

REPORT
on the Free Movement of Workers
in the Czech Republic in 2004

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Introduction

The Czech Republic acquired the status of associated country in 1994 and the application for full membership in the EU was submitted in 1996. Then a phase of gradual association started during which the Czech Republic took up an obligation to approximate the Czech law to the *acquis communautaire* and ensure its implementation. The dialogue was initiated in 1998. The first step to be done before negotiations was a comparison of all national legal acts with *acquis communautaire*, so-called screening. For the purpose of the technical consultations a division of all acts of the Community Law into 31 negotiation chapters was made and the responsibilities of respective authorities for all the chapters were determined. The field of free movement was covered by Chapter 2 – Free movement of persons under responsibility of the Ministry of Labour and Social Affairs and Chapter 24 – Justice and Home Affairs, Schengen under responsibility of the Ministry of the Interior. Results of the screening became a basis for bilateral negotiations between the European Commission and each candidate country. The process of negotiations was initiated with the Czech Republic in March 1998. The whole negotiation process going along with great effort in all respective areas ended in 2004 when the Czech Republic became one of the Member States of the European Union.

Due to the very short time period as of the date of accession for application of the respective rules in practice there has been hardly any national case law regarding the field of free movement of persons. Therefore this first report is rather limited in these parts and it focuses on the specification of the current legal background.

As regards the Commission's comments on the Czech report:

Your comments concerning the replacing of information from one chapter to another and your requirements for either deeper information or broad description of not necessary information we accept and we will follow your instruction in the report for the next year.

You have mentioned mistakes contained in the report but you did not specify any. Then it is very difficult to work on problematic parts of the text. Furthermore there may be slight misunderstanding as for individual sentences that can be understood differently when they are viewed separately and without the context of the whole text.

As regards the future legislative plans, the result of the legislation process in 2004 (which is described in the Report) aimed at achieving accordance with *acquis communautaire*. Further need for legislative changes arises due to developments of the European law and case law. There are different amendments being worked out but these do not relate to the free movement of persons as such and could not have been presumed or adopted in 2004. The amendments to the substantial legal acts adopted during 2004 were properly described.

The mentioned sentence (p. 167) could be changed in the following way: "The result of the process of the recognition of qualification is a decision stating whether the applicant is eligible for the employment (professional activity) pursuant to the relevant legal regulation of the Czech Republic or not."

Chapter I

Entry, Residence, Departure

Relevant Legal Regulation

- Act No. 326/1999 Coll of Laws, on Residence of Aliens on the Territory of the Czech Republic (Alien´s Act)
- Act No. 325/1999 Coll. of Laws, on Asylum and on the Change of Law No. 238/1991 Coll. of Act on the Police of the Czech Republic (Asylum Act).
- Act No. 221/2003 Coll. of Laws, on Temporary Protection.
- Act No. 310/1999 Coll. of Laws, on Temporary Stay of Foreign Armed Forces in the CR.

The conditions for entry/admission, residence and departure of all foreigners on the territory of the Czech Republic are given in the Aliens Act. There were no specific provisions related to EU citizens before EU accession, the same rules were applied to all foreigners entering the Czech Republic. The amendments with changes to the Aliens Act related to EU nationals came into force on the day of accession. These amendments ensured a more favourable treatment of EU nationals and their family members, compared to the rest of the foreigners in the country. The Aliens Act was adopted in 1999, since then it has been changed several times, and three of the amendments (those related to EU nationals) were large. The law contains almost 200 large sections.

Free movement of workers within the European Union is applicable to each citizen of each Member State. EU citizens can enter and stay in the Czech Republic basically (see below) without any limitation from the day of accession to the EU (1 May 2004), only on the basis of a valid travel document (i.e. passport or identity card). EU citizens do not need any visa regardless of the reason and duration of the stay. In the case that a citizen of another EU Member State intends to stay in the Czech Republic for more than three months (because of employment, study, business or similar activity, etc.) they are entitled (but not obliged) to ask for a temporary residence permit or, under certain conditions, a permanent residence permit. The same is applicable also with respect to citizens of Norway, Iceland, Liechtenstein and Switzerland.

Text in force

The Aliens Act gives conditions for entry, residence and leave of all foreigners/aliens (the personal scope of the Act is given in sec. 1 (2): an alien is a natural person who is not a Czech national, including a national of the European Union. The Aliens Act is not applied to (1) asylum seekers or recognized refugees, (2) aliens who applied for the temporary protection or are granted temporary protection, (3) aliens with the temporary stay of foreign armed forces in the Czech Republic. Provisions on entrance, residence and leave of EU nationals apply also to nationals of a state bound by the Treaty on European Economic Community unless this Treaty stipulates otherwise. The law contains some sections common to EU nationals and third country nationals (TCN), in which case there are two different regimes of residence permit. The EU nationals have more favourable, preferable conditions compared to third country nationals.

Entry

All aliens are entitled to enter the Czech Republic through a border crossing at the place and time as specified for border control; an alien is obliged to submit the travel document and visa entitling him to reside on the territory of the Czech Republic if the visa obligation applies in his case. The EU national is obliged to submit a valid travel document (i.e. passport or identity card). The third country nationals have more obligations, they are obliged to submit also a document confirming funds for the stay in the territory or a certified invitation, a certificate of medical insurance, a document confirming accommodation, proven resources for the costs of leaving the Czech Republic, to complete and to sign the state border crossing report, etc.

The police will refuse entry to the territory if an alien who fails to meet the obligation to submit documents required by the Act (an alien is listed in an information database established by states bound by international treaties on the removal of border controls, Schengen agreements), if there is a well-founded fear that the alien might endanger the security of the state, violate public order or obstruct the exercise of court or administrative decisions etc. If the police deny admission to an EU national, it issues an administrative decision on the refusal of admission; a similar procedure applies to family members of an EU national if this national resides on the territory on the basis of a temporary residence permission or a permanent residence permission (“special residence permission”, see below).

Residence

This part of the law gives preferable regime to EU nationals and their family members (sect. 87a-87u), but we also give a short introduction of the TCN regime to understand the legislation.

An alien may stay on the territory on a temporary basis (A) or a permanent stay (B).

The temporary based stay

This is possible

1. without a visa;
2. on the basis of a short-term or a long-term visa or a diplomatic or a special visa (the two last-mentioned are only for diplomats);
3. on the basis of temporary residence permit;
4. by exit order.

Without visa

EU nationals can stay on the territory of the Czech Republic without a visa (sect. 18 (c)). Without a visa an alien can also stay if the alien owns a document entitling him to reside on the territory of another contracting party and the length of his residence shall not exceed three months. Other TCN can stay without a visa on the basis of the provisions of an international agreement or a government order, or under other conditions as when he is in custody or imprisonment, is put in a police cell or in a facility for the detention of aliens, etc.

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With visa or temporary residence permit

The following applies only to TCN (but is not strictly mentioned in the law as such). The visas can in general be extended, an application is filed on a diplomatic authority (with exemptions). The alien can apply for different visas according to the length and purpose of the stay.

The *short term visa* means the stay which is not longer than 90 days (e.g. airport visa (A type), transit visa (B type), visa for residence not exceeding 90 days (C type, usually given for the purpose of study, medical care, employment), or Unified Schengen visa (A, B, C type given by a Member State and entitles the alien to stay on the territory of another Schengen Member State).

The *long term visa* (D type) is issued for the stay which is longer than 90 days, the purpose of the visa might be e.g. employment, business, family reunification, study, etc.

The *temporary residence permit* can be given to an alien residing in the Czech Republic on the basis of the long term visa intending to stay in the Czech Republic for longer than one year for the same purpose (as for which the long term visa was issued).

The *exit order* entitles an alien to remain in the Czech Republic for the period as specified in the visa and to leave the territory.

The permanent stay on the territory

The preferable regime to EU nationals and their family members is stated here.

TCN

Any TCN can ask for permanent stay on the territory of the Czech Republic after 10 years of continuous stay, some exemptions are stated for the family members, or when an alien has a humanitarian reasons, other deserving reasons or his stay is in the foreign political interest of the Czech Republic etc. (see Sec. 65). The alien will be given the *residence permit*.

EU nationals and their family members

The EU nationals have preferable regime stated in sect. 87a-87u. The Act stipulates two grounds for stay, the temporary residence permit and permanent residence permit (the law gathers these two permits under one name – special residence permit). Application for the special residence permit (for both temporary and permanent residence permit) can be filed either on the territory of the Czech Republic on the Aliens Police Department according to the place of residing in the Czech Republic or at the Embassy.

Temporary residence permit

An EU national can (is entitled, not obliged to) apply for the temporary residence permit when he intends to stay in the Czech Republic for longer than 3 months. When applying for the temporary residence permit the EU citizen (and the same is required for the family members of the EU national) is obliged to enclose:

1. a passport (identity card);

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2. a document confirming the reason of residence (e.g. employment contract);
3. 2 photographs;
4. a document evidencing health insurance and affidavit that he/she will not ask for social benefits due to residing in the Czech Republic. These documents are not required if the citizen will be employed in the Czech Republic, will run a business or will be a member of the management board of a legal entity;
5. in serious cases a medical report may be required certifying that the citizen does not suffer from serious illness, according to the list of diseases dangerous to public health and the list of diseases which could be dangerous to public order.

The Aliens Police issues a temporary residence permit in the form of “Residence permit card for the citizen of the Member State of European Communities”.

Permanent residence permit

The foreign police department issues the permanent residence permit to the EU citizen upon her/his request if one of the following conditions is met:

1. he/she must be employed in the Czech Republic continuously at least for three years;
2. he/she is engaged in business activity in the Czech Republic;
3. he/she is a member of the management board of a legal entity;
4. at the time of termination of business activity or termination of a management board of a legal entity or termination of employment, he/she reached the pension age and he/she did the mentioned activity during the last 12 months in the EU prior to his/her request, and he/she has been residing continuously at least 3 years in the Czech Republic,
5. he/she terminated business activity or management of a board of a legal entity or he/she terminated employment for the reason of incapacity from work and he/she has been residing continuously at least 2 years in the Czech Republic (this condition is not applicable if during his/her residence he/she received disability pension on the basis of work injury or occupational disease);
6. he/she is employed in another EU Member State and he/she is returning to the Czech Republic at least once a week if he/she used to stay and work in the Czech Republic before continuously for at least three years;
7. he/she is engaged in business activity in another EU Member State or he/she is a member of a management board of a legal entity and he/she at least once a week is returning to the Czech Republic and if he/she used to stay and was engaged in similar business activity here at least for three years;
8. he/she resides in the Czech Republic continuously on a temporary based stay for five years for reasons other than employment, business activity, or being a member of the management board of a legal entity;
9. he/she fulfills the conditions for the permanent resident permit without the need to have previous continuous stay, pursuant to section 65 of the Aliens Act.

The EU national is obliged to attach the following attachments to the application:

1. a travel document (passport or identity card);
2. he/she must be employed in the Czech Republic continuously at least for three years;
3. 2 photographs;
4. in serious cases a medical document may be required, that he/she has no serious illness.

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A permanent residence permit card for the EU citizen is issued for ten years, and it can repeatedly be extended for another 10 years.

Family members

The family members of an EU national can apply for the permanent residence permit if the EU citizen already stays in the Czech Republic on the basis of a permanent residence permit or he/she has applied for such a permit. For the purposes of this regulation, a family member of the EU citizen is a spouse, a child under 21 years of age or without any limitation on age if it is dependent on the EU national, or a dependent direct relative in ascending or descending line or such relative of the spouse of the EU national. If the purpose for stay in the Czech Republic is study, then only a spouse and a dependent child are considered as a family member (see sect. 15a). Family members of the EU citizen who are third country citizens (i.e. citizens outside EU, Switzerland, Norway, Iceland and Liechtenstein) need a Czech visa for the entry of the Czech Republic, if there is a visa obligation for such country's citizens. If the family member does not have the visa, the police will refuse the entry.

Notification duties

Every alien staying on the territory of the Czech Republic is subject to many obligations. A TCN, for example, is obliged to notify about the place of stay within three working days (unless this duty passes to the provider of accommodation) and is also obliged to notify about changes of place of stay (within 3 or 30 working days – depending on the type of visa and length of the assumed stay). An EU national (or a family member of an EU national) is obliged to notify the place of stay within 30 days (unless this duty passes to the provider of accommodation) and is also obliged to notify the changes within 3 working days (only if the assumed length of stay is more than 180 days). Then there are also other obligations. If the alien does not meet the obligation, he committed an administrative offence and a penalty can be imposed.

Departure

Texts in force

The law contains provisions on administrative expulsion and detention. The law also contains provisions on subsidiary protection, but the law has not yet been harmonized with the Qualification Directive, and the amendment transposing the Directive is now being discussed.

Draft legislation

There was no amendment to the Alien's Act in 2004, only one draft was written, but presented and adopted in 2005 (the draft proposes to add the parent of an EU national under 21 years as the family member to the Alien's Act, other changes connected to EU nationals are not fundamental. The draft also transposes the Council Directive on Family Reunification).

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Miscellaneous

The law is wide (e.g. the number of types of visas and residence permits) and often changed. NGOs repeatedly report problems which are mainly connected with the TCN asking for visas, residence permits, and the prolonging of visas. The NGOs also report problems with the extensiveness of the Alien's Act, which causes problems not only to the aliens, who do not know their obligations, but also to the Aliens Police officers. Also the capacity of the Aliens Police in relation to the third country nationals is being reported as absolutely unsatisfactory (mainly the conditions in the waiting rooms in Prague, slowness, also mainly in Prague – reported not only hours, but dates of waiting to get to the Aliens Police, etc.) have also been criticized by the Ombudsman.

Chapter II

Equal Treatment

Relevant legal regulation

- Resolution no. 2/1993Coll. on declaration of the Charter of Fundamental Rights and as a part of the constitutional order of the Czech Republic
- Labour Code, Act no. 65/1995 Coll.
- Civil Procedure Code, Act no.99/1963
- Employment Act, Act no. 435/2004 Coll.
- Draft Act on Labour Inspections
- Act on Public Offices (i.e. civil servants and other employees at administrative authorities and their remuneration), Act no. 218/2002 Coll.
- Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (hereinafter the Act on Accession)
- Act on Education, Act no. 561/2004 Coll.
- Recognition of qualification of EU nationals Act, Act.no. 18/2004 Coll.
- Act on Foreign Exchange, Act no. 219/1995 Coll.

The Charter of Fundamental Rights and Freedoms (hereinafter the Charter) which is a part of the constitutional order of the Czech Republic, in sect. 3 explicitly provides for a ban on discrimination. Fundamental rights and freedoms are guaranteed to everyone regardless of sex, race, colour, language, religion, political or other opinion, national or social origin or belonging to a national or ethnic minority. Furthermore, with regard to sect. 1 all individuals are equal as their rights and dignity is concerned.

Prior to the accession the Amendment on the Criminal Code no. 134/2002 Coll. of Laws extended sanctions for the criminal offence of violence against a group of residents or an individual, defamation of a nation, race or opinion, or incitement of national and racial hatred.

With regard to the fact that racially or ethnically motivated discrimination does not have to be a criminal offence, an amendment to the Misdemeanour Act no. 200/1999 Coll. was adopted. The amendment extended the merits for discriminatory conduct causing harm. Anyone who causes harm to an individual for his/her belonging to a national or ethnic minority, ethnical origin, race, colour, sex, sexual orientation, language, religion can be fined.

Discrimination as a behaviour disadvantaging, endangering or causing harm to an individual or a group of individuals affects not only Czech citizens, but also aliens residing in the Czech Republic. The latter is inflicted to an even wider extent. With regard to a language barrier, lack of information, insufficient knowledge of law and local environment, immigrants represent an endangered group which has a lower ability to recognize discrimination and to defend itself efficiently. The aliens can be subject to multiple discrimination because of race, ethnic origin and religion, age or sex. They can be victimized by individuals or institutions. Institutional discrimination also covers situations when different prerequisites which are not inevitable are set out in a way the immigrants cannot fulfil.

Discrimination is prohibited by various Acts but without an exact definition. In this way it is very difficult to prove any discriminatory approach.

As regards the Member States nationals, there is the principle of non-discrimination based on nationality in sect. 12 and in sect. 39 of the Treaty on the European Community which provides free movement of workers. Such a right must be enjoyed without discrimination based on nationality as employment, remuneration and other work conditions are concerned. Detailed provisions regarding non-discrimination are incorporated in Regulation no. 1612/68 on Freedom of Movement for Workers within the Community.

The Labour Code prohibits any discrimination of employees in labour-law relations on the ground of race, colour, sex, etc. It prohibits explicitly any discrimination when the stipulating prohibition by such an employer's conduct is discriminating not directly but in its consequences. An amendment to the Labour Code and its sect. 1 was adopted (in force as of April 2004). This amendment touches upon equal treatment and ban of discrimination. It differentiates between direct and indirect discrimination.¹ It stipulates which treatment cannot be regarded as discriminatory. Different treatment reasoned by the nature of a working activity if this reason constitutes essential and crucial requirement for a work performance which is necessary for such a performance is not considered to be discriminatory. The objective followed by this exception must be justified and the requirement must be adequate. Temporary arrangements of an employer with regard to admitting new employees, vocational training and chances to achieve a certain position aiming at equal men-women representation, provided that it is reasoned by existence of such a misbalance, is not regarded discriminatory as well.

To make the protection offered by the law more effective there was also another amendment to the Civil Procedure Code. According to sect. 133 a burden of evidence in labour-law relations lies with an employer. Facts bearing on the issue of discrimination are considered to be proven unless proven otherwise.

The New Act on Employment in sect. 4 provides for an obligation to treat individuals exercising the right to employment equally, prohibits both direct and indirect discrimination on the basis of sex, sexual orientation, racial or ethnical origin, nationality, citizenship, social origin, language, health, age, religion, matrimony or marital status or obligations to a family, membership in political parties or movements, trade unions or unions of employers. Discrimination on the grounds of pregnancy or maternity is considered to be discrimination on the basis of sex. Behaviour encompassing instigation or giving rise to a coercion leading to discrimination is discriminatory too. Situations which are not regarded as discriminatory are similar to those provided for in the Labour Code, see above.

Discrimination is also prohibited by international conventions to which the Czech Republic acceded, e.g. the Convention on the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Elimination of All Forms of Discrimination of Women, or the International Convention on the Repression of All Forms of Apartheid.

1 See Sect. 1 (4) Labour Code: Employers' conduct which involves indirect discrimination (i.e. where the consequences of such conduct are discriminatory) shall also be prohibited. Sect. 4 (6) Employment Act: The indirect discrimination is a conduct, when seemingly neutral decision, distinction or procedure, disadvantages or advantages one natural person compared with another pursuant to distinction according the discriminatory reasons; indirect discrimination for the reasons of the health condition will be also dismissal or omission of receiving steps necessary in the particular case, so that the natural person with the handicap has access to the employment.

The Draft Act on Labour Inspections is under the process of adoption. This Draft Act authorises the Labour Inspectorates to check on adherence to regulation on equal pay. It includes definition of offences in the field of equal treatment including equal remuneration and equal pay. Breaches of these provisions can be penalized by imposing a fine of up to 500.000 CZK.

Thus supervisory activity of Labour Offices resulting from sect. 126 of the Act on Employment will concern the field of employment regulations only.

A ban on discrimination can also be found in sect. 80 of the Act on Public Offices. Public authority must guarantee equal treatment with all employees regarding conditions of service performance, remuneration and other cash values, education and chances to achieve a certain position unless provided for otherwise. There is also reference to sect. 28 of the Labour Code for situations before beginning of employment. There is a prohibition of both direct and indirect discrimination of civil servants on the grounds of race, colour, sex, language, religion, political or other opinion, membership in political parties or movements or other associations, nationality, ethnic or social origin, property, health, age, matrimony or marital status or obligations to a family. Performance of duties of public employees must not be abused for causing harm to another public employee, for degrading his/her human dignity, nor for causing harm to anybody else. A definition of sexual harassment is also included. As conduct, degrading human dignity is considered such a sexual behaviour which is unacceptable, unsuitable or offensive or which can be viewed by another employee rightfully as a condition affecting exercise of rights or duties performance. If a breach of a ban on discrimination occurs for any reason, an employee has the right to ask for refraining from discriminatory behaviour, for an elimination of consequences and an adequate satisfaction.

The Charter is a primary source of law from which all rights and freedoms are derived. Some of them are conferred to all individuals in general, but some to citizens of the Czech Republic only (sect. 42, para 2). Furthermore some of them are conferred to an extent of laws implementing the Charter (sect. 41, para 1).

According to sect. 26 everybody is entitled to choose an occupation freely but a law can set out prerequisites and limits. Sect. 26, para 4 provides for a possibility of a different regulation set out by law for foreigners. This specific regulation can be found in the Act on Employment, for more details see other chapters.

The principle of non-discrimination is also included in the Act on Accession. According to part 1, Free movement of persons, para. 14, during transitional period stricter rules cannot be applied to Czech workers and their family members legally residing and working in another Member State than those applied to third-country migrant workers and their family members residing and working in that Member State.

As of 1 May 2004 matters of mutual recognition of qualifications for the purpose of free movement of persons in the EU are regulated by the Act on Recognition of Qualification. This Act stipulates the procedure of administrative authorities or professional associations in the process of the recognition of qualification and other skills for start-up of dependent or independent regulated working activity in the Czech Republic, if the qualification was acquired or such an activity was carried out by the EU nationals or their family members in another Member State. The regulation is based on the principle of non-discrimination on the basis of nationality. Any person who has sufficient qualification for a certain occupation in one Member State must have access to the same occupation in another Member State, even if the required education or vocational training has some minor differences as regards duration or content.

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The Czech administrative authorities and professional associations may require fulfilment only of those conditions which are mandatory for the Czech nationals also. This regulation, however, does not constitute a legal title for acceptance to an employment for an applicant from another EU Member State but he/she is authorized to have his/her qualification evaluated in the administrative proceedings initiated for this purpose by a “recognition authority” in the time period set out by law and with a possibility of further review of such a decision. The process of deciding on the recognition of the qualification has to be carried out with due respect to the public interest and interests of legal entities and individuals as well, as these interests could be potentially infringed by employment of persons lacking professional qualification. These interests are protected by special legal regulation governing conditions for employment. Particular emphasis is placed on protection of life and health, protection of property, protection of consumers, protection of environment, protection of national cultural riches, etc.

The outcome of the process of recognition of the qualification is a ruling stating whether the applicant is eligible for the employment (professional activity) pursuant to the relevant legal regulation of the Czech Republic.

Sect. 33 of the Charter regarding the right to education refers to all individuals. But regarding elementary and secondary education for free it refers to Czech citizens only. Moreover, this provision is one of those which are conferred to an extent of laws implementing the respective article (sect. 41, para 1 of the Charter). The provision mentioned above is implemented by the Act on Education which regarding education of foreigners provides for the following in sect.20.

Individuals who are not Czech citizens and reside in the territory of the Czech Republic legally have access to elementary, secondary and higher vocational education on the same terms as Czech citizens. They will become pupils and students on the terms set out by this Act, provided that they prove the legality of the stay in the Czech Republic by the beginning of the education at the latest. Individuals having the nationality of another Member State of the EU and their family members have access to education in accordance with this Act on the same terms as Czech citizens. Foreigners have to prove sufficient knowledge of the Czech language as part of entry exams and can be forgiven upon application. Children of EU citizens residing in the Czech Republic on a long-term basis who carry on compulsory school attendance have the right to the Czech language course for free to be assisted in elementary education.

Acquisition of real estate is regulated by the Act on Foreign Exchange (sect. 17) which differentiates between exchange foreigners and exchange citizens. The latter, as to who is regarded a foreigner residing permanently in the Czech Republic, also can acquire real estate without limitation. The same is provided for nationals of the EU Member States (even though they belong to the exchange foreigners) having the residence permit of the national of the Member State of the European Communities according to Act no. 326/1999 Coll., on Residence of Aliens.

The Czech Republic has negotiated a transitional period regarding objects of secondary housing before accession to the EU and is therefore entitled to keep the rules provided for in the Act on Foreign Exchange for such an acquisition by the nationals of the EU Member States not residing in the Czech Republic. Nevertheless the respective Act does not follow this exception. On the contrary, the only requirement for the EU Member State nationals is to have the abovementioned permit.

Chapter III

Employment in the Public Sector

Relevant legal regulations

- Resolution no. 2/1993Coll. on declaration of the Charter of Fundamental Rights and as a part of the constitutional order of the Czech Republic
- Constitution of the Czech Republic, Act. no 1/1993 Coll.
- Act on Elections to the European Parliament, Act no. 62/2003 Coll.
- Act on Elections to the Parliament, Act no. 247/1995 Coll. ...číslo??
- Act on Elections to Municipal Councils, Act no. 491/2001 Coll.
- Act on Officers of Municipalities, Act no. 312/2002 Coll.
- Act on the Constitutional Court, Act no.182/1993Coll.
- Act on Courts and Judges, Act no. 6/2002Coll.
- Act on Public Prosecutors, Act no. 283/1993 Coll.
- Act on Public Guardian of Rights (Ombudsman), Act no. 349/1999 Coll.
- Act on Public Offices (i.e. civil servants and the other employees at administrative authorities and their remuneration), Act no. 218/2002 Coll.
- Act on Service Contract of Members of Police of the Czech Republic, Act no. 186/2003 Coll.
- Act on Fire Department of the Czech Republic, Act no. 238/2000 Coll.
- (both Acts will be replaced by the new Act 361/2003 on Service Contract of Members of Security Corps from 1.1.2006)
- Act on Professional Soldiers, Act no.221/1999 Coll.
- Act on Security Information Service, Act no. 154/1994 Coll.

Article 39 of the Treaty on the European Community provides for free movement of workers. Such right must be enjoyed without discrimination based on nationality as employment, remuneration and other work conditions are concerned. The Member States nationals can take up offers of employment and pursue such an activity, move freely and reside for this purpose in one of the Member States and remain after having ceased to pursue the economic activity.

Article 39, para. 4 concerns the exception to the abovementioned rule regarding the employment in the public sector. According to the case law of the European Court of Justice such an exception is acceptable if there is a direct or indirect participation in exercise of sovereign rights or in fulfilling tasks connected to general targets of the state or other entities of the public law. Both prerequisites, the exercise of powers by the public law and fulfilling tasks of the state, have to be met at the same time. The European Court of Justice has tended to the functional concept emphasizing an occupation itself and review of the nature of the tasks and responsibilities covered by each position. The exception mentioned above does not include all public employees, nor all employees covered by the Act on Public Offices.

The functions (or the fields) which will probably fall under the exception are the following: diplomacy, armed forces, police, justice, tax authorities and other authorities participating in preparation or monitoring of legal acts. The exception cannot be in principle applied to the fields of health, education, non-military research institutes and authorities of commercial administrations.

Czech Republic

Various Acts (see relevant legal regulation) require Czech nationality for some occupations or functions. Even for these positions the EU citizens can apply, nevertheless, on the basis of the exception provided for by the Treaty, and with regard to the European Court of Justice interpretation the nationality will in these cases be one of the prerequisites for the occupation. Therefore service contracts of members of security departments (policemen, professional soldiers, firemen, members of Security Information Service), ministry offices, positions of judges, public prosecutors, diplomatic officials in the Czech Republic will be held by the Czech citizens only.

Chapter IV Family Members

Relevant legal regulations

- Act on Accession
- Act on Residence of Aliens in the Territory of the Czech Republic, Act No. 326/1999 Coll.
- Act on Employment, Act No. 435/2004 Coll.

The legal definition of family members is provided for by Regulation no. 1612/68 on freedom of movement for workers within the Community. Its transposition can be found in the Act on Residence of Foreigners in the Territory of the Czech Republic. According to sect. 15a the following persons are considered as family members of the EU citizen: a spouse, a child under the age of 21 years, and a dependant direct relative in ascending or descending line or such a relative of a spouse of the EU citizen (see above).

The Act on Employment (sect. 3) refers to the Regulation itself. In sect. 3 it is also provided that the citizens of other Member States of the European Union and their family members, even if they are not the EU Member State's citizens, are in the same legal position in legal relations regulated by this Act as Czech citizens, unless provided otherwise. Furthermore sect. 85 sets out that for employment purposes, according to this Act, workers from abroad are individuals who are neither citizens of the Czech Republic nor of the European Union nor their family members. Therefore they do not need to obtain a work permit or their employers do not have to apply for a permit to engage foreign workers. There is only the information obligation towards the Labour Office (sect. 87, 102).

The family members of the EU citizens are also covered by the Act on Accession. The transitional measures do not apply to the new Member States' citizens who are legally working in an old Member State at the date of accession or following accession and have been admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer. Then they will have free access to the labour market of that Member State. Family members of such a worker legally resident with him/her in the territory of a Member State at the date of accession, will also have access to the labour market of that Member State. If the family members join the worker after the date of accession, they will have access to the labour market of that state once they have been resident for 18 months or from the third year after accession, whichever is earlier. Family members means the spouse of the worker and their children under the age of 21 or who are dependants.

Transitional arrangements are not being applied in respect to rights of residence of categories other than workers (tourists, students, pensioners, etc.) and their family members.

Chapter V

Influence of Recent Judgments of the European Court of Justice

Since the introduction of European citizenship by the Maastricht Treaty, a considerable movement can be traced in the attitude towards persons moving within the Community and their access to public benefits. It is reflected in the consolidation directive no. 2004/38 and in recent case law of the ECJ in cases C-184/99 *Rudy Grzelczyk*, 85/1996 *Martínez Sala*, C-456/02 *Trojani* and C-209/03 *Bidar*. All these judgements concern the right to residence resulting in access to public benefits based on Articles 12 and 18 of the Treaty (equality of treatment and right to residence). From the abovementioned directive and judgments it is possible to conclude, that an EU national has equal rights as nationals and access to public benefits as long as the conditions for the right to residence are fulfilled.

The legislative development (Directive 2004/38) and the extensive case law on access to public benefits of migrants was followed by an amendment of the Aliens Act. Consequently the amendment was proposed to the Social Security Act that sets the personal scope of the social care scheme – it is currently being debated in Parliament. It now includes all EU nationals who registered themselves with the Aliens and Border Police. In practice however, this change has impact only to a position of non-active persons, since the gainfully active – workers in particular – have another Community provision to protect their social rights.

If such a registered person claims social benefit, the competent authority firstly examines whether the conditions for the entitlement are fulfilled. Simultaneously there will be a procedure designed to establish whether a person concerned could become an “unreasonable burden of the social assistance scheme”.

The scheme will be based on the following principles:

- It creates group of persons who can never be an “unreasonable burden of the social assistance scheme” – i.e. workers, other persons who are gainfully active, etc.
- For other persons it establishes the system of point attributed to certain facts or characteristics of a person concerned. The facts that are taken into account are mainly the previous length of residence, previous length of employment or self-employment in the Czech Republic, previous periods of study in the Czech Republic, possibilities of finding a job).
- There is a discretionary power in order to take into account whether the person concerned has only temporary difficulties, his/her personal circumstances, family commitments, and potential amount of benefit.
- Assessment base is a number of points received. When such a number is low enough to create “unreasonable burden of the social assistance scheme”, the information from the municipal authority will be delivered to the Aliens and Border Police for the possibility of initiation of the procedure of declaration of unlawful residence.

As stated above, the amendment that was proposed in order to implement Directive 2004/38 together with recent case-law of the ECJ, is currently being debated in Parliament, and the entry into force is expected in the beginning of the year 2006. The same changes are included into the Assistance in Need Bill and Social Services Bill.

Chapter VI

Policies of a General Nature with Possible Repercussions on the Free Movement of EU Citizens

Relevant legal regulations

- Act on Accession
- Government Resolution 13/2004 on the position of the Government to transitional period on free movement of workers
- Act on Employment, Act no. 435/2004 Coll
- Labour Code, Act no. 65/1965, Coll.
- Act on International Private and Procedural Law, Act no. 97/1963 Coll.
- bilateral agreements

In consequence of the Act on Accession, the Czech Government adopted the Resolution no. 13/2004 on the *position towards the transitional period on free movement of workers* in which it was provided that it will not in advance abandon the possibility to introduce a transitional period for the Member States and the accession countries on the basis of the evaluation of the current situation on the labour market. The newly adopted Act on Employment put together two previous Acts (Act no. 1/1991 Coll. and 9/1991 Coll.) to make provisions related to employment more transparent. The changes created by this new piece of legislation are as follows.

Nationals of the EU Member States and their family members in principle have a status equal to the Czech nationals in the field of employment. The term “foreign employees” pursuant to sect. 85 means individuals who are neither Czech Republic citizens nor EU citizens or their family members.

To solve difficult cases there is the legal regulation setting out the following rules. During the time a person is in the “relevant period” and a citizen of no state or his/her nationality is unknown, then he/she is considered as a national of the state where he/she lived during the “relevant period”. If this does not lead to ascertaining of the nationality, then he/she is considered to be a Czech citizen.

The principle of equal treatment and protection against discrimination on the grounds of sex, sexual orientation, racial or ethnic origin, nationality etc. has been reinforced. The concept of illegal work is defined (an individual does not work for another individual on the basis of labour-law relation or other contract, an alien carries out a working activity contrary to or without the work permit if required).

The Act includes new and extended inspection powers of the labour offices and customs authorities, e.g. regarding entry to a work place and identity checks. Not required any longer is the authorisation of the Head of the Labour Office, which caused delays and gave time to employers to “get ready” for the inspection. Illegal work may be fined up to 2.000.000 CZK. Substantial changes (making rules stricter) were made in the field of intermediation of employment by the Labour Offices, in the field of an unemployment support or retraining. Decisions of the Labour Offices in a number of situations were made with possibility of lodging an appeal against the administrative decisions. There are also changes adopted to the system of employment of disabled individuals. And also some new instruments of an active employment policy were introduced.

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As regards foreign employment there are the following principles in force. Foreign workers may be engaged and employed only if they have a valid work permit, unless this Act provides otherwise, and a valid residence permit. For these purposes, the term employment covers general work done by a partner, statutory body or member of statutory or another body of a business company for a business company or member of cooperative or member of statutory or another cooperative body for a cooperative. As a rule, foreign nationals apply for work permits in writing to the Labour Office before they come to the Czech Republic, either in person or through their future employer or an employer to whom they will be assigned by their foreign employer to work. Employers may engage workers from abroad on the basis of a permit to fill vacancies for which they cannot engage job seekers. For employment purposes according to this Act, workers from abroad are natural persons who are neither citizens of the Czech Republic or of the European Union nor their family members. The permit to engage foreign nationals is issued by the respective Labour Office upon an employer's application. The application contains the employer's particulars and information about the vacancy and its characteristics. The permit is issued for a fixed period and it is limited to an exact employer and exact work place. There is no legal claim to a work permit even if all the conditions are fulfilled, which means that there is no obligation for the Labour Office to issue it. When issuing a work permit, the labour market situation in the respective region is always taken into account. The permit to engage foreign nationals is not required for an employer intending to engage a foreign national to whom a work permit is issued regardless of the situation in the job market (sect. 97) or for whom no work permit is required (sect. 98). The work permit is connected to a residence permit. Therefore expiry of one of these permits revokes the other one automatically. The Act makes no difference among foreign workers with regard to time period of stay or work, there are the same restrictions for newcomers as for anybody else until they are entitled to apply for the permanent residence after 10 years. The work permit contains the foreign worker's particulars, the place of work, the type of work, particulars of the employer for whom the foreign national will work, the period of validity (sect. 92). The work permit is valid only for the employment, the employer, type of work and place where the work will be performed stated in the permit.

Employers are obliged to inform the Labour Office in writing if a foreign worker to whom a work permit has been issued does not turn up at work, or terminates the employment before expiration of the period for which the permit is issued. Then the Labour Office is obliged to notify the Aliens Police department. The information duty must be discharged by employers no later than 10 calendar days after the day when the foreign national was to start work or terminates the employment. Although the Act copies principles of the two previous acts, it also brings some significant changes, on one hand restrictions, on the other hand indispensable alleviations. The permit to engage foreign nationals is not required if a foreign national carries on as partner, statutory body or member of the statutory body of a business company for a business company or member of cooperative or member of statutory body of a cooperative for the cooperative work which is not among the objects of the business company or cooperative, or applies for an extension of a work permit. These individuals work for the companies owned or represented by them, they are remunerated for their activities but do not have to be necessarily in an occupational relation with these entities. In the past some foreigners evaded the law and requirement of the work permit by membership in a company of such a type which is not difficult to establish. They received a residence permit consequently but in fact they carried out "a dependant activity" under instructions of a superior.

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The newly adopted general ban on carrying out ordinary working activities without the work permit will probably affect smaller companies which have not evaded the law in this way.

Administrative fees are levied for lodging an application for the permit to engage foreign workers in amount of 2000 CZK and for an application for the work permit lodged by an employee in amount of 500 CZK according to the Act on Administrative Fees no. 368/1992 Coll. The fees can be viewed as a deterrent for smaller employers or poor foreign employees.

The Act provides for details of the applications explicitly (Art. 91). So far these details have been based on practice of the Labour Offices. Now it is necessary to submit along with all applications documents proving qualifications for the required employment, i.e. a medical certificate of the foreign national's state of health, which must not be older than one month. On the other hand the Act does not mention any longer an evidence of termination of former employment in the Czech Republic which was required by the Labour Offices before. The administrative practice regarding the assignment of workers has also been covered with the provisions of the Act. Now foreign nationals may be assigned to work in a place other than that given in the work permit for a time longer than 30 calendar days, provided they were issued a work permit by the respective Labour Office according to the new place of work. If a foreign national is assigned to work in a place other than that given in the work permit from 7 to 30 calendar days and a foreign worker is assigned for a period longer than 30 calendar days, the employer is obliged to report the fact in writing to the respective Labour Office according to the foreign national's new place of work.

Before concluding an agreement on assignment of workers the Czech employer is obliged to discuss with the competent Labour Office numbers and professions of the workers concerned and duration of their assignment. The application for a work permit for these foreign workers has to be filed by the Czech employer. This person is responsible for the foreign worker having a valid work permit and residence permit for the entire duration of their assignment. The reason for this change was that there were applications for work permits lodged in the regions with a lack of labour but then the work was carried out in the regions with high unemployment rate where the permits would have never been issued. The solution to this kind of non-flexibility can be found in sect. 145 according to which it is possible to apply for a work permit for more places of work. The respective Labour Office dealing with the application must ask the other Labour Offices for their opinions.

According to sect. 87 an employer has a new obligation to inform the Labour Office in writing on employment of foreigners who do not need a work permit, e.g. foreigners with the permanent residence in the Czech Republic no later than the day when this employee starts work (not after this day as provided for before). Notification must include the following information: identity details about the person, address of residence and delivery mail address, number of travel document (passport), type of work, the place where the work will be performed and the period of the employment, gender, specification of job according to the field classification of economic activities, attained education, education relevant for the employment activity, residence permit (if relevant), the first day and the last day of the employment (or being posted to an employment by a foreign employer). Within ten calendar days it is also necessary to inform the employment office about the termination of the employment (also posting to employment) of the EU citizen. There are also modifications to rules for employment of certain categories of foreigners. Nationals of the EU Member States have easy access to the labour market. They are not in terms of employment considered as foreigners (only their registration is required).

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The Act differentiates among 4 categories of foreigners in principle:

- those who do not need work permits at all provided for in sect. 98, e.g. who have permanent residence permit, a family member of a member of a diplomatic mission, who has been granted asylum, who is covered by an international treaty, workers posted from another EU Member State with work permit of this Member State etc.
These individuals fall under the same rules as Czech nationals but they are subject to the registration.
- foreigners who are issued with work permits regardless of the situation on the labour market (sect. 97). This category is considered to be unable to endanger the labour market, e.g. researchers, trainees, asylum seekers after 12 months from lodging an application for asylum, persons having a visa to allow exceptional leave to remain, e.g. victims of human trafficking. For them an employer does not need to have the permit to engage foreign nationals. There is an essential change for those foreigners with a visa for exceptional leave to remain who were not allowed to work according to the former provisions,
- other foreigners who need a standard work permit issued by the Labour Office with respect to the situation on the labour market,
- asylum seekers during 12 months from lodging an application for asylum who cannot obtain a work permit at all. This arrangement should discourage potential asylum seekers from purpose applications for asylum.

Sect. 102 regards records of citizens of the European Union and foreign nationals. The Labour Offices keep records of the Member State nationals who have taken up employment and foreign nationals to whom a work permit has been issued, and records of foreign nationals for whom no work permit is required. The records contain the foreign worker's particulars, the place of work, the type of work, particulars of the employer for whom the foreign national will work and the gender of these natural persons, their classification according to the classification of economic activities, their educational attainment and education necessary for the profession. Employers are obliged to keep records of the Member State nationals and all foreign nationals who they employ or who are posted to them to work by a foreign employer. The records contain the foreign worker's particulars, his address in the country of their permanent residence and a mailing address, the number of their travel document and the name of the authority that issued it, type of work, place of work and time for which the employment is to be held, the gender of these individuals, their classification according to the classification of economic activities, their educational attainment and education necessary for the profession, the period for which they are issued work permits and for which they are permitted to stay, the starting and ending date of the employment or assignment to work by a foreign employer.

The Act also introduced an institute of renewal of a work permit (sect. 94). A work permit may be renewed by the Labour Office taking account of the situation on the labour market, upon a foreign worker's application, even repeatedly, but always for up to one year. The condition for renewal of a work permit is that the employment will be with the same employer. In comparison with application for a new work permit there is a lower administrative fee in amount of 250 CZK and moreover an employer does not need a permit to engage foreign nationals. This constitutes a significant and administrative facilitation for both employers and foreign employees

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As mentioned above the principal contribution of the Act is clarification of some questionable issues, formal determination of certain obligations by law instead of internal guidelines of the Ministry of Labour and Social Affairs and definition of certain terms. Although the definition of illegal work in Article 5 does not offer a clear answer to a question about whether conclusion of a contract with a foreign worker without a work permit when required gives rise to a labour-law relation or not, it tends to be in favour of legal validity of such an act which would have a significant impact on claims of an illegal employee towards an employer.

According to sect. 6 of the Labour Code, labour-law relations between Czech employers and foreign workers in the Czech Republic (and between foreign employers in the Czech Republic and Czech employees) follow the Labour Code, if private international law regulations do not stipulate otherwise.

International private law regulations will be applicable if:

- parties to labour-law relation choose foreign law;
- an employee of a foreign employer working in the Czech Republic has residence in another EU Member State (then the legal regulations of the state of the employer's residence can be used);
- an employee works as a staff member of foreign transportation. In these cases the labour law of the state of the employer's residence is used (if it concerns rail and road transportation). In case of the river or air transportation labour law depends on the place of registration and the marine transportation according to the flag of the operator.

The second indent above was interpreted by the court as follows: "if the employee renders work in one state on the basis of the employment contract with a legal entity which has its seat in another state then the law of the legal entity's seat will be applicable". The facts concerning the activity of the legal entity resident in another state and also entities from the state of the employee's actual work participate are not substantial (Rc26/87).

In connection with employment (or posting) of the EU citizens in the Czech Republic (or Czech employees to the EU Member State) it is necessary to draw attention to the provision of the Labour Code (sect. 6) about "social dumping", which means the import of cheaper workers from foreign countries in order to cut down labour costs. This provision is the consequence of implementation of the Directive 96/71/EC. The Czech regulation is not relevant only for posting the employees for rendering services but for posting of any employee by an employer for work to and from other EU Member States to the Czech Republic.

The employee posted by a foreign employer for an employment to some of the EU Member States must follow the regulations concerning the working and remuneration conditions of the Member State where the work is performed, e.g. regulation regarding length of working hours and rest period, length of annual vacation, minimum wage, safety and protection of health at work, working condition of women, adolescents and employees taking care of at least one child under 3 years of age, equal treatment of men and women, and the ban on discrimination.

However, the legal regulation of the state of "origin" is always applicable to a posted employee, if it is more favourable. The law sets out that individual claims of an employee are to be assessed separately. The rule of using more favourable regulation does not apply if duration of posting is not longer than one month within the last 12 months from the beginning of the employment. It is not applied to minimum wages either. If the employee is posted more than once, the time period is within the last 12 month added up (the so called "*refer-*

encní období – relevant period). The same exception (which is connected to the legal regulation of annual vacation) is also applicable to the short-time work (less than 22 days within the last 12 months from the beginning of employment). In these cases, the working conditions follow the regulation of state from which the employee was posted. The favourable regulation of the other areas of working conditions will be assessed separately without relevance to duration of posting.

What also should not be overlooked is the matter of bilateral agreements regarding employment. Some of them (which were concluded with the Member States) stopped being applied in practice as a consequence of the accession to the EU and free movement of workers restrictions were imposed. Benefit has been derived from those which offer a more favourable regime to the Czech citizens during the transitional period, e.g. in Germany and Austria.

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Chapter VII EU enlargement

Approximation of the Czech law as part of complex law reform culminated before the accession of the Czech Republic to the EU. This process presumed a reform from socialistic to democratic law first. There were new pieces of legislation, transposing *acquis communautaire*, adopted gradually, very often followed by their amendments even before their entry into force. The Act on Residence of Foreigners was a key norm for transposition of the *acquis* in the field of free movement of persons. Its amendments followed the objective to undertake the respective part of the *acquis*. Amendments were prepared in accordance with sect. 18, para. 1 of the Treaty on European Communities to ensure the right of the EU citizens to move freely and reside on the territory of the Member States except for the limitations and conditions set out by the Treaty and implementing legislation. Also taken into consideration during the preparatory work were objectives of the EU, specified in Article 2 of the Treaty on the EU, “to preserve and develop the Union as an area of freedom, security and justice together with convenient measures regarding external border controls, immigration, asylum and crime prevention”.

The existing Aliens Act changed significantly due to dividing foreigners into two groups, the EU citizens and other foreigners. The respective provisions of the Schengen Agreements had to be taken into account as well. The amendments also included the case law regarding various aspects of free movement of persons, e.g. restriction of the right of free movement with lifelong expulsion from a territory of one of the Member States. The case law was duly considered during the process of preparation of the legal acts. This facilitated and ensured the right interpretation of certain provisions for future.

Employment of Czech citizens in another EU Member States

The transitional arrangements agreed between the 15 Member States and the candidate countries are part of the Accession Treaty and will be significant to the eight new Member States to whom they primarily apply. The structure of the transitional arrangements in brief is as follows. The old Member States may decide to open their labour markets following accession or can apply national measures for 2 years following accession. First review by the Council on the basis of a report worked out by the European Commission before the expiry of the 2 year period following accession.

The old Member States must notify the Commission whether they will lift the transitional arrangements and apply the Community law or if they will continue with the transitional arrangements for the following 3 years. There can be one more upon request of the new Member State. In principle the old Member States should apply the Community law fully after 5 years following accession. Nevertheless, if there are serious (even potential) disturbances of the labour markets, they may prolong the national measures for the next two years after notifying the European Commission. There is a possibility for the old Member States which have lifted the transitional arrangements to invoke the safeguard clause allowing for the application of restrictions if there are serious (even potential) disturbances of the labour market.

During the period when they apply the transitional arrangement Austria and Germany are allowed to limit the temporary employment of workers in the context of cross-border

supply of services in certain sectors (e.g. construction, industrial cleaning) if there is a serious disturbance in the sectors concerned.

There is also the possibility of reciprocal restrictions between the new Member State and any old Member States that apply restrictions in relation to that new Member State. As long as one of the old Member States retains transitional measures in relation to one of the new Member States, the new Member States may use the safeguard clause among themselves if there are serious (even potential) disturbances on the labour market due to workers from one of the new Member State.

The transitional arrangements are not applied to workers from the new Member States who have been legally working in the old Member States at the date of accession or following accession and have been admitted to the labour market for an uninterrupted period of 12 months or longer. They will enjoy free access to the labour market of that Member State.

As mentioned above the family members of the EU citizens are also covered by the Act on Accession. The transitional measures do not apply to the new Member States citizens who are legally working in an old Member State at the date of accession or following accession and have been admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer. Then they will have free access to the labour market of that Member State. Family members of such a worker and legally resident with him/her in the territory of a Member State at the date of accession will also have access to the labour market of that Member State. If the family members join the worker after the date of accession, they will have access to the labour market of that state once they have been resident for 18 months or from the third year after accession, whichever is earlier. The spouse of the worker and their children under the age of 21 or who are dependants are considered as family members.

Transitional arrangements are not being applied in respect to rights of residence of categories other than workers (tourists, students, pensioners etc.) and their family members. Application of the transitional measures has no effect on other areas of free movement of persons in the EU, e.g. co-ordination of social security systems (keeping the earned entitlements from social insurance, state support, social assistance, unemployment benefits or health care), possibility to take advantage of the EURES system to seek for employment, mutual recognition of professional qualification.

As soon as the migrant worker gains access to the labour market in one Member State then he/she gains all the other advantages including entitlement to benefits of social security systems related to employment. These systems are under the sovereign authority of the EU Member States and can be fully regulated according to their needs. These systems must respect the principle of non-discrimination on the basis of nationality and they must not create worse conditions for employment for workers from another EU Member State than for their own nationals.

The national measures will also likely change regulation with respect to the third-country nationals' access to the labour markets (in the form of the new or changed legal regulation). Access of the Czech workers to the labour markets of the old Member States (within the first period) after 1 May 2004, according to expectations, is the same as it has been before (under the condition of receiving the work permit). Even though the new Member States nationals do not have equal access to the labour markets (as the citizens of the old Member States) there is the principle of community preference applied and this is a significant change in comparison with the situation before May 2004.

Chapter VIII Statistics

Actual state

Until 31 December Of the year	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Valid work permit in the Czech Republic	23,336	39,209	59,323	72,244	69,723	49,927	40,312	40,080	40,097	44,621	47,704
Registered Slovak citizens in the Czech Republic	28,281	32,871	52,536	71,002	61,044	61,320	53,154	63,567	63,555	56,558	58,034

Source: <http://www.cizinci.cz/mpsv-a-integrace.shtml?x=357>

<i>Actual state until 31 December 2003</i>	<i>Aliens</i>	<i>Slovak nationals</i>
Workers without qualification	19,979	16,182
Skilled workers	16,403	27,814
High school degree	3,076	5,961
University degree	6,358	5,425

Source: <http://www.cizinci.cz/mpsv-a-integrace.shtml?x=357>

Foreigners holding residence permit

At the end of 2003 there were 240,000 foreign holders of a residence permit in the Czech Republic, making up 2.3% of the total population. Foreigners with long-term residence made up 1.5%, those with permanent residence 0.8%. Temporary migration of foreigners is often followed by permanent settlement, sometimes resulting in their naturalisation. In the period 1999-2003 Czech citizenship was granted to almost 25,000 foreigners, mainly Slovaks (86% in 1999, 84% in 2000, 75% in 2001, 65% in 2002). Their percentage is gradually falling and that of naturalised foreigners from other countries is on the increase. Three quarters of foreigners with residence permits in the Czech Republic (both temporary and permanent) may be considered settled since the length of stay exceeds one year. This number is increasing, 164,000 in 2001 and 179,000 in 2002. The reasons for foreigners settling in the Czech Republic (legal stay of more than one year) are: economic activities 51%, family unification 30% and settlement 15% (end of 2002).

Work permit holders

The majority of work permits for foreigners are granted to manual laborers (79%). At the end of 2003, 14% of foreigners with such permits worked in a position requiring a university education. Total job vacancies offered to foreigners with work permits in 2003 showed the following educational requirement profile: 49% lower technical education, 31% secondary technical education with an apprenticeship certificate, 7% completed secondary technical or general education with leaving certificate, fewer than 14% required university education. The most numerous groups of foreigners with work permits in 2003 consisted of skilled and production workers – 39% of the total. One fifth of the work permits for foreigners were granted to the least qualified workers. One tenth of the work permits were granted to expert,

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scientific and “intellectual” workers. Over 6% of the work permits were granted to foreigners in a managerial position. One third of the work permits were granted to foreigners employed in manufacturing, 26% in the construction industry, 9% for those involved in real estate, leasing, services, and research and development, 8% for those in trade and services, 6% in agriculture and 5% in mining and quarrying (according to the Czech classification of industries).

Work permit holders from third countries (non-EU) make up the majority of foreigners in the Czech labour market. Work permit holders from Central and Eastern Europe usually perform manual-skilled work, being mainly employed in the manufacturing or construction industries as machine or equipment operators. Foreigners from OECD countries are usually employed as experts in professions requiring a university degree.

(Source: Milada Horáková: The Czech Republic’s response to migration in the context of European Union enlargement, Research Institute for Labour and Social Affairs, Prague)

Figures regarding nationals of the EU/EEA/EFTA

Nationality	2000	2001	2002	2003	2004
Austria	590	644	682	760	658
Belgium	159	152	154	151	139
Cyprus	12	14	17	17	18
Denmark	84	89	91	80	66
Estonia	14	13	19	18	11
Finland	84	68	71	51	51
France	731	745	839	870	669
Germany	2,289	2,158	2,255	2,417	2,406
Greece	115	130	140	156	167
Hungary	161	172	198	179	240
Italy	506	533	557	630	553
Ireland	85	77	103	108	98
Latvia	32	29	36	35	25
Lithuania	78	63	61	58	180
Luxembourg	5	5	7	9	7
Malta	9	9	10	9	6
Netherlands	429	405	366	350	308
Norway	32	31	28	31	22
Poland	8,712	7,712	8,419	8,529	10,133
Portugal	18	16	50	17	15
Slovakia	70,237	70,606	63,733	66,176	68,575
Slovenia	54	57	64	68	60
Spain	118	116	111	105	114
Sweden	166	131	133	128	111
Switzerland	105	97	87	96	95
United Kingdom	1 407	1 341	1 397	1 452	1 261
Total EU/EEA/EFTA nationals	86 127	85 316	79 541	82 404	85 988

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Comparison of figures regarding EU/EEA/EFTA nationals at the date of accession and at the end of the year 2004

Nationality	To April 2004	2004
Austria	404	658
Belgium	93	139
Cyprus	6	18
Denmark	56	66
Estonia	10	11
Finland	31	51
France	648	669
Germany	1,227	2,406
Greece	18	167
Hungary	69	240
Ireland	77	98
Italy	267	553
Latvia	19	25
Lithuania	24	180
Luxembourg	5	7
Malta	5	6
Netherlands	205	308
Norway	21	22
Poland	6,664	10,133
Portugal	15	16
Slovakia	61972	68575
Slovenia	29	60
Spain	85	114
Sweden	72	111
Switzerland	42	95
United Kingdom	884	1261
Total EU/EEA/EFTA nationals	72949	85988

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Comparison of figures regarding employment of EU nationals 1995 – 2004

Cizinci v postavení zaměstnanců - občané států EU (stav k 31. 12.)													
Foreigners - employees of citizens of EU member states, 31 December													
Pramen: MPSV ČR-SSZ											Source: MLSA CR-ESA		
Země	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	rozdíl 2004-1995	rozdíl 2004-2003	Country
Celkem EU 25	75 893	89 903	88 447	76 369	64 878	76 199	74 651	68 638	70 334	72 775	-3 118	2 441	EU 25, total
Podíl EU na cizincích celkem	67,8	62,8	67,6	68,6	69,4	73,5	72,0	67,8	66,5	67,4			
Belgie	86	90	86	104	111	120	106	107	102	93	7	-9	Belgium
Dánsko	50	55	37	55	60	69	73	74	64	46	-4	-18	Denmark
Estonsko	11	10	16	8	11	8	7	13	10	3	-8	-7	Estonia
Finsko	22	32	57	62	68	76	59	59	38	32	10	-6	Finland
Francie	391	457	470	540	585	621	613	702	727	509	118	-218	France
Irsko	127	124	99	89	72	74	65	84	83	67	-60	-16	Ireland
Itálie	146	209	245	242	235	243	230	250	296	202	56	-94	Italy
Kypr	2	3	5	8	6	6	6	9	7	6	4	-1	Cyprus
Litva	39	70	137	92	26	59	42	40	40	142	103	102	Lithuania
Lotašsko	14	19	25	16	15	19	19	26	23	9	-5	-14	Latvia
Lucembursko	0	2	3	2	3	3	3	5	7	5	5	-2	Luxembourg
Maďarsko	37	79	73	75	66	72	73	100	75	131	94	56	Hungary
Malta	-	3	6	7	5	8	7	8	7	4	4	-3	Malta
Německo	1 462	1 457	1 536	1 545	1 466	1 452	1 218	1 306	1 412	1 303	-159	-109	Germany
Nizozemsko	223	243	276	329	303	332	285	242	227	179	-44	-48	Netherlands
Polsko	12 071	12 843	13 665	9 941	6 880	7 679	6 661	7 338	7 403	8 882	-3 189	1 479	Poland
Portugalsko	8	8	7	3	10	17	15	49	16	13	5	-3	Portugal
Rakousko	434	449	475	455	421	384	396	432	502	390	-44	-112	Austria
Řecko	13	16	17	19	27	21	21	23	25	30	17	5	Greece
Slovensko	59 323	72 244	69 723	61 320	53 154	63 567	63 555	56 558	58 053	59 818	495	1 765	Slovakia
Slovinsko	51	36	28	26	24	24	24	32	38	29	-22	-9	Slovenia
Spojené království	1 224	1 233	1 252	1 207	1 129	1 112	989	1 005	1 018	741	-483	-277	United Kingdom
Španělsko	69	80	84	86	83	95	91	84	77	78	9	1	Spain
Švédsko	90	141	125	138	118	138	93	92	84	63	-27	-21	Sweden

Comparison of figures regarding EU nationals holding trade licence 1996 – 2004

Czech Republic

Cizinci s platným živnostenským oprávněním - občané států EU (stav k 31. 12.)

Foreigners holding valid trade licence of citizens of EU member states; 31 December

Pramen: MPO ČR

Source: MIT CR

Země	1996	1997	1998	1999	2000	2001	2002	2003	2004	rozdíl 2004-1996 Difference 2004-1996	rozdíl 2004-2003 Difference 2004-2003	Country
Cizinci celkem	45 499	63 191	44 201	57 415	61 340	64 000	60 532	62 293	65 219	19 720	2 926	Foreigners, total
Celkem EU 25	8 801	11 389	8 688	9 406	9 868	10 650	10 892	12 057	13 116	4 315	1 059	EU 25 total
Podíl EU na cizincích celkem v %	19,3	18,0	19,7	16,4	16,1	16,6	18,0	19,4	20,1	x	x	Proportion of EU to foreigners, total (%)
v tom:												
Belgie	37	51	45	43	39	46	47	49	46	9	-3	Belgium
Dánsko	12	14	8	12	15	16	17	16	20	8	4	Denmark
Estonsko	2	3	4	5	6	6	6	8	8	6	-	Estonia
Finsko	6	7	6	5	8	9	12	13	19	13	6	Finland
Francie	74	230	90	102	110	132	137	143	160	86	17	France
Irsko	4	7	7	13	11	12	19	25	31	27	6	Ireland
Itálie	185	239	204	243	263	303	307	334	351	166	17	Italy
Kypr	7	8	6	6	6	8	8	10	12	5	2	Cyprus
Litva	6	11	7	17	19	21	21	18	38	32	20	Lithuania
Lotyšsko	5	7	10	15	13	10	10	12	16	11	4	Latvia
Lucembursko	5	5	1	3	2	2	2	2	2	-3	-	Luxembourg
Maďarsko	105	121	84	85	89	99	98	104	109	4	5	Hungary
Malta	1	1	1	1	1	2	2	2	2	1	-	Malta
Německo	1 238	1 410	761	799	837	940	949	1 005	1 103	-135	98	Germany
Nizozemsko	90	118	87	95	100	124	127	125	132	42	7	Netherlands
Polsko	667	878	797	940	1 033	1 051	1 081	1 126	1 251	584	125	Poland
Portugalsko	1	1	1	1	1	1	1	1	2	1	1	Portugal
Rakousko	236	413	200	215	206	248	250	258	268	32	10	Austria
Řecko	65	89	70	82	94	109	117	131	137	72	6	Greece
Slovensko	5 869	7 493	6 017	6 371	6 670	7 051	7 175	8 123	8 757	2 888	634	Slovakia
Slovinsko	12	15	18	28	30	33	32	30	31	19	1	Slovenia
Spojené království	139	215	220	274	264	364	406	450	537	398	87	United Kingdom
Španělsko	14	20	20	24	23	25	27	28	36	22	8	Spain
Švédsko	21	33	24	27	28	38	41	44	48	27	4	Sweden

Chapter IX

Social security of persons moving within the EU

Relevant Czech legislation in force

- Act, Public Health Insurance Act no. 48/1997 Coll., as amended
- Act Employee's Sickness Insurance no. 54/1956 Coll., as amended
- Social Security Act no. 100/1988 Coll., as amended
- Pension Insurance Act no. 155/1995 Coll., as amended
- Employment Act no.435/2004 Coll., as amended
- State Social Support Act no. 117/1995 Coll., as amended
- Social Need Act no. 482/1991 Coll., as amended
- Supplementary Pension Insurance with State Premium Act no. 42/1994 Coll., as amended
- and implementing regulation to the abovementioned acts

Relevant Czech legislation in preparation

- Social Services Bill (assumed to enter into force 1.1.2007)
- Assistance in Need Bill (assumed to enter into force 1. 7. 2006)

This chapter will describe how different categories of persons – users of the right to free movement of workers – can access the Czech social scheme. A general picture of the scheme including different kinds of benefits and also institutions involved is described in table below.

Generally, the Czech social scheme consists of three parts:

- Benefits based on insurance of the person concerned
- Health care (benefits in kind in case of sickness or accidents, incl. employment injuries and occupational diseases). Nine public health insurance companies administer it.
- Sickness benefit (cash benefits in case of sickness or accidents, incl. employment injuries and occupational diseases). It is administered by Czech Social Security Administration and, in specified cases, the employers.
- Pension (old-age, invalidity, survivor's pension in general cases and also as a result of occupational disease and accidents at work). It is administered by Czech Social Security Administration.
- Unemployment benefit. Labour Offices and Employment Services Administration administer it.
- Benefits in case of occupational disease and accidents at work – apart from benefits described above there is a system of employer's liability.

Benefits included in State social support scheme – benefits designed mainly to support families with dependent children. Some benefits are means tested – child benefit, social allowance, housing allowance. Other are granted without any means testing – birth grant, funeral grant and parental allowance. Financial resources for this scheme derive solely from general taxation. This scheme is administered by Labour Offices.

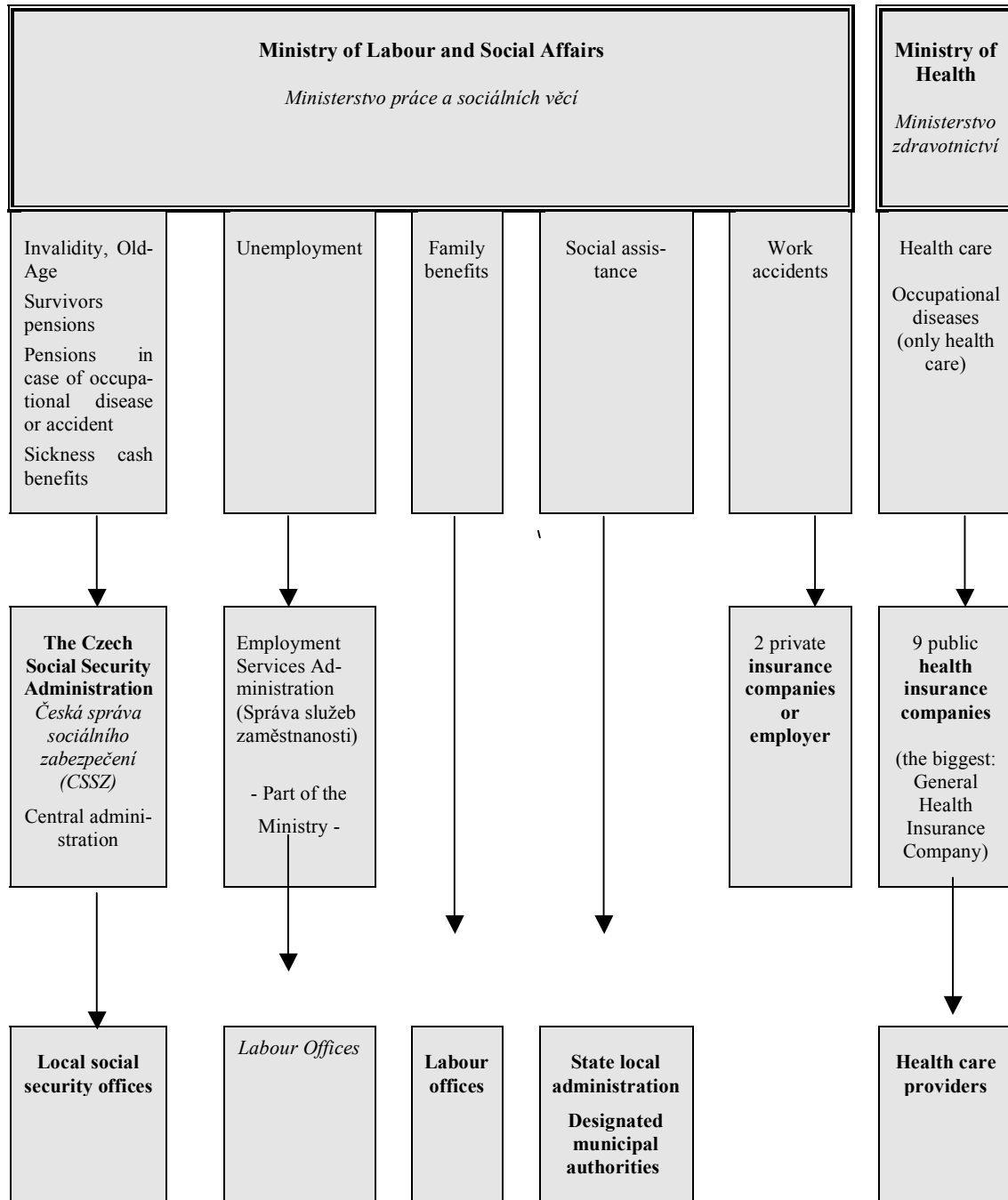
Benefits granted within the social assistance – benefits and services for persons in need, i.e. those whose income is under the minimum subsistence. This scheme includes a wide

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range of benefits (in cash and in kind) including the general benefits and also special benefits available to seniors, persons with disabilities and families with dependent children. This scheme is administered by municipal authorities. In the field of social assistance there are major changes in preparation. Social Services Bill and Assistance in Need Bill are currently debated in the Parliament.

As an addition to the first pillar pensions scheme, the supplementary pension scheme with the state premium was introduced in 1994. It is implemented by private pension funds based on private insurance of individuals with the possible participation of the employer. As regards the supplementary pensions of migrants, into this act the Directive 98/49 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community was implemented.

Table 1



Access to social advantages according to Article 7, para. 2 of Reg. 1612/68

The regulation itself is directly applicable, therefore there is no transposition of its provision into the relevant legislation. However, in legislation which is in preparation – Social Services Bill, Assistance in Need Bill – reference to Regulation 1612/68 is included in personal scope for better clarity of the legislation.

In case of contributory schemes – where recipients themselves contribute for future benefits (health care, sickness and pension insurance) – there are no differences in access to schemes or in the range of benefits available to migrant workers compared to the Czech nationals.

Schemes of state social support and social assistance are based on residence. To be eligible for a benefit, the recipient must reside permanently in the territory of the Czech Republic. Therefore, for access to these kinds of benefits for migrant workers, it is extremely important to apply Article 7 (2), to overrule the permanent residence requirement in case of workers covered by Regulation 1612/68, where necessary including the cases described in decisions of the ECJ. The uniform application of this Regulation and respective jurisprudence by the designated municipal authorities and labour offices (in case of state social support) is secured by methodological instructions issued by the Ministry of Labour and Social Affairs and regular training of respective staff.

Application of Regulation 1408/71

The objective of the Community coordination is to secure the rights of migrant workers and their family members through building a connection between different national schemes without harmonizing them. It touches upon every branch of social schemes. It applies to migrant EU citizens, their family members as well as to the third country nationals moving within EU states.

The Czech Republic as all other new acceding states started to apply Community coordination rules from the 1st of May 2004. Before the enlargement, however, there was an important network of bilateral agreements with “old” (Austria, Germany, France, the Netherlands) as well as the “new” Member States (Poland, Slovenia, Slovakia, Lithuania, Hungary, Cyprus) mostly based on the same principles as the Community coordination. That enabled the Czech authorities to prepare for the application of Community rules together with two twinning projects (with UK and Finland).

Community coordination, compared to the bilateral agreements, brings considerably wider rights, as some benefits or situations are not normally covered by bilateral agreements. The advantages of the multilateral Community coordination are application of the same rules by 25 Member States and the interpretation by the ECJ. Therefore, from the point of view of rights of migrant workers the effect of the enlargement is definitely a positive one. As an example of changes from the 1st of May 2004 it is possible to mention that for Czech insured persons it is possible to receive necessary health care in every Member State at the expense of Czech health insurance companies. At the same time, Czech health care providers and insurance companies do the same service for insured persons from another Member State. In the pension sector it is important that as soon as the Czech Republic joined the EU it is pos-

sible by application of aggregation of periods principle to calculate a pension of persons who did not fulfil the national conditions without taking into account the foreign periods. The principle of non discrimination is already included in the Czech Constitution, nevertheless the concept of indirect discrimination as it is interpreted by the ECJ, seems to be a new and valuable tool in the protection of migrant's rights. Generally, the accession brought additional rights to individuals, and the Community coordination, even though sometimes time-consuming, is perceived very positively.

From the institutional point of view, it is important to know that coordination of social security is implemented by the same institutions and authorities that are responsible for granting of benefits in wholly internal situations. Therefore, for the description of authorities involved in the coordination, see table above.

Regulations 1408/71 and 574/72 comprise an exhaustive set of rules accompanied by extensive interpretation of these provisions by the ECJ. Both of the Regulations are directly applicable, therefore, no transposition into the national legislation was necessary. The uniform application of coordination rules by Czech institutions is ensured by detailed implementation instructions issued by competent institutions, liaison bodies and, where necessary, competent authorities. In order to solve practical difficulties and other problems with the application of Regulations between institutions, a working group was established, led by the Ministry of Labour and Social Affairs.

Special features or situations in coordination of different kinds of benefits by the Czech authorities and institutions

Sickness benefits in kind (health care)

Residence

Health care insurance is an insurance scheme based on permanent residence. According to the General Health Insurance Act, foreigners in general can be covered by this scheme only when they are employed in the Czech Republic, which means for example an employment contract in order to perform work to an extent that it gives the possibility to participate in the sickness insurance (e.g. not only having occasional jobs).

The residence condition is a typical example of indirect discrimination practice, that is contrary to Art. 3 of the Regulation 1408/71.

Therefore, for persons covered by Community coordination, this condition should not apply.

As far as gainfully active persons, pensioners, students and their family members are concerned, health insurance companies enable them to affiliate the general health insurance scheme.

The situation is, however, less clear when non-active persons, who are not pensioners, covered by Article 13, para. 2 lit. F are concerned. In some cases health insurance companies tend to deny non-active persons covered by the Regulation access to the general health insurance scheme, referring to the fact that they have not "permanent residence" in the territory of the Czech Rep. On the other hand, the term residence used in Regulation 1408/71 as it is interpreted by the ECJ has its community meaning different to the "permanent residence" that is provided for in the Czech legislation. Such practice of health insurance companies could rise doubts about the compliance with the Community law.

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Article 1 of Regulation 1408/71 defines residence as ordinary residence. It is necessary to note that notwithstanding the jurisprudence of the ECJ that interprets it, it seems that between Member States there still is space for differences in application. Some states consider persons as residents when they start to work there, some require more conditions to be fulfilled. That can result in the situation where a person is considered a resident in two states or in none of them, with considerable impact on the rights of such person and their family members.

Application of Art. 22 – authorization to travel abroad to receive medical treatment

Czech health insurance companies follow Article 22 of Regulation 1408/71 for authorization of hospital care together with the jurisprudence of the ECJ in cases *Kohl-Decker*, *Müller-Faurée* and others on freedom to provide services. However, cases of travelling in order to receive treatment and application for authorization are not numerous.

In 2004 there were 30 applications for authorization, 7 of them were refused; 210 insured persons from another Member State were treated in the Czech Republic.

In 2005 so far, there are 300 cases of treatment authorized by institutions from another Member State. From this date it is possible to conclude that the Czech Republic can be considered as importer of authorized patients rather than as exporter.

European Health Insurance Card (EHIC)

The Czech Republic has chosen to use EHIC as a national card as well. So far approximately 8 million cards were issued (i.e. 80 per cent of population have the EHIC). It is considered to be an excellent tool for securing rights of insured persons during their stay abroad. Health insurance companies together with Centre for international reimbursement (liaison body) offer foreign institutions and providers the possibility of checking the validity of submitted EHIC via their web sites.

Pensions

The Czech institution responsible for pensions – Czech Social Security Administration – deals with calculation of national and pro-rata pensions. There seems to be no major difficulties in this process. With some Member States, however, the situation seems to be special.

Greece

In 1984 the Agreement on the settlement of pension rights of repatriates was concluded between the former Czechoslovakia and Greece. Pursuant to this agreement, persons of Greek origin, who emigrated to Czechoslovakia because of their political opinion, and who returned to Greece between 1985 and 1990, should receive only the pension calculated according to Greek legislation. As a compensation, Czechoslovakia transferred 24 million USD to Greece to cover these costs. During the accession negotiation, the Czech Republic endeavoured to include this Agreement into Annex III to Regulation 1408/71. Due to the refusal of the Greek side, however, there is no entry. Therefore, the Czech Republic will have to apply the provisions of the Regulation and consider periods once paid by abovementioned compensation as Czech and calculate pro-rata pension. Nevertheless, this situation leads to double payment for the same period of insurance.

Germany – Annex III

A special situation exists also in relation to Germany. There was a bilateral agreement in force since 2002, but it was not possible to include it into the Accession Treaty, as the text of the Treaty was finalised earlier. Entry was subsequently proposed and included into Miscellaneous Amendments 2004 that are currently in legislative process.

From the legal point of view there is still no legislation in force that would enable Czech or German authorities to apply a bilateral agreement, even though entry to the Annex of Article 39, para. 1 let. b) and c) is mutually agreed. If nowadays there was a claim for pension, only Regulation 1408/71 should apply. It can lead to the situation where a period of insurance that according to bilateral rules was once treated as German for the calculation of German pension, will have to be taken into account again and treated as Czech according to the Regulation. This situation will last as long as the legislative process of Miscellaneous Amendments 2004 to Regulation 1408/71 is not finished. Therefore, the rights of persons concerned will, to a great extent, depend on when the application for a pension is delivered to the competent institution. Considering that the Annex III is designed among others to ensure continuity of application of certain bilateral provisions and stability of rights once settled, it is an unfortunate situation.

Unemployment benefits

The Regulations 1408/71 and 574/72 should be fully applicable from the date of accession since there are no provisions in the Act of Accession that would limit their application. However, the transition period for free movement of workers, i.e. Articles 5 and 6 of the Regulation 1612/68, as applied by some of “old” Member States has serious implications on application of unemployment chapter in the Regulation 1408/71.

During the first year after the enlargement one of main difficulties encountered by Czech citizens covered by Regulation 1408/71 concerned the export of unemployment benefits under the unemployment chapter of this Regulation. Their requests were declined with the reference to the argument that either there are transitional arrangements on free movement of workers which forbid the registration of such persons within Public Employment Services (PES) or that due to the transitional arrangements and tight labour market situation it is a mere theory to have a job mediated by relevant PES office.

From a legal point of view it is necessary to point out following:

- Transitional arrangements (that result in application of national rules in access to labour market) expressly relate to Articles 39 and 49 of the Treaty. There is nothing concerning Article 42, which is the legal base for Regulation 1408/71.
- In transitional arrangements, there is also one provision on the dir. 68/360 on residence of workers, which cannot be fully applied without full application of Regulation 1612/68. Such provision expressly enables Member States to divert to a necessary extent from its provisions. On the other hand, there is no such option for Regulation 1408/71, which is also closely linked to Regulation 1612/68 mainly to its Article 5.
- The reason for introducing transitional measures on free movement of workers was to give Member States the power to limit the inflow of labour force. Application of Regulation 1408/71 cannot limit this right.
- If a direct payment of unemployment benefits presumed under Regulation 883/2004 was used, such problem would probably not occur, although transitional arrangements will still be in force.

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Another important aspect is that if there was such information available before the accession, that would enable all new Member States firstly to express their view on this measure and after to inform their own nationals about the results in advance.

Impact of the EU citizenship on the access of migrants to public benefits

Since the introduction of European citizenship by the Maastricht Treaty a considerable movement can be traced in the attitude towards persons moving within the Community and their access to public benefits. It is reflected in the consolidation directive on movement and residence 2004/38 and in recent case-law of the ECJ in cases C-184/99 *Rudy Grzelczyk*, C-224/1998 *d'Hoop*, C-456/02 *Trojani* and C-209/03 *Bidar*. The common denominator of all of these judgements is access to public benefits based on Articles 12 and 18 of the Treaty (equality of treatment and right to residence).

These changes are reflected in the Amendment to the Social Security Act (100/1988 Coll, as amended), Social Services Bill and Assistance in Need Bill, that are currently discussed in Parliament. Persons who have the right to reside in the Czech Republic will have access to social services and assistance benefits covered by these acts as long as they are not considered an “unreasonable burden” to the public schemes (details see Chapter 5).

Judicial practice

Czech courts so far had very few possibilities to use Regulation 1408/71 and 574/72 in their decision-making, due to the temporal scope of Community law. It must be considering that the case must be solved pursuant to the legislation in force when it started.

The only exception so far, where the reference to previous decisions of the ECJ was used by Supreme Administrative Court, was the case of Czecho-Slovak pensions. This case concerns a Czech national who according to the Agreement receives Slovak national pension and claims to be damaged by the Agreement since Czech pension for the same period would be higher. Therefore, she claims to be entitled to a payment of differential amount between these two pensions. This case and cases similar to it, however, are still pending.

Literature

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Internet resources

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Chapter X

Establishment, Provision of Services, Students

Legislation in force

- Act on Residence of Foreigners in the Territory of the Czech Republic, Act no. 326/1999 Coll.
- Commercial Code, Act no. 513/1991 Coll.
- Act on Foundations and Endowment Funds (Act on Foundations), Act No. 227/1997 Coll.
- Trade Licence Act, Act no.455/1991 Coll.
- Act on University Education, Act No. 111/1998 Coll.

The Right of Establishment and provision of services and students texts in force, draft legislation and judicial practice (if any)

Freedom of movement of persons covers many aspects and cannot be reduced to a possibility of movement of persons from one Member State to another only. Free movement of persons constitutes a possibility to change a place of residence for the purpose of exercising an economic activity either employed or self-employed, i.e. the possibility to establish and exercise economic activity in the territory of any Member State and remain in the Member State after having ceased the economic activity. During the 1990s this freedom concerned persons exercising the economic activities and their family members but then the categories of the persons concerned were extended for non-active individuals like students, pensioners or individuals living on independent income. For more details regarding the access to employment see Chapter VI.

Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms under the conditions laid down for its own nationals by the law of the Member State where such establishment is pursued. For exercising these rights there is an emphasis on mutual recognition of qualification (for more details see Chapter II). Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those who are non-profit-making.

Sect. 21-26 of the Commercial Code concern setting-up of companies and cooperatives by foreigners in general. The foreigners may carry business in the Czech Republic under the same conditions and to the same extent as the Czech entities unless provided otherwise. The term foreigner means a private individual or legal entity having a place of residence outside the Czech Republic. The Czech legal entity means a legal entity having a place of residence in the Czech Republic. A business activity of the foreigner in the Czech Republic must be understood as a business activity on condition that the company or its branch is located in the Czech Republic. A business activity can be carried out as of the day of registration. This does not apply to the individuals who are nationals of the EU/EEA Member States and carry out the business activities in the Czech Republic; they fall under the same regulation as the Czech nationals. The foreigners entitled to carrying out business abroad are considered to be enterprisers according to this Act. Capital participation of the foreigner in the Czech legal entity is also possible.

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According to the Act on Foundations the foreign legal entity having a place of residence outside the Czech Republic which is constituted as a foundation according to the law of the state of residence is entitled to carry out an activity under the same conditions and to the same extent as the foundations set up by this Act unless provided otherwise. Its activities can be carried out as of the day of registration of the branch set up in the Czech Republic.

According to the Trade Licence Act a trade can be carried on by a private individual or a legal entity under conditions provided for by this Act. The private individual or legal entity having a place of residence outside the Czech Republic can carry on the activity under the same conditions and to the same extent as the Czech individuals or entities unless provided otherwise.

Freedom to provide services allows nationals of the Member States established in one Member State to provide services in the Member States of the persons for whom the services are intended.

Services in particular include activities of an industrial character, activities of a commercial character, activities of tradesmen, activities of the professions. Without prejudice to the regulation relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided under the same conditions as are imposed by that Member State on its own nationals. The respective activity is evaluated as a service on the basis of its temporality. Freedom to provide services enshrines the right of a temporary personal presence and temporary performance of activity by the subject providing the service. Freedom of establishment enables carrying out the activities in the territory of the Member States permanently.

As regards students the regulation was adopted to ensure access to education without discrimination for a Member State national admitted to vocational education in another Member State. It covers the students who do not enjoy the rights of the family members of the active persons.

The admittance does not exclude passing entry exams that fall under competences of the Member States. The Act on University Education provides conditions for admitting foreigners who must enable fulfilment of the obligations resulting from international agreements or treaties to which the Czech Republic is a party.

The right of free movement together with the right to exercise an economic activity is also acquired by a spouse or dependent children of the student even if they are third-country nationals. Detailed provisions transposing the respective directives can be found in the Act on Residence of Foreigners in the Territory of the Czech Republic (Chapter IVa Residence of the EU national and family members on the basis of special residence permit). There is no difference for students exercising an economic activity. They fall under the provisions regarding employment or self-employment (for more details see other chapters).

There is also the regulation for pensioners, individuals receiving pension for old age, invalidity, accident at work, occupational disease or early retirement pension. The right of residence and conditions to be fulfilled for its exercise have also been transposed to the Act on Residence of Foreigners in the Territory of the Czech Republic (Chapter IVa Residence of the EU national and family members on the basis of special residence permit).

Transitional period for provision of services

The Accession Treaty contains also possibilities for limiting an access to the labour markets as regards provision of services in connection with free movement of services. Only Ger-

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many and Austria introduced transitional measures in this respect. The companies founded in the Czech Republic are after notification to the European Commission limited in providing services and their staff is temporarily limited in movement and employment on the territory of Germany and Austria. Their right to access to employment is subject to the national regulations in these Member States.

The only thing that was forbidden in case of the access of employees of the Czech companies to Germany and Austria was to make the conditions of temporary stay of workers more restrictive than in comparison with the conditions as of the 16th of April 2003. The Czech Republic can after the notification to the European Commission and to extent to which Austria and Germany restricts Czech companies make reciprocal steps.

The above mentioned limitation is applicable only with respect to a few branches, not to the whole subject of services.

In relation to Germany, it is applicable only with respect to the building industry and related fields such as house cleaning services and the cleaning of transportation vehicles and also activities in the field of interior decorating.

In relation to Austria, it is applicable also with respect to building industry and related fields such as house cleaning service and cleaning of transportation vehicles and activities in vegetable production, shaping of gardens, parks, plantations and other grassed areas, cutting, shaping and final processing of decorative and (constructional) wall stone, fabrication of steel constructions and its parts, search and security activities and other activities related to medical and social care, and social work that is not connected with accommodation.

Chapter XI Miscellaneous

Chosen studies with respect to migration

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<http://www.iom.int/documents/publication/en/iom%5Fii%5Fcz.pdf>

Horáková, M., *Migrace v ČR před vstupem do Evropské unie*, Praha VÚPSV, 2004 (Migration in the CR before the accession to the EU)

Horáková, M., *Mezinárodní migrace a migrace cizí pracovní síly*, Praha VÚPSV, 2003 (The international migration with respect to alien's migration)

Horáková, M.: *The Czech Republic's Response to migration in the context of European Union enlargement*, VÚPSV, 2003

Internet resources

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www.mvcr.cz

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