembourg's re-ports. The decision hasn't had any impact on the Austrian Law and practice. No follow-up was noted in Denmark and the decision is not likely to have any impact on the Bulgarian, Finnish and Greek situation while a residence clause does not exist. Most benefits in Estonia are exportable as well although one benefit for disabled persons is not exportable. Situations comparable to *Hendrix* have not yet arisen in the Czech, Irish, Italian, Maltese, Portuguese,

Slovakian and Spanish context. Although a comparable situation has not yet arisen in the Czech Republic the permanent residence clause in the relevant legislation most probably contravenes the *Hendrix* judgment. The same applies to the existing residence clauses in the Cypriot, Hungarian, Latvian, Lithuanian, Polish, Romanian, Slovenian, Swedish en UK leg-islation. In the Netherlands the court relied directly on the *Hendrix* judgment and set aside the residence clause in the *Hendrix* case while in the particular circumstances of this case the residence clause entailed 'an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation'.

FOLLOW UP TO: *RENNEBERG* (C-527/06)

This is an important judgment for cross-border workers in particular. Mr Renneberg was a Dutch citizen who went to live in Belgium while continuing to work in the Netherlands where he earned more than 90% of his total income. At that time, a resident of the Nether-lands was eligible for tax relief in the Netherlands on the ownership of immoveable property. If the property was situated in the Netherlands, there was a tax deduction based on the differ-ence between the rental value of the dwelling and interest paid on the mortgage (called nega-tive income). If the property was situated outside the Netherlands, relief was still available, although much more limited.
Mr Renneberg applied unsuccessfully for deduction of the negative income relating to his Belgian dwelling against his income arising in the Netherlands.

The Supreme court of the Netherlands decided to refer the following question to the ECJ for a preliminary ruling:

> Must Article 39 EC be interpreted as precluding... a situation in which a tax payer, who in his Member State of residence has negative income from a dwelling owned and occupied by him, and obtains all of his work-related income in another Member State, is not permitted by that other Member State... to deduct the negative income from his taxable work-related income, even though the Member State of employment does allow its own residents to make such a deduction?

First of all, the Court granted the protection of Article 39 to workers who only became cross border worker by moving their residence. Mr *Renneberg* a Dutch resident became not a usual cross border worker by starting to work in Belgium, but just the other way around: he moved his residence to Belgium but continued to work in The Netherlands. The problem then is that his tax treatment in the Netherlands became less advantageous than that of resident workers.

The second question for the Court concerned the issue whether this unequal treatment derives from the bilateral tax agreement between the Netherlands and Belgium. The answer of the Court is negative for two reasons. Firstly, the distribution of the taxing powers in the bilateral tax treaty does not preclude the taking into account of negative income from im-moveable property in Belgium. 'The taking into account of the relevant negative income, or the refusal to do so, thus depends in reality on whether or not those taxpayers are residents of the Netherlands'. Secondly, the rules of the Court with respect to the taxation of cross border work as derived from Article 39 EC have precedence over the allocation of taxing powers as agreed by the Member State. That is, when there is no objective difference between residents and non-residents, the latter group may not be denied the tax advantages available to resi-dents. This is the case particularly where a non-resident taxpayer receives no significant in-come in his home state and derives the major part of his taxable income from an activity

pursued in the work state. In such a situation discrimination arises from the fact that the per-sonal circumstances of the taxpayer are taken into account neither in the home state nor in the work state.

Two conclusions emerge from the case law of the Court: Firstly, Article 39 EC is not only relevant where a worker become a cross border worker by changing jobs, but also by changing residence. Secondly, the taking into account of a non-resident worker's personal circumstances includes all tax advantages, including the possibility to deduct losses.

The decision is not mentioned in the *Belgian, France, German, Luxembourg* reports.

According to the *Austrian* rapporteur the *Renneberg* judgment does not call for any legal activity in Austria. The Austrian Income Tax Act makes it possible to take into account a loss abroad, if the person is subject to taxation without limitation. Tax experts confirm that the decision has no impact on Austrian legislation.

With reference to the *Renneberg* judgment the *Bulgarian* rapporteur mentions a pending infringement procedure. On 19 March 2009 the European Commission announced the issu-ance of a reasoned opinion (2007/4881) formally requesting Bulgaria to change its tax provi-sions according to which certain types of Bulgarian source income are subject to a withhold-ing tax on a gross base when paid to non residents whereas Bulgarian residents may deduct expenses related to the same income. According to the Bulgarian rules (mainly the Law on Taxation of the Incomes of Physical Persons) certain types of Bulgarian source income of individuals and legal persons resident in other EU Member States and EEA/EFTA states are subject to withholding tax on a gross basis. However, the tax on similar income earned by Bulgarian residents is assessed on a net basis and Bulgarian residents may deduct expenses for the purpose of determining the basis of assessment of taxation of their income.

No concrete follow-up of *Renneberg* judgment in the activities of *Czech* authorities or courts could be identified. Under Czech income tax law, residential taxpayers and taxpayers, who stay in the Czech Republic more than 183 days a year, are subject to tax on their entire income, all other taxpayers (non-resident taxpayers) are subject o tax only on income re-ceived in the Czech Republic. Pursuant the provisions of Act. No. 586/1992 Coll., on Income Tax, mortage interest relief may be claimed under certain conditions, however, these provi-sions do not specify, whether the dwelling concerned has to be located in the Czech Repub-lic. Thus it appears that it is possible to claim a mortgage relief also for properties located outside the territory of the Czech Republic. However, the income tax law stipulates the re-quirement, that non-resident taxpayers may claim mortgage relief (and certain other reliefs) only if their income from the Czech Republic is at least 90 per cent of his/her entire income. This provision appears to be problematic, as such requirement is applicable only to non-resident taxpayers, but no such precondition is entailed for the resident taxpayers. Thus in a case of a person with e.g. 85 per cent income from Czech Republic, the right to claim mort-gage relief under Czech income tax law would depend from the residency of that person or the fact, whether or not such person has stayed for at least 183 days of the particular tax pe-riod (year) in the Czech Republic. The *Renneberg* case concerned a person, inter alia, receiv-ing 'all or almost all of its income' in a Member State, which he/she was not resident of. It remains questionable, whether a non-resident with e.g. 85 per cent income from the Czech Republic would still fall under this category. If the answer would be positive, it appears, that the provisions stipulating the precondition of 90 per cent income from the Czech Republic would be contrary to the ruling of the ECJ ruling in the *Renneberg* case and thus to Commu-nity law.

The *Cypriot* rapporteur has not identified any rule that is contrary to the findings or the broader principle of the *Renneberg* case.

According to the *Estonian* rapporteur the *Renneberg* decision has as a consequence that the bilateral tax agreements should be revised in order to avoid any unequal treatment or less favourable position of a migrant worker.

In Finland workers are entitled to claim tax deductions for payments of interest on a loan that is taken to finance the permanent owner-occupied home. Workers are entitled to make this deduction regardless of whether the home is located in Finland or abroad.

According to the Greek rapporteur the *Renneberg* decision had no particular influence on Greece. Greek tax legislation does not provide that if the calculation of net income (includ-ing the income deriving from occupying his own dwelling), results in a negative amount, this negative amount is deducted from taxable gross income. Therefore, concerning this issue, there is no discrimination between nationals and other EU citizens.

As the Estonian rapporteur the Hungarian rapporteur refers to the applicable bilateral tax agreements as well. If a bilateral agreement so prescribes, a tax title emerging in another Member State has to be taken into account in the Member State liable for tax assessment.

The specific circumstances obtaining in the *Renneberg* case do not obtain in *Ireland*, since taxable income does not include the advantage which the taxpayer derives from occu-pying his own dwelling (and as a result will not enjoy the benefit of any tax deduction in respect of a negative amount).

In *Italy* the income tax act does not take into account the rental loss on immovable prop-erty in order to determine the basis of assessment of the income tax of a non-resident tax-payer, while interests paid on the mortgage are deducted form the gross income tax. On the contrary, resident taxpayers are entitled to both advantages.

In *Latvia* there is no right to negative income deduction with regard to the expenses relat-ing to the dwelling in Latvia. There is only a right to negative income reduction for expenses relating to education and health service. The detailed Latvian regulations concerning the negative income deduction obviously does not envisage the situation of frontier workers. Firstly, expenses for medical services include expenses for health insurance, but regard only to such health insurance which is provided by insurance companies operating in accordance with Latvian Law. Therefore, a negative income deduction does not apply to such medical insurance which is provided by an insurance company outside Latvia. Secondly, although the applicable regulation does not explicitly refer to the medical services received in Latvia only, it is more likely that State Revenue Service would apply these regulations regarding only the medical services bought in Latvia. Both provisions neglect the situation of a frontier worker and his/her family members, who having residence in another member state and are more likely to receive medical services and medical insurance provided by local service providers. Although in 2008, the regulations were amended concerning the provision considering ex-penses for education services received in other EU and EEA member states as subject to the negative income deduction, the Latvian tax legislation with regard to the negative income deduction is still contrary to Article 39 of EC Treaty and Article 7(2) of Regulation 1612/68.

The *Lithuanian* rapporteur sees little relevance of the *Renneberg* judgment for the Lithuanian situation because no similar possibilities to deduct or not to deduct income exist according to the Lithuanian legislation. The same applies to *Malta, Romania* and *Slovenia.*

In the *Netherlands* the Supreme Court, who asked for the preliminary ruling, still has to issue a final judgment in this case. Answering parliamentary questions the State Secretary of

Finance informed Parliament on 9 December 2008 that the consequences of this ECJ judg-ment are still subject of further investigation.

According to the *Polish* Act on personal income tax, there is a different position of indi-viduals depending on their residence status. According to Article 3 of the Act, all individu-als, whose place of residence is in Poland, are subject to unlimited tax liability in Poland, which means that they are liable to pay Polish taxes on the total of their income, irrespective of where it was generated. Individuals who do not have their place of residence in Poland are subject to limited tax liability, which means that they are liable to pay taxes only on income gained at the territory of Poland. Other rules may be subject of international agreements on elimination of double taxation. Therefore, according to Article 3 para. 2a of the Act, there is no possibility to cover also income or loses generated outside territory of Poland in cases of individuals subjected to limited tax liability in Poland.

Concerning the implementation at national level of the *Renneberg* judgment, the *Portu-guese* rapporteur remarks firstly, that the Portuguese tax law foresees that the interest on a debt taken on to finance a personal dwelling is deduced from gross work-related income and, consequently, from the taxable income of a resident taxpayer, even if the interest exceeds the advantage the taxpayer derives from living in his own dwelling. Secondly, there is a Conven-tion between the Portuguese Republic and the Kingdom of Spain for the avoidance of double taxation and for the prevention of fiscal evasion in the field of taxes on income. It is not clear if such convention allows the deduction, for the purposes of determining the basis of assess-ment of the income in one of the States, the negative income relating to a house owned by the taxpayer and used as a dwelling in the other State, even if the non resident taxpayer re-ceives all or almost all of is taxable income in the State where he works. According to the rapporteur, due to Article 39 of the EC Treaty as interpreted by the Court of Justice in *Ren-neberg*, Portugal must accept in any case that the negative income related to a dwelling in Spain is taken into account by its tax authorities for the purposes of determining the basis of assessment of taxable income, whereas the taxpayer derives all or almost all of his taxable income from salaried activity carried out in Portugal. Therefore, the above mentioned con-vention must be interpreted in conformity with the *Renneberg* judgment.

According to the *Slovakian* rapporteur the national legislation on income tax does not provide for such differentiated treatment as mentioned in the *Renneberg* judgment. However, a permanent residence condition is included in Article 33 of the law which governs the so called tax bonus – the possibility to lower the tax base when having dependent children. Only individuals having permanent residence in Slovakia can apply the tax bonus.

Recently the *Spanish* government has presented a First Report on a Draft Taxation Act in order to transpose EU legislation on the subject of transnational professionals. The Draft Taxation Act intents to adapt Spanish legislation on taxation of non-residents in order to improve free movement of workers, services and capital. Regarding frontier services a new rule is introduced on taxation in the reception State while currently the Spanish rule is taxa-tion in the State of origin. Concerning real estate taxes, the Draft includes rules on taxation in the MS in which the real estate is located. On the other hand, the Draft Act introduces especial rules for incomes obtained without a permanent establishment by tax payers resi-dents in another MS.

In *Sweden* the *Renneberg* judgment has been considered in Swedish tax law and an amendment of the Income tax Act was coming into force on January 1, 2008. The intention was to adapt the Swedish legislation to EC law and to facilitate the movement on the labour market. The increased right to tax reduction for interest rate paid in another Member State

should be granted people having residence in the EU and income solely (or almost solely) from work in Sweden, if the interest rate has not been subject to tax reduction in the home Member State.

According to the *United Kingdom*'s rapporteur the first finding in the *Renneberg* case that a EU national who has always worked in his or her Member State of origin and only lives in another Member State is still a worker for the purposes of Article 39 EC is important for the UK. Such a situation arises not infrequently in Northern Ireland. The second finding regarding the right to deduct losses on immovable property in the Member State of residence from taxable income in the Member State of employment is also of interest in the UK. Taken on its very specific facts, mortgage tax relief, the judgment is not relevant to the UK as such a tax relief was abolished more than ten years ago. However, the wider principle regarding treatment of losses on immovable property in one Member State and the possibility to set these off against income earned in the UK cannot be dismissed so clearly are irrelevant. Ac-cording to the UK's Inland Revenue from 2006 'Rent and other receipts from properties outside the UK continue to be taxed separately as foreign income. The profits or losses are computed using trading principles just like those of a UK rental business.' However, the IR continues 'Profits or losses of an overseas property business are not combined with the prof-its or losses of a UK rental business; they are taxed separately and losses on one can't be set against profits on the other.' This appears to indicate that the kind of problem which arose in *Renneberg* could arise in the UK though not in respect of mortgage tax relief. As appears from the judgment, the situation as regards double taxation agreements must also be taken into account.

Concluding

The *Renneberg* case is not mentioned in the Belgian, French, German and Luxembourg's reports. The decision has no impact on the Austrian legislation. No follow-up was noted in Denmark and the decision is not likely to have any impact on Cyprus, Greece, Ireland, Lithuania, Malta, Romania and Slovenia, while similar possibilities to deduct or not to de-duct do not exist. In Finland deductions are allowed regardless of whether the home is lo-cated in Finland or abroad. Although the Czech legislation seems in conformity with *Renne-berg*, it is questionable whether the strict precondition of 90 per cent income from the Czech Republic is in conformity with the *Renneberg* requirement of receiving 'all or almost all of its income' in a Member State, which he or she is not resident of. The national reports of Italy, Latvia, Poland, Slovakia and the UK are not very clear on the subject, but due to the strict distinction between resident and non-resident taxpayers the Italian legislation seems contrary to *Renneberg*. The same applies to comparable tax legislation in Latvia, Poland (distinction between unlimited and limited tax liability), Slovakia and the UK. With refer-ence to *Renneberg* the Bulgarian rapporteur refers to a pending infringement procedure. The Estonian, Hungarian, Polish, Portuguese and UK rapporteurs emphasize that the situation as regards double taxation agreements must also be taken into account. The consequences of *Renneberg* are still subject of further investigation in the Netherlands. In Spain a new draft Taxation Bill is pending. In Sweden the *Renneberg* judgment is already included in an amendment of the Income Tax Act which came into force 1 January 2008.

FOLLOW UP TO: *RACCANELLI* (C-94/07)

The case concerned Mr Raccanelli who was a student at the Max Planck Institute for Radio Astronomy, part of the Max-Planck-Gesellschaft zur Förderung der Wissenschaften in Ger-many. Mr Raccanelli was funded by a doctoral grant given by the Institute. Under this grant Mr Raccanelli was not placed under an obligation to work for the Institute, and could if he so desired devote his entire time to his thesis. Researchers formally employed by the Institute were required to work during normal working hours for the Institute, and could only work on their theses outside of these normal working hours. Grant funded researchers, like Mr Rac-canelli, were exempt from income tax and were not affiliated to the social security system. Employed researchers were liable to pay income tax and social security contributions. Mr Raccanelli was Italian, and complained to the Arbeitsgericht (Labour Court) Bonn (compar-ing himself to German employees of the Institute) that he was being discriminated on the basis of his nationality in a working relationship, contrary to Article 7 of Council Regulation 1612/68 on freedom of movement for workers within the Community. The Arbeitsgericht Bonn referred various questions to the ECJ, including whether Mr Raccanelli was a worker. The ECJ said, inter alia

> 'a researcher preparing a doctoral thesis on the basis of a grant contract… must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain pe-riod of time under the direction of an institute… if, in return for those activities, he receives re-muneration'.

The decision is not mentioned in the *Belgian, French and Luxembourg* reports.

According to the *Austrian* rapporteur the *Raccanelli*-decision (C-94/07) doesn't cause problems in Austria. As a doctoral student you are either a student only or an employee of the university (as a researcher or lecturer). Maybe there might be some misuse in specific disciplines where doctoral students have to work close together with the professor (e.g. be-cause of the need to use a laboratory); then the student should be employed as a 'project staff': But usually doctoral students are not involved in university procedures in a way that calls for a qualification as 'employee'.

According to the *Bulgarian* rapporteur the ECJ judgment in the *Raccanelli* case has not brought any new legal developments in this regard yet. If a similar case arises in Bulgaria, general anti-discrimination legislation would apply. However it is hardly probable that even Bulgarian nationals who are PhD students are considered workers.

At the present, no concrete follow-up of this judgment could be found in the activities of *Czech* authorities or courts. As regards the eventual influence of the case, a situation similar to the *Raccanelli* case may occur also in the Czech Republic, i.e. a private association em-ploys a researcher/provides a researcher with a grant enabling him to prepare a doctoral the-sis on this bases. A researcher with an employment contract would be liable to income tax and social security contributions, whereas a grant recipient would be not affiliated to the social security and health insurance system, however, he would be liable to income tax. The Czech law, in general, does not contain any specific provisions on providing grants to stu-dents/researchers by private-law associations. In a case similar to *Raccanelli*, the Czech courts would be obliged to apply the Community law concept of a 'worker' on the basis of direct applicability of Community law in order to asses, whether the grant recipient can be regarded as a 'worker' under Art. 39 EC.

According to the *Cypriot* rapporteur the rules of the Research Promotion foundation (RPF) contain various discriminatory elements for researchers to be funded as employed researchers of Cypriot institutions or other institutions based in Cyprus, as workers exercis-ing the right to free movement in the EU. For instance in the categories of eligible persons the term 'researcher' is defined as 'academic, scientists who work's permanently or has a contract of employment/cooperation with an institution' but the contract of employment/co-operation must be a contract of indefinite duration or a long duration that is not confined to a single task or research program'. Such a provision amounts (a) direct discrimination against workers of fixed term contracts, or even those on part-time contracts; (b) this provision is prima facie indirectly discriminatory against Union citizen researchers who would otherwise be allowed to exercise their right to be employed or contracted for services by an institution in Cyprus, when compared to Cypriots. The rapporteur assumes that the goal of the RPF rules would be to encourage 'local' research and infrastructural investment in 'developing' the institutions based in Cyprus, but such an aim in such means as provided in the provision is unlikely to be justifiable. Moreover, it is likely to be contrary to the ruling of *Raccanelli*, by both unduly restricting the definition of researcher as 'worker' and restricting free move-ment of workers. A complaint is pending before the Cypriot Equality body on the basis of this logic.

On the contrary the case of *Raccanelli* does not have any implications to the practice and to the legislation concerned in *Estonia*. There is no such practice that the same places of work for doctoral students are only reserved for domestic students and the other under the worse conditions are only meant for foreigners. On basis of the law the foreign and domestic doctoral students are treated equally.

The same applies to *Finland*: no information was found on that arrangements compara-ble to that in *Raccanelli* would be used in Finland.

In *Germany*, the Labour Court of Bonn by judgment of 19 November 2008 has rejected the claim of Mr. Raccannelli, since he has not been regarded by the Court as qualifying as a worker in the sense of EU legislation due to his particular contractual agreement with the Max-Planck-Society. Mr. Raccanelli has filed an appeal with the Labour Appeal Court. The appeal is still pending.

The *Raccanelli* judgment does not have particular influence in *Greece* as a special status of researchers does not exist.

In *Hungary* the granting of scholarships for young researchers falls within the compe-tence of high-level educational and/or research institutions. A full time Ph.D. researcher has determined teaching and studying obligations, must obey the instructions of the appointed professor and gets remuneration as well. In this sense he would be 'Community worker' and would fall under the EC Treaty. Browsing the eligibility conditions of the ELTE University, Law Faculty (Budapest) we found that the Ph.D. candidate must have obtained his/her di-ploma in a Hungarian university in order to be eligible to apply. It means that students who obtained their diploma in another Member States are excluded from the possibility to apply and to become funded full time Ph.D. researchers.

According to the *Irish* rapporteur the issues as mentioned in the *Raccanelli* judgments have not come up in the Irish context.

The same applies tot *Italy*. A case similar to the *Raccanelli* could hardly have taken place in Italy, since there is only one kind of contract that doctoral students can sign with Universi-ties or research institutions.

In *Latvia* and *Lithuania* too the issues as analysed in the *Raccanelli* judgment are not likely to arise in these countries.

In *Malta* the rapporteur is not aware of any particular action or follow-up taken by the Maltese authorities.

The judgment of the Supreme Court in the *Netherlands* in the case of a Dutch Ph.D. stu-dent working on a grant rather than an employment contract like his co-workers seems in accordance with the *Raccanelli* ruling of the EC Court of Justice. In its judgment of *14 April 2006* the Supreme Court decided that Ph.D. students working on a grant should be consid-ered as working on a labour contract according to the Civil Code. Three elements are deci-sive: work, remuneration and authority. Ph.D. research is part of the core business of a uni-versity and should therefore be considered as work. The Supreme Court qualifies a study grant as remuneration and according to Article 7:610a Civil Code (BW) the relationship should be considered as based on a labour contract when the work continues during three consecutive months weekly or for at least twenty hours a month. In its decision 2008-106 the Equal Treatment Committee used the *Raccanelli* judgment to establish a labour relationship in a situation in which a labour contract according to civil law was lacking.

In *Poland*, there is no possibility to be both employed at a University and have a scholar-ship. However, employment concerns any employment taken by an individual. In the latter case, such a person, irrespective the fact of preparing a doctoral dissertation, shall be treated as a worker, as opposed to a not working doctoral student.

In *Portugal* there are some private-law associations, equivalent to that at issue in case *Raccanelli*, which contract with researchers preparing their doctoral thesis or grant them subsidies for that purpose. According to this judgment, such private-law associations must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 of the EC Treaty. An infringement of such principle can entitle the worker in question to claim compensation pursuant to the national legislation applicable in relation to non-contractual liability.

According to the *Romanian* rapporteur similar problems as analysed in *Raccanelli* could not be identified in the Romanian jurisprudence.

In *Slovakia* the provisions governing position of doctoral students in the Law on univer-sities apply according to Article 113 of this Law equally to Slovak citizens and citizens of EEA countries. Therefore, the *Raccanelli* judgment should not have any influence on Slovak legislation.

In *Slovenia*, in case of a dispute on the existence of the employment relationship it shall be assumed that an employment relationship exists, if the core elements of employment are dominant. The role of the court is therefore focused on assessment of the actual content of the contractual relation of the parties. The wording of neither the contract nor the type of that contract has legal relevancy for the court's decision. In this respect it does not matter if the worker is a national of another member state.

In *Spain*, legislation regarding researchers 'in training' allows two different situations. The old system: four years of a grant as researcher in training (no labour contract) and a new system: two years of a grant as researcher in training (no labour contract) and two more years of a labour contract. In both models during the first two years there is not a recognised labour relation, with all the social security consequences of that situation.

According to *Swedish* law a criterion for being a worker is remuneration (wage), and a person having a scholarship should not be considered to be a worker (because then he would become subject to taxation). Further, it should be noted that scholarships granted to doctoral

students are not contrary to Swedish law, even if there is for different reasons a strive to en-gage doctoral students as employees.

In the *UK* doctoral students receive funding in a wide variety of different forms and from a wide variety of different sources. Often funding comes in the form of a bursary from the university where the student is studying, often from some other grant awarding institution. The treatment of doctoral students is very varied in UK institutions (almost all of which are public law institutions). Some are employees where they are on contract to carry out specific activities, others are treated as students. In 2004, the National Postgraduate Council, a UK association for postgraduate students, examined whether PhD students in the UK could claim worker status and if so whether this would be to their advantage. Certainly their conclusion at that time is that it is a very mixed question – some students might benefit from worker status while others would be disadvantaged. The question raised in *Raccanelli* is certainly relevant to the UK but the extent to which postgraduate students may wish to challenge their classification is less clear as the benefits for them are less apparent than in the German case.

Concluding

The *Raccanelli* case is not mentioned in the Belgian, French, German and Luxembourg re-ports. The decision does not cause problems in Austria. No follow-up was noted in Denmark, Bulgaria, the Czech Republic, Estonia, Finland, Ireland, Italy, Latvia, Lithuania, Malta, Po-land and Romania. The relevant rules in Cyprus contain various discriminatory elements with regard to researchers from other Member States. A complaint is pending before the Cypriot Equality body. The principle of equal treatment in this respect is explicitly men-tioned by the Estonian, Portuguese and Slovakian rapporteurs. In the Netherlands the Su-preme Court decided that Ph.D. students working on a grant should be considered as work-ing on a labour contract according to the Civil Code. The Slovenian rapporteur is of the opin-ion too that in case of a dispute it shall be assumed that an employment relationship exists, if the core elements of employment are dominant. The situation in Sweden (why should a scholarship under specific circumstances not being considered as remuneration?), Spain and Hungary is unclear. Nonetheless, the law faculty of the ELTE University in Budapest applies discriminatory criteria while students who obtained their diploma in another Member State are excluded from the possibility to apply and to become funded full time Ph.D. researchers. The question raised in *Raccanelli* is certainly relevant to the UK but the extent to which postgraduate students may wish to challenge their classification is less clear as the benefits for them are less apparent than in the German case. In Germany, the Labour Court of Bonn by judgment of 19 November 2008 has rejected the claim of Mr. *Raccanelli*, since he has not been regarded by the Court as qualifying as a worker in the sense of EU legislation due to his particular contractual agreement with the Max-Planck-Society. Mr. *Raccanelli* has filed an appeal with the Labour Appeal Court. The appeal is still pending.

41 Arbeitsgenehmigungsverordnung of 17 September 1998, *Official Gazette* I, p. 2899, amended by Art. 6 of the law of 7 December 2006, *Official Gazette* I, p. 2814; 2007 II, p. 127, as amended by law of 10 November 2008, *Official Gazette* I, p. 2210.

Chapter VIII Transitional Measures

1. EU-10

1.1 Transitional measures imposed on EU-8 Member States by EU-15 Member States

Eight of the ten Member States joining the European Union on May 1, 2004 were confronted with transitional measures regulating the right to free movement by workers. By 2009 these restrictions regulating access to the labour market of the ‘old’ Member States have been abolished by all Member States except Austria and Germany.

The *United Kingdom* still uses a registration scheme for workers from the EU-8 Member States which allows them to monitor the work done by nationals of these Member States and help local services plan and ensure that migration is working for the United Kingdom. Ac-cording to the Registration Scheme there is no right to full access to benefits until paid em-ployment has been pursued and taxes have been paid for twelve consecutive months. A number of EU-8 nationals have found themselves excluded from residence or income sup-port although they had worked in the UK for twelve months as they had failed to re-register under the Workers Registration Scheme when they changed employer. As a consequence, their employment was no longer lawful and they did not accumulate the so needed twelve consecutive months of employment. In the *Zalewska* case no breach of Article 7 of Regula-tion (EEC) 1612/68 was established as this provision only applies to lawful employment. Neither was the measure classed as disproportional as the system was necessary to acquire up-to-date statistics.

Austria notified the Commission in April 2009 of its intention to maintain transitional measures for workers from the EU-8. Justification given was the fact that nearly half of its territory borders an EU-8 Member State, the high percentage of non-nationals in the country and an exceptionally difficult labour market. The decision was not subject to public debate, notwithstanding the fact that Poland had expressed its intention to take Austria to the ECJ if transitional measures were maintained. The prolongation of transitional measures enjoyed consensus at the political level, with only the Greens objecting. Although transitional meas-ures are maintained, workers from EU-8 Member States can take up employment in those professions listed in the *Fachkräfte-Bundeshöchstzahlenüberziehungsverordnung*. The fact that the list in this *Verordnung* covers 65 professions with a shortage of labour is felt to im-ply that the main reason not to abolish transitional measures is to appease the public.

In 2009 *Germany* extended its transitional measures applicable to workers from EU-8 Member States until 30 April 2011. The justifications put forward were: serious disturbances of the German labour market and the danger of such disturbances for Germany. An amend-ment of the regulation on labour permits[41] has facilitated access to the labour market for EU-8 and EU-2 nationals. The social partners participated in the decision to prolong transitional measures and they are supported by the trade unions. Since January 1, 2009, Union citizens and family members entitled to free movement with an academic diploma or comparable employment are granted a labour permit without examination of the preference clause in the

42 Sec. 39 para. 2, No. 1 of the Residence Act (disadvantageous effects upon the labour market.

German Residence Act or other additional requirements.[42] The amendment exempts EU-8 and EU-2 nationals who have acquired a recognised German school diploma abroad from the obligation to obtain a work permit for qualified professional formation in a recognised or comparably regulated profession suitable for training. Restrictions, however, do remain pos-sible regarding certain sensitive sectors, the provision of services (Article 49(1) EC) and temporary admission of trans-frontier workers for the entire territory of the Federal Republic of Germany. Access to the labour market is already possible for qualified occupations, sea-sonal workers, holders of EU labour permits after one year of occupation, academics, per-sons who have received a primary education at German schools abroad and general facilita-tions applicable to qualified workers, such as scientists with particular knowledge, persons teaching in special functions as well as specialists and employees with particular profes-sional experience provided that they earn at least a salary in the amount of € 64.800 per year, remain in force.

Although no transitional measures are applied in *the Netherlands*, the presence of EU-8 workers, in particular Polish workers, has been a source for political and social debate. In *Sweden* the debate has focussed on free movement of services and posted workers' salaries and on the consequences for the Swedish industrial relations system.

1.2. Transitional measures imposed on EU-15 Member States by EU-8 Member States

The EU-8 Member States were permitted to apply reciprocal transitional measures. Only Slovenia, Hungary and Poland decided to use this option. By 2009 these Member States have lifted any reciprocal measure in force, thus allowing for full free movement of workers from the EU-15. Various

EU-8 Member States report that they are actually experiencing labour market shortages due to their own nationals moving to an EU-15 Member State to take up paid employment there. They have had to attract labour from third-countries to fill vacancies.

1.3. Malta and Cyprus

Different from the transitional measures for the EU-8 Member States, Article 39 EC applies fully for EU citizens wanting to work in Malta, with the exception that Malta is given the possibility to invoke a safeguard clause according to which Malta, in case of serious distur-bances of the labour market, may request the Commission to suspend Article 39 EC and Articles 1-6 of Regulation 1612/68. Exceptionally, in urgent and exceptional cases, it may even suspend the application of these provisions against a reasoned ex-post notification to the Commission. Until now, Malta has not made use of either safeguard clause so Article 39 EC applies fully, the only exception being that the transitional arrangements allow Malta, to have advance notice of disturbances of the labour market in view of the invoking the safe-guard clause, may maintain its work permit scheme, provided it issues work permits auto-matically.

These transitional provisions will end when the transitional period ends in April 2011. A Joint Declaration regarding Malta annexed to the Final Act to the Accession Treaty states that should the accession give rise to difficulties to the free movement of workers, the matter can be brought before the EU institutions to obtain a solution to this problem which would,

however, be in strict accordance with in particular provisions of EC law on free movement of workers.

2. EU-2

2.1. Transitional Measures imposed on EU-2 Member States

Like with the EU-8 Member States, the Member States negotiated transitional arrangements allowing them to regulate access to their labour market by nationals from the EU-2. Roma-nian and Bulgarian citizens are still subject to transitional measures in *Austria, Belgium, Germany, France, Ireland, Italy, Luxembourg, Malta, the Netherlands* and *the United King-dom*. The following Member States either did not restrict access to their labour market by Romanian or Bulgarian nationals or have lifted these transitional arrangements since: *Den-mark, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia,* and *Sweden*. The *Czech Re-public* does grant EU-2 nationals access to their labour market, albeit under national law rather than the Community free movement rules.

2.2. Transitional Measures imposed by EU-2 Member States

Bulgaria and Romania were both granted permission to apply reciprocal restrictions to Member States imposing labour market restrictions to their nationals. Where Bulgaria chose not to apply such restrictions, Romania initially (2007) applied correlative transitional meas-ures. These reciprocal measures were withdrawn in 2008. Currently no restrictive measures apply to EU citizens working as an employee in these Member States.

43 For more information on SOLVIT, see the European Commission's web site at http://ec.europa.eu/sol-vit/site/about/index_en.htm.

Chapter IX Miscellaneous

INTRODUCTION

This chapter offers a brief overview of developments in Member States which impact on free movement of workers, focusing in particular on integration policies, changes to policies ad-dressing the admission for employment and treatment of workers from third countries, and the return of EU-10 nationals. Information is also provided on mechanisms in Member States (in addition to national SOLVIT centres[43]), which EU citizens can approach for information about their rights under free movement law or to resolve difficulties in accessing these rights.

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

There have been a number of developments of a general nature in Member States worth not-ing that impact on the free movement of Community workers. An important development in *Bulgaria* is the clear distinction introduced into the Law on Foreigners between third-country nationals and EU citizens, EEA and Swiss nationals, who are no longer considered as for-eigners.

In *Finland*, in accordance with the arrangements pertaining to the Common Nordic La-bour Market, it is observed that other Nordic nationals benefit from more favourable provi-sions on entry, residence and departure than EU citizens.

In the *Czech Republic*, there have been complaints to the Ombudsperson concerning the lack of access to adequate information about visa requirements and the interview process for third-country family members of EU citizens, particularly in relation to the unavailable or outdated websites of Czech embassies. This has resulted in a new website established by the Ministry of Foreign Affairs, although much of the pertinent information is still in the Czech language.

An interesting development in *Estonia* is the increase in the exercise there of the right to establishment by nationals of Finland, Germany, Sweden and the United Kingdom because of the lower taxes in that country.

The entry of the new Member States which joined the EU in May 2004 into the Schen-gen system at the end of 2007 (with internal air borders lifted in March 2008) has been a significant development in those countries, clearly facilitating the free movement of workers, and is highlighted in the report of *Malta*.

Finally, another significant development in some Member States (e.g. *Netherlands*) of relevance to facilitating the free movement of workers has been the transposition of Direc-tive 2005/36/EC on the recognition of professional qualifications, although *Greece* has not yet transposed this measure.

Integration measures

The Federal Ministry for Interior Affairs in *Austria* is working on a national action plan for integration and the introduction of a 'Red-White-Red Card', which will require prospective immigrants to gain knowledge of the German language to A1 level before coming to Austria. Presumably, EU citizens and their family members would not be covered by these rules, although this is not explicitly stated. In *Finland*, and as observed in previous reports, immi-grants who moved to Finland after 1 May 1997 (including EU citizens and their family members), who have been entered into the population register system of their home munici-pality, and who are eligible for a labour market subsidy and/or social assistance are entitled to a personal (voluntary) integration plan for a maximum period of three years during which subsistence is secured through the provision of integration assistance. In *Portugal*, the Plan for immigrants' integration was approved in 2007 by a Council of Ministers Resolution, which sets out a national strategy concerning the reception and integration of immigrants including measures in the fields of employment, vocational training, residence, health, edu-cation, culture, sport, social benefits and justice.

Immigration policies for third-country nationals and the Community preference principle

Schemes to attract more highly skilled migrants from third countries are being developed in a number of EU Member States. In 2008, in the *Czech Republic*, a system of 'green cards' was introduced to facilitate access of third-country nationals to the labour market. Green cards are issued for vacancies that cannot be filled by Czech nationals and EU citizens (as well as their family members) within 30 days. The pilot project 'Selection of Qualified For-eign Labour' facilitating the access of integrated skilled third-country nationals to permanent residence (see the 2007 Report) continues. Similarly, in *Denmark*, the stated aim to increase the recruitment of highly qualified labour from third countries has resulted in a number of adjustments to the national legislation, and, in *Hungary*, there has been an observable inflow into the labour market of highly skilled foreign managers (mainly as intra-corporate transfer-ees within multinational companies from the former EU-15).

The most radical changes regarding labour migration from third countries were intro-duced in December 2008 by new regulations in *Sweden*, which abolish the previous labour market test and leave the decision for hiring solely to the employer subject to a check by the Migration Board that the community preference has been respected and that the salary and other termsof employmentare in accordance with the conditions applying to employees already resident in the country. In the *United Kingdom*, the new Points-Based System (PBS) on primary migration from third countries came into effect in February 2008 with the aim of making the management of migration more transpar-ent and simpler to administer. The PBS is divided into five tiers ranging from highly skilled migrants to students, and points are awarded for various criteria, such as educational attain-ment, previous employment and knowledge of the language, etc. In all categories, except self-employment, the third-country national must have a sponsor, which may be an employer or an educational institution if s/he is a student. The PBS does not apply to EU citizens, in-cluding Bulgarian and Romanian nationals who continue to be subject to transitional ar-rangements. One problem that has already arisen with the PBS is that the in-built flexibility to change the rules quickly has affected some third-country nationals who prepared their

applications in accordance with the published rules only to discover that these applications are being assessed on the basis of different criteria.

As mentioned in the 2007 Report, in *Poland*, nationals of Belarus, Russia and Ukraine have privileged access to the labour market and can be employed for six months within a period of one year without the need to obtain a work permit. However, there have been calls by some employer associations and trade unions to tighten up these rules in the light of the economic crisis, particularly in regard to low-skilled employment in the agriculture and con-struction sectors. It is also possible for persons of Polish origin to apply for a document know as the Charter of a Polish National *('Karta Polaka'*), which is issued by Polish consu-lates after the person concerned has satisfied certain criteria. Possession of this document provides free access to the Polish labour market. Moreover, there is no legal obligation in Poland to give preferential treatment to EU citizens in respect of access to employment. In *Finland*, third-country nationals may only be issued with a residence permit for the purpose of employment if the employment office is satisfied that issuing such a permit would not prevent a person already in the labour market from finding work. Persons already in the la-bour market include Finnish citizens, citizens of other EU Member States and lawfully resi-dent third-country nationals.

In *Ireland*, the Immigration, Residence and Protection Bill, introduced in 2008, is still under discussion in Parliament, although it is clear from a 'saver clause' in the Bill that its provisions, particularly those relating to entry, residence and expulsion, will not apply to persons covered by EU free movement rules.

In *Italy*, 2008 amendments to the consolidated law on immigration introduced *inter alia* penalties for persons who rent property to foreigners without a regular residence permit and possibilities for DNA testing to prove family relationships in family reunification cases where documents attesting such relationships cannot be produced or where there are doubts as to their authenticity. Moreover, a July 2009 law passed by Parliament criminalizes irregu-lar migration by making irregular entry and stay subject to a financial penalty of EUR 5,000-10,000.

The economic crisis has reduced the perceived need in *Lithuania* to relax the rules relat-ing to the admission of third-country nationals for employment, referred to in previous re-ports. Moreover, there is generally no promotion of active recruitment of workers from third countries, and the Community preference principle is applied in respect of EU workers and their family members.

Return of nationals to new EU Member States

In some of the Member States (*Estonia*, *Poland*), there are signs that their nationals are re-turning home after being employed in the former EU-15, a situation due to a combination of the economic crisis and the availability of higher salaries and better working conditions at home.

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

With regard to a number of Member States, the rapporteurs explicitly stated that there were no special non-judicial bodies to which complaints regarding violations of Community law could be launched. In some Member States, ombudspersons (*Czech Republic* – see also above, *Denmark*; *Finland*, *Greece* – where there is a particular section of the office special-izing in immigrants' rights, *Hungary*, *Latvia* – but only if complaints concern human rights, which includes unequal treatment, and three such complaints from EU citizens were received in 2008 and 2009, *Portugal*), equality or anti-discrimination bodies (*Cyprus*, *France*, *Hun-gary* – although it is not possible to bring a complaint of discrimination on the ground of nationality) and the public authority supervising working conditions (*Finland*) or labour inspectors (*Slovenia*) play important roles in this regard. The Commissioner of Human Rights Protection in *Poland* is another key state body, and, in *Portugal*, it is also possible to make petitions to the Assembly of the Republic as well as complaints to the Ministry of Home Affairs.

In a number of Member States, assistance can be sought from trade unions, employer as-sociations and NGOs (e.g. GISTI and CIMADE in *France*; Immigrant Council of *Ireland*; Legal Clinics Foundation, Stefan Batory Foundation and the Helsinki Foundation for Human Rights in *Poland*). In the *United Kingdom*, a series of advice centres can be approached, such as Community Advice Bureaux, community law centres, and the AIRE Centre, which is a specialist organization providing advice not only to individuals but also to first-level advi-sors with a particular reference to problems relating to free movement of workers. A further avenue in *Ireland* is the Eurojus consultant lawyer under the auspices of the European Commission.

SEMINARS, REPORTS, ARTICLES

Compared with previous years, it is noticeable that there are now more seminars, reports and articles relating to the free movement of workers in some of the new Member States that acceded to the EU in 2004 and 2007. There were a number of seminars and other events hosted in the *Czech Republic* in 2008 and 2009, including a seminar on 'Rules for Free Movement of Services and Freedom of Establishment', organized on 21 October 2008 by the Czech Confederation of Commerce and Tourism in cooperation with the Department on European Affairs Information of the Government of the Czech Republic, and the ministerial conference on 'Strengthening EU Competitiveness – Potential of Migrant Workers on the Labour Market', held in Prague on 26-27 February 2009. In *Hungary*, the Free Movement of Workers Network organized a regional seminar on the legal experiences with equal treat-ment and the status of EU workers and their family members at the University of Szeged on 14-15 May 2009, which enabled legal practitioners from a wide range of government de-partments and other stakeholders in Hungary and Romania to discuss the transposition of Community law on free movement of workers in the two countries concerned. In *Romania*, an international conference on 'Post-Communism and the New European Identity', to be held at the University of Oradea on 5-7 November 2009, will discuss inter alia questions of identity and mobility in Europe.

The Centre for Migration Law organised a conference entitled ‘Celebrating 40 Years of Free Movement of Workers: Old Problems and New Issues’, held at the Golden Tulip Rot-terdam Centre, Rotterdam, The Netherlands, on 14 and 15 November 2008. The contribu-tions to this conference have been published in: Paul Minderhoud and Nicos Trimikliniotis, *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishers, 2009, ISBN: 978-90-5850-464-7.