

REPORT
on the Free Movement of Workers
in Bulgaria in 2008-2009

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Introduction

This is the second annual report on the Free Movement of Workers in the Republic of Bulgaria after the country became a Member State of the European Union on 01 January 2007. The 2008 report aims to provide information on the most important developments with regard to specific issues highlighted by the Commission. Background description could be sought in the first report concerning the year 2007.

In 2008 there is still little legislative, administrative, judicial and research practice in respect of the operation of the rules on free movement of workers in Bulgaria. However, in comparison with the state of play in the previous year, in 2008 essential positive amendments of the legal regulation took place. Major changes concern the abolition of the nationality requirement for access to work as civil servants in the public sector and as a captain of a ship, and the recognition of periods of employment in other Member States.

Although the number of EU citizens from other Member States working and resident in Bulgaria is still small and application of the rules - limited, Bulgaria has been exerting efforts to improve the transposition of the Community provisions into national law. Problematic issues, such as the one with regard to taxation law addressed in the reasoned opinion of the European Commission on 19 March 2009 (discussed in Chapter VII of this report), will continue to be an object of further follow-up and reporting.

Chapter I

Entry, Residence, Departure

The European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereafter ‘the EU Citizens Directive’) is transposed in Bulgaria by means of the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (hereafter ‘LERD’), separate from the Law on the Foreigners in the Republic of Bulgaria.

A. STATE OF TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

Art. 7 (1) (a) of the EU Citizens Directive is transposed in Art. 8 (1) (1) LERD. Right of residence for more than three months (*‘continuous residence’* as it is called in LERD) is recognized to EU citizens if they are workers or self-employed persons in the Republic of Bulgaria.

Art. 7 (3) (a-d) of the EU Citizens Directive is transposed into Art. 8 (3) LERD. The conditions for retention of status are the same as stipulated in the EU Citizens Directive, except for one divergence in the transposition of Art. 7 (3) (d) of the EU Citizens Directive. Art. 8 (3) (4) LERD stipulates that when the Union citizen is involuntarily unemployed, vocational training *shall not be* related to the previous employment. This goes contrary to the idea of the EU Citizens Directive that in those cases vocational training not related to the previous employment is allowed, but it is not envisaged to exclude the one related to the previous employment. In the cases under Art. 8 (3) (c) of the EU Citizens Directive, the period through which the status is retained is six months.

Art. 8 (3) (a) of the EU Citizens Directive is transposed into Art. 9 (2) LERD. The national law requires *‘a document proving the existence of the circumstances’* under Article 7 (1) (a) of the Directive.

The same wording is found in Circular No.I3-487 from 28 March 2007 on the procedure and organization of the issuance of the documents under LERD.

Art. 14 (4) (a-b) of the EU Citizens Directive is not transposed.

Art. 17 of the EU Citizens Directive: There is a substantial mistake in the transposition of the main rule regarding eligibility for the right of permanent residence under Art. 16 and Art. 17 of the EU Citizens Directive. Art. 16 LERD provides that an EU citizen or his/her family member who is an EU citizen is given a permanent residence certificate, if that person has resided continuously in the Republic of Bulgaria for five years and he/she fulfills any of the requirements under Art. 17 of the EU Citizens Directive.

Art. 24 (2) of the EU Citizens Directive is not transposed.

B. SITUATION OF JOB-SEEKERS

There is no transposition in Bulgarian law of Art. 14 (4) (b) of the EU Citizens Directive providing that ‘Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged’.

Under Art. 18 of the Law on Employment Promotion, EU citizens and their family members formally have a right of registration to seek work at the local employment office of the Employment Agency at the Ministry of Labour and Social Policy.

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However, LERD makes no reference to a right of residence over 3 months of EU citizens who are documented job-seekers. The residence regime is within the exclusive competence of the National Police Service at the Ministry of the Interior. Its powers with regard to the residence of EU citizens and their family members are exhaustively regulated in LERD.

According to Article 24, LERD, discontinuance of the right of residence in the Republic of Bulgaria is imposed if the person ceases to meet the requirements stipulated in Art. 8 LERD (Art. 8, LERD, transposes Art. 7 (1) (a) – (c) of the EU Citizens Directive).

Contradictions in the web site of the Employment Agency explained in the 2007 report with regard to the document certifying address registration of the job seekers (required for their registration at the employment office) seem not to reflect contradictions in practice. This suggestion is based by analogy on additional data published in the same web page with regard to non-EEA citizens that are family members of EEA citizens.¹ However this issue will continue to be an object of further reporting.

1 http://www.az.government.bg/eng/internal_en.asp?CatID=12&WA=JobSeekers/RegBT_EAAen.htm.

Chapter II

Access to Employment

EU citizens can exercise their right to free movement for work purposes in the territory of Bulgaria, without need for a work permit.

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

According to the Law on Employment Promotion, registered job-seekers that are EU citizens or members of their families have the same rights and obligations under the Law on Employment Promotion as Bulgarian nationals, with the exception of cases in which Bulgarian citizenship is explicitly required. However, as explained in the previous chapter, LERD makes no reference to a right of residence over 3 months of EU citizens who are documented job-seekers.

Services offered by the National Employment Agency to those actively seeking employment are:

- Information and Consultation/ Career Orientation
- Employment Mediation²
- Psychological Support³
- Career (Professional) Orientation⁴
- Enrollment in appropriate Programmes⁵ and Employment Measures⁶
- Qualification and Motivation Training⁷

The Law on Protection against Discrimination has a special section on equal treatment in the field of employment. Discrimination on the basis of nationality is explicitly prohibited, save in cases where the nationality requirement is stipulated by law.

2. LANGUAGE REQUIREMENT

In general there are no explicit requirements in law for knowledge of Bulgarian language for employment in the private sector. As a rule, this is to be decided by the employer, subject to rules on contractual freedom, if the nature of the job so requires. Art. 7 (1) (2) of the Law on

2 More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/02&WA=JobSeekers/HelpJobSeek_en.htm (accessed on 06 March 2009).

3 More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/03&WA=JobSeekers/Psiho_en.htm (accessed on 6 March 2009).

4 More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/04&WA=Training/Orientation_en.htm (accessed on 6 March 2009).

5 More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/05&WA=Projects/Programmes.htm (accessed on 6 March 2009).

6 More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/06&WA=Projects/UnemplMeasures_en.htm (accessed on 6 March 2009).

7 More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/07&WA=Training/Training_en.htm (accessed on 6 March 2009).

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Protection against Discrimination stipulates that there is no discrimination if certain treatment/requirement is reasoned with the nature of a particular occupation or activity, or of the conditions in which it is performed, if such a characteristic constitutes an essential and decisive occupational requirement, the aim is legitimate and the requirement does not go beyond what is necessary for its achievement.

There could be language requirements for some professions in the private sector, justified on public interest grounds.

With regard to EU, EEA or Swiss citizens whose medical professional qualification has been recognized in Bulgaria, Article 186, Paragraph 2 of the Law on Health provides that the Ministry of Health and the high schools should provide them with conditions for acquiring the necessary language knowledge and professional terminology in Bulgarian ‘when this is in their interest and in the interest of their patients’. In comparison, Paragraph 3 of the same provision stipulates that third country nationals are allowed to practice their medical profession in Bulgaria only after it has been established in accordance with the rules in a Minister’s ordinance that they know Bulgarian language and the respective professional terminology in Bulgarian.

With regard to lawyers and legal assistants, it is noteworthy that the official language in Bulgarian institutions (including judicial hearings) is Bulgarian. According to the Attorney’s Act (Articles 11 – 19a), a lawyer who is an EU, EEA or Swiss citizen is allowed to practice in Bulgaria only together with a barrister from the Bulgarian Bar. Membership in the Bulgarian Bar is allowed after a thorough exam in Bulgarian national law (in Bulgarian). That possibility for membership of non-Bulgarian citizens is given only to persons who have acquired their professional qualification in an EU Member State, but it is conditioned by knowledge of Bulgarian law and language.

CHAPTER III EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

1. WORKING CONDITIONS (DIRECT, INDIRECT DISCRIMINATION)

Texts in force

- Law on Employment Promotion

Art. 18 (3) (5) – this provision has been added explicitly in 2008 (State Gazette No.26) with regard to guaranteeing equal treatment of third country nationals who are family members of EU citizens

Art. 70 (3) – this is the legal basis on which EU citizens can enter into *labour relations* or *be self-employed* on the same conditions as Bulgarian nationals. They are exempted from the requirement to be in possession of a work permit;

Art. 71 (1) (2) - EU and EEA citizens are exempted from the general rule that a local employer can hire a foreign employee provided that for the immediately precedent 12 months the total number of foreigners employed by the domestic employer does not exceed 10 percent of the average number of the people on the payroll, hired under labour contracts, who are Bulgarian nationals and/or refugees.

- Ordinance on the Conditions and Procedure for Admitting Posted Workers or Civil Servants
Posted workers for provision of services on the territory of the Republic of Bulgaria who are EU citizens are also exempted from the work permit requirement set out for other foreigners.

- Law on Protection against Discrimination

Art. 13, Art. 14, Art. 15 and Art. 21 explicitly prohibit discrimination on the basis of nationality with regard to working conditions, remuneration, the possibilities for professional qualification and career development and the reasons for dismissal respectively.

- Law on Health and Safety at Work

Art. 2 provides that the law ‘shall apply to all enterprises and places, where work or training are carried out, regardless of the form of organization, type of ownership or legal grounds on which the work or the training are performed’.

- Labour Code

Art. 4 provides that employees are entitled, with no prior permission, to freely form, by their own choice, trade union organizations; to join and leave them on a voluntary basis, showing consideration for their statutes only.

With regard to the right of association of employees and access to professional and trade unions, there are no legal obstacles to the exercise of this right by EU citizens and their family members.

- Constitution of the Republic of Bulgaria

Art. 49 recognizes the workers’ right to association;

Art. 26 (2) provides that foreigners in the Republic of Bulgaria have the same rights and obligations as Bulgarian citizens, unless the Bulgarian citizenship requirement has been explicitly provided for in the Constitution or in a law.

2. SOCIAL AND TAX ADVANTAGES

a) Social Advantages

EU citizens and their family members are entitled to the same social security rights and unemployment benefits under the same conditions valid for Bulgarian nationals according to the Code on Social Security.

Article 3 (5) of the Law on Family Allowances for Children (in Bulgarian: *Закон за семейни помощи за деца*) provides that pregnant women who are foreign citizens and families of foreign citizens who permanently reside in Bulgaria and look after their children in the country have a right to family allowances for children if that is envisaged in an international treaty to which Bulgaria is a party. By analogy with the Law on Employment Promotion, the Treaty on the Accession of Bulgaria to the European Union could be regarded as falling within the scope of Article 3 (5).

Article 2 (4) of the Law on Social Assistance (in Bulgarian: *Закон за социално подпомагане*) provides that a right to social assistance is recognized to persons who are not Bulgarian citizens when that is envisaged in an international treaty to which Bulgaria is a party. By analogy with the Law on Employment Promotion, the Treaty on the Accession of Bulgaria to the European Union could be regarded as falling within the scope of Article 2 (4).

The relevance of this law is found with regard to allowances for job-seekers. Detailed rules on the conditions and the procedure for providing social assistance are found in the Rules on the Implementation of the Law on Social Assistance.

With regard to these issues, in the database of the Supreme Administrative Court of Bulgaria there are no cases involving EU citizens and their family members. The practice in this matter will continue to be an object of follow-up reporting.

b) Tax Advantages

The taxation legislation envisages rules preventing double taxation of incomes already taken into consideration in an EU Member State or an EEA country (Art. 37, Para. 7 of the Law on Taxation of the Incomes of Physical Persons). Problems with regard to non-deduction of expenses for the purposes of determining the basis of assessment of taxation of the income are described in Chapter VII in relation with the analysis of the *Renneberg* case.

Under Chapter IV of the Law on Taxation of the Incomes of Physical Persons, the following tax advantages are applicable, regardless of nationality:

- Tax reduction for disabled persons;
- Tax reduction for voluntary social insurance;
- Tax reduction for young families with mortgage to pay;
- Tax reduction for having children;
- Tax reduction for donation.

With regard to these issues, in the database of the Supreme Administrative Court of Bulgaria there are no cases involving EU citizens and their family members.

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

At the present moment there is nothing more to report apart from what is already covered by the other chapters of the Report. Bulgaria is new to the law on free movement of workers and obstacles are yet to be identified with augmentation of administrative practice.

4. SPECIFIC ISSUES: FRONTIER WORKERS, SPORTSMEN/ SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

Please note that this section will look at issues other than taxation. Problems with regard to non-deduction of expenses for the purposes of determining the basis of assessment of taxation of the income are described in Chapter VII in relation with the analysis of the *Renneberg* case.

4.1. Frontier Workers

Social security issues with regard to frontier workers have been addressed in the 2007 report. This year's report is required to focus on the issue of existence of residence clauses within the meaning in the case of *Hartmann* (C-212/05).

The only source of special legal regulation of the issue of frontier workers in Bulgaria is found in intra-institutional instructions. These are Administrative Instructions No91-01-286/28.12.2007 and No 91-01-13/21.01.2008 by the National Social Security Institute. So far they seem not to contradict the findings of the ECJ in the judgment in the *Hartman* case. Neither transfer of residence, nor lack of permanent residence in the country, seems to be obstacles to equal treatment in Bulgaria. However for the time being administrative and judicial practice is lacking to confirm these theoretical suggestions. With augmentation of the number of frontier workers in Bulgaria we will follow whether any practical problems in this regard will arise.

4.2. Sportsmen/ Sportswomen – to be elaborated in a separate questionnaire

The rules on the transfer of foreigners in sports clubs in Bulgaria, as well as on the possible nationality quotas in this regard, are adopted by the relevant National Federations in each sport area and approved by the head of the State Agency for Youth and Sport at the Bulgarian government. According to Art. 8 of the Implementing Regulation of the Law on Physical Education and Sport, within a 6-months period from the receipt of their license, the Federation has to propose to the head of the State Agency for Youth and Sport Rules on the recognition, discontinuance and withdrawal of competition rights and on the status of amateur and professional sportsmen/sportswomen that participate in the activities of the sport clubs that are federation members.

Below there is information on concrete sports in Bulgaria.

Football

There are no nationality quotas for EU citizens in the areas of football. Recently the Bulgarian Football Union took a decision to decrease the number of third country nationals in the sports clubs, but this decision does not affect EU citizens.

Volleyball

According to Art. 4 (6) of the Rules on the Competition Rights and Internal Transfer of the Bulgarian Volleyball Federation, a volleyball club from the prime league should not have more than three players with foreign nationality, and only two of them can play in a game at a time. There are no exceptions provided for EU citizens. The quotas rule does not apply to foreigners with long-term residence.

Basketball

According to Art. 16 of the Rules on the Competition and Transfer Rights of the Bulgarian Basketball Federation, the Board of Directors of the Federation decides on the number of foreign nationals allowed to participate in a basketball club.

After an official request for the purpose of writing this report, on 19 March 2008 I received the following information from the Head Secretary of the Bulgarian Basketball Federation:

1. With regard to the number of foreigners that could be members of a basketball club, there are no quotas at all. However, the Ordinance on the National Championships for Men and Women stipulates the following limitation:

'In the team list for each game within the National Championship or Bulgaria Coup for men and women there could be a maximum of six foreigners, within which number only three could be with nationality outside Europe.'

2. With regard to international transfers, there is equal treatment of the sportsmen/sportswomen, regardless of their nationality. For each permission for international transfer of a Bulgarian or a foreign national the Bulgarian Basketball Federation charges an administrative fee of 100 Euro, payable by the new club of the sportsman/sportswoman.

3. There is equal treatment between Bulgarian and EU nationals with regard to the membership fee in Bulgaria – 5 levs (2.5 Euro). However, in this regard a problem has arisen with FIBA who treats every sportsman/ sportswoman with a non-Bulgarian passport as a foreigner, regardless of his/her EU citizenship. For that reason the Bulgarian Basketball Federation is required to pay FIBA 125 Euro for each basketball-woman and 250 Euro for each basketball-man that are non-Bulgarians and this has led to charging the Bulgarian basketball clubs with that additional sum of money.

Handball

According to Art. 12 of the *Rules on the Competition Rights and the Membership of the Handball Players* adopted by the Bulgarian Handball Federation, competition rights are recognized only with regard to Bulgarian citizens or foreigners with permanent residence status in Bulgaria. There are no exceptions provided for EU citizens.

Ice Hockey

According to Art. 15 of the *Rules on the Status of Persons Participating in Training and Competition Activities and on the Transfer of Competition Rights of Ice Hockey Players in the Republic of Bulgaria*, adopted for the season 2008/2009, competition rights are recognized only with regard to Bulgarian citizens or foreigners with long-term residence in Bulgaria. There are no exceptions provided for EU citizens.

4.3. *The maritime sector*

There are positive legislative developments in 2008. At the time of writing the report for 2007, the Merchant Shipping Code (in Bulgarian: *Кодекс на търговското корабоплаване*) stipulated that 'in all cases, the captain and the chief engineer officer of the ship shall be Bulgarian nationals'. However Art. 88 (4) of the Merchant Shipping Code was amended in August 2008 (State Gazette No.71/12.08.2008) to provide that the captain and the chief engineer officer of the ship should be Bulgarian nationals *or EU, EEA or Swiss citizens*.

The rest of the crew may be formed of qualified foreign seafarers – nationals of Member States of the European Union, holding competency certificates, issued in compliance with the International Convention on Standards of Training, Certification and Watch keeping for Seafarers 78/95 (STCW 78/95) or with the Recommendations on Preparation of the Ship Drivers and their Provision with Competency Certificates for International Shipping of the Inland Transport Committee of the United Nations Economic Commission for Europe and the Danube Commission, without discrimination based on nationality of the workers regarding hiring, payment and other labour conditions, but knowing a language common on the ship.

Ordinance No6 of 22 November 2007 (published in State Gazette No101 of 4 December 2007) on the Competences of Maritime Personnel in the Republic of Bulgaria, issued by the minister of transport regulates the procedure for recognition of the right of EU citizens, acquired in those Member States, to occupy positions in ships sailing under the Bulgarian flag.

4.4. *Researchers/Artists*

Researchers

For the time being no legal or practical obstacles have been identified with regard to equal treatment of researchers who are EU nationals.

The Law on Higher Education (LHE) was amended as early as in 2005 (State Gazette No83/2005), with amendments entering into force on 01 January 2007, in order to facilitate integration of EU citizens into the higher education system of Bulgaria.

According to Art. 68 (6) LHE the admission of students, doctoral students and researchers who are citizens of EU Member States or of EEA states, is realized under the conditions and procedure provided for Bulgarian nationals.

According to Art. 95 (7) LHE, students, doctoral students and researchers who are citizens of EU Member States or of EEA states pay education fees according to the conditions and procedure provided for Bulgarian nationals.

Artists

The Law on Copyright and Neighboring Rights was amended as early as in 2005 (State Gazette No99/2005), with amendments entering into force on 01 January 2007 to enlarge its scope to EU citizens, based on the equal treatment principle.

4.5. *Access to study grants*

The Law on Employment Promotion (Chapter Seven) envisages qualification and motivation training for unemployed and employed job seekers. The training programmes are carried out

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either by the Labour Office Directorates or by licensed educational institutions. Access to these trainings is not conditioned on any residence requirements with regard to EU, EEA and Swiss nationals and members of their families.⁸

According to Art. 91 (5) (4) of the Law on Higher Education, unlike other foreigners, citizens of EU Member States or of EEA states are not excluded from state-subsidized scholarships.

⁸ For more detailed information on this issue, please visit the web page of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/07&WA=Training/Training_en.htm (accessed on 6 March 2009).

Chapter IV

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

Amendments made in the Law on Health Insurance, the Code on Social Security and the Code on Taxation and Social Security Procedure in transposition of the relevant provisions of Regulation 1408/71 and Regulation 574/72 have been described in the 2007 report. Administrative Instructions on the Application of the Rules for Coordination of the Social Security Schemes and relevant model application forms are published at the web site of the National Social Security Institute, under the 'European Integration' section: <http://www.nssi.bg/index.html>.

With regard to the relationship between Regulation 1408/71, on the one hand, and Article 39 EC and Regulation 1612/68, on the other hand, it is important to note that neither material, nor procedural national laws in Bulgaria contain detailed provisions on their interaction. The laws enumerate and refer to the EU regulations with regard to their direct applicability.

However, legislative amendments in 2008 have been made in response to practical problems that have arisen in cases not covered by the transposition of Regulation 1408/71. These refer to legal recognition of periods of employment in another Member State on which equal treatment with regard to remuneration might be dependent. Recognition of length of labour experience could affect also one's professional promotion or seniority, right to leave of absence, unemployment benefits, etc. In order to address this problem, changes were introduced in the Ordinance on the Structure and the Organization of the Salary (In Bulgarian: *Наредба за структурата и организацията на работната заплата*)⁹ in relation to Article 11 of the Labour Code.

In the first place, Article 12 (4) (3) of the Ordinance has been amended to stipulate that when defining the size of the additional remuneration given for continuity of employment and professional experience, the employer should take into account periods of employment in the same or similar position of EU citizens and their family members in other Member States.

Secondly, Article 12 (4) (4) of the Ordinance provides for recognition of work in another Member State that has not been done under a labour contract as period of employment in labour contract relations. This is applicable in cases when the worker concludes a labour contract in Bulgaria and has been socially insured for the work done in the other Member State¹⁰.

When adopting the amendments, the Council of Ministers of the Republic of Bulgaria stated that they aimed at harmonizing Bulgarian legislation with ECJ jurisprudence in Case C-87/96 and Case C-195/98.

With regard to application of the new rules (Art. 12, Para.4, Subparagraphs 3 and 4) in practice, the national reporter obtained the following information from the 'Free Movement of Workers and Coordination of the Social Security' Section at the Ministry of Labour and Social Policy:

The documents required in Bulgaria for proving periods of employment in other Member States are not the e-forms under Regulation 1408/71, but labour contracts or other documents issued by the employer or by the relevant state institution in that country.

These documents must include the obligatory elements (pieces of information) required for the validity of a labour contract under Bulgarian legislation. They are presented to the Bulgarian employer. If employers have doubts with regard to the authenticity of the documents presented, they shall turn for information to the competent authorities of the respective Member State or to

⁹ State Gazette No.11/05.02.2008.

¹⁰ The Ordinance defines as a 'Member State' each State that is a member of the EU, EEA or Switzerland.

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its embassy in Bulgaria. The 'Free Movement of Workers and Coordination of the Social Security' Section at the Ministry of Labour and Social Policy receives many requests for information by employers who are unwilling or unsure whether to recognize documents presented in a foreign language and originating from another State.

A confusion observed by the Ministry is the lack of differentiation between periods of *employment* and periods of *social insurance*. EU citizens reportedly often present documents certifying their social insurance periods and their rights under the social security schemes, but not proving their periods of employment.

Chapter V

Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

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

The nationality requirement for access to positions in the public sector in Bulgaria is found both in the Constitution and in the laws. Although it might be still questionable whether all the positions for which Bulgarian nationality is required fall within the narrow understanding of the public service by the ECJ, there is a *significant legislative change in 2008*:

According to Art. 12 (1) of the Law on the Administration, the activity of the administration shall be carried out by two categories of employees:

- a) State servants (appointed according to an administrative act);
- b) Persons working under labour contracts.

According to Art. 116 of the Constitution of the Republic of Bulgaria, *state servants* realize the will and the interests of the nation. The conditions for their appointment and dismissal are provided for in law.

Before the legislative amendments in 2008, Art. 7 (1) (1) of the Law on the State Servant stipulated that only Bulgarian nationals could be appointed to be state servants. However, in 2008 (State Gazette No.43/29.04.2008) the provision was amended to include also EU, EEA and Swiss citizens as eligible to be appointed as state servants.

High ranking positions and certain sections from the public sector, however, are still reserved for Bulgarian citizens:

- Art. 19, Para.5 of the *Law on the Administration* explicitly requires Bulgarian nationality for the following posts: the chairmen, the vice-chairmen and the members of state agencies, state commissions, executive agencies and state institutions functioning in connection with the implementation of the executive power and established by a law or decree of the Council of Ministers.
- Art. 67 (1) of the *Law on the Judiciary* stipulates that members of the juries in penal law cases shall be Bulgarian nationals. According to Art. 162 of the Law on the Judiciary only a Bulgarian national can be appointed as a judge, a prosecutor or an investigator. The posts of the assistants of judges and prosecutors are also reserved to Bulgarian nationals only (Art. 245).

According to Art. 295 of the Law on the Judiciary, an internee-lawyer (with regard to obligatory state practice, necessary for the recognition of rights to practice the lawyer's profession) can also be an EU citizen or a foreigner who has graduated Law in Bulgaria or whose Law diploma has been recognized accordingly.

- The *Constitution of the Republic of Bulgaria* requires Bulgarian nationality for the following positions: Art. 59 – positions in the army; Art. 65 – members of the National Parliament; Art. 93 (2) – President of the Republic of Bulgaria; Art. 110 – members of the Council of Ministers (the government).
- There is no constitutional requirement for Bulgarian nationality of mayors and members of municipal councils. However, Art. 4 of the *Law on Municipal Elections* stipulates that only a Bulgarian national can stand to be elected as a mayor. As far as the members of municipal councils are concerned, in 2007 a new Art. 4a was added stipulating that an EU citizen is

eligible, provided that he/she has no other nationality outside the EU, has a continuous or a permanent residence status and before scheduling of the elections has lived on the territory of the respective municipality.

- According to Art. 179 of the *Law on the Ministry of the Interior*, a requirement for occupying any post at the Ministry of the Interior is Bulgarian nationality. This is valid not only for civil servants (employed according to an administrative act), but also to labour contract employees. The Ministry of the Interior encompasses the policemen and the firemen.

1.2. Language requirement

Art. 3 of the Constitution of the Republic of Bulgaria stipulates that the official language in the Republic is Bulgarian. Art. 36 of the Constitution provides that studying and usage of the Bulgarian language is a right and an obligation of all Bulgarian citizens. Art. 36 (3) states that the cases in which only the official language is used are stipulated by law.

Although such explicit language requirements are rarely found in laws, since Bulgarian is the official language in the State, knowledge of it is presumed as naturally needed in order to perform one's functions.

Art. 13 of the Law on the Judiciary stipulates that all procedures before the judiciary bodies (courts, prosecutors and investigators) are carried out in Bulgarian language.

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

The legal amendments made in 2008, which were reported in Chapter IV with regard to relationship between Regulation 1408/71 and Regulation 1612/68 in cases not covered by the former, are most relevant for employment in the public sector. They allow for recognition of professional experience of EU citizens and their family members in another Member State when that employment period should be taken into account under the national laws of that State.

2. WORKING CONDITIONS

As reported in Chapter IV above, amendments made in the *Ordinance on the Structure and the Organization of the Salary* have been meant to put Bulgarian legislation in line with the judgment in the Case C-187/96 *Commission v. Hellenic Republic*. Recognition by Bulgaria of periods of employment in the national public service of another Member State currently guarantees equal treatment with regard to salary, grade and seniority. Application of legal amendments in practice will continue to be an object of further reporting.

Chapter VI

Members of the Worker's Family and Treatment of Third Country Family Members

1. RESIDENCE RIGHTS-TRANSPPOSITION OF DIRECTIVE 2004/38

The European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereafter 'the EU Citizens Directive') was transposed in Bulgaria by means of the *Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family* (hereafter 'LERD'), separate from the Law on the Foreigners in the Republic of Bulgaria. Only *family members of Bulgarian citizens* explicitly have been provided for to fall under the scope of the *Law on the Foreigners*, Art. 1 (2) of which stipulates: 'this law is applied to members of the family of Bulgarian nationals that are not EU citizens or nationals of an EEA country or of Switzerland'.

There is literal transposition of Art. 5 (2) and (3) of the EU Citizens Directive in *Art. 4 (2), (3) and (4) of LERD*. LERD stipulates that *visas* are issued to third-country national family members free of charge and in a special procedure that shall be stipulated in an act of the Council of Ministers, which has not been adopted yet.

The transposition of Art. 2 (2) of the EU Citizens Directive is found in §1.1 of the *Additional Provisions of LERD*, which gives a definition of a 'member of the family of an EU citizen'. The national norm includes all the categories of family members enumerated in Art. 2 (2) of the EU Citizens Directive, with the following two types of exceptions:

1. Exceptions that *narrow* the scope of family members:
 - 1.1. With regard to Art. 2 (2) (c) of the EU Citizens Directive, §1.1.LERD does not mention the direct descendants of the partner as defined in Art. 2 (2) (b) of the EU Citizens Directive;
 - 1.2. With regard to Art. 2 (2) (d) of the EU Citizens Directive, §1.1.LERD does not mention the direct relatives in the ascending line of the partner as defined in Art. 2 (2) (b) of the EU Citizens Directive.
2. Exceptions that enlarge the scope of family members:
 - 2.1. With regard to Art. 2 (2) (c) of the EU Citizens Directive, §1.1.LERD does *not* mention the word 'direct' when referring to descendants, which shall mean that grandchildren are also included;
 - 2.2. With regard to Art. 2 (2) (d) of the EU Citizens Directive, §1.1.LERD does not mention the word 'direct' when referring to relatives in the ascending line, which shall mean that grandparents are also included.

Art. 5 LERD stipulates that 'a right to entry, residence and departure of the Republic of Bulgaria is recognized also to':

- 1) 'another member of the family, irrespective of his/her citizenship, who does not fall within the definition of §1.1.LERD and who in the country, from where he/she comes, is a dependant person or a member of the household of the EU citizen, that has a right to free movement, or in cases where serious health reasons necessarily require personal care for the family member by the EU citizen';
- 2) 'the person with which the EU citizen has certified factual partnership'.

Art. 5 LERD seems to equal the rights of beneficiaries under Art. 2 (2) and Art. 3 (2) of the EU Citizens Directive. Art. 5 LERD refers to recognition of 'a right to entry, residence and departure of the Republic of Bulgaria' and not to just facilitation.

However, it is *not clear* how Art. 2 (2) (b) and Art. 3 (2) (b) of the EU Citizens Directive will be applied in Bulgaria. On the one hand, §1.1(a) LERD refers to 'factual partnership'. On

the other hand, Art. 5 (1) (2) LERD requires ‘*certified* factual partnership’. The law does not elaborate on the issue *how* the factual partnership should be proved or certified or under what circumstances it is recognized as such.

According to the EU Citizens Directive, the partner under Art. 2 (2) (b) is recognized as a family member, ‘if the legislation of the host Member State treats registered partnerships as equivalent to marriage’. This issue is currently questionable in Bulgaria. The Family Code in force does not envisage such a partnership at all and therefore does not treat it as equivalent to marriage. There is a legislative proposal for a new Family Code, which provides for ‘factual spouse partnership’ that could be either registered or non-registered one. At the moment the latter is still a draft submitted by the Council of Ministers and approved at first reading by the National Parliament on 02 October 2008¹¹. The National Parliament has powers to adopt it after a second reading. It could be argued that the term ‘factual spouse partnership’ is gaining legal recognition in Bulgaria by including it in several legal acts - the Law on Protection against Domestic Violence, the Law on Asylum and Refugees, etc. However the problem of proving that partnership remains since the inclusion of the term is usually a consequence of literal transposition of EU provisions and it is not clear how those texts will be implemented in practice.

Art. 5 (2) LERD literally transposes the last paragraph of Art. 3 (2) of the EU Citizens Directive, without any elaboration as to how the provision will be applied in practice.

Art. 6 LERD recognizes a *right of residence for up to three months* to family members who are not EU citizens, on the basis of their passport.

Bulgaria has opted for the requirement in Art. 8 (1) of the EU Citizens Directive. Union citizens and their family members shall *register* at the Ministry of the Interior for periods of *residence longer than three months*. The deadline for registration is 3 months from the date of arrival.

Union citizens and their family members, who are themselves Union citizens, are issued a *registration certificate on the same day* of the submission of the relevant documents.

Family members who are not nationals of a Member State are issued a *residence card* no later than *three months* from the date on which they submit the application.

Retention of the right of residence of family members as provided for in Art. 12 and 13 of the EU Citizens Directive is transposed in national law with the following discrepancies concerning family members who are not nationals of a Member State:

- in the event of divorce, annulment of marriage or termination of registered partnership, along with the requirements set out in Art. 13 (2) of the EU Citizens Directive, Art. 15 (3) LERD requires presence of the conditions in Art. 7 (1) (a) or (b) of the EU Citizens Directive in order for the right of residence to be retained (not in order to acquire permanent residence);
- Art. 13 (2) (c) of the EU Citizens Directive is transposed as to referring only to cases of being a victim of domestic violence and not to ‘other particularly difficult circumstances’.

Right of permanent residence

There is a substantial mistake in the transposition of the main rule regarding eligibility for the right of permanent residence under Art. 16 and Art. 17 of the EU Citizens Directive. Art. 16 LERD provides that an EU citizen or his/her family member who is an EU citizen is given a permanent residence certificate, if that person has resided continuously in the Republic of Bulgaria for five years *and* he/she fulfills any of the requirements under Art. 17 of the EU Citizens Directive.

¹¹ The draft and the state of play of the legislative proposal is published at the web site of the National Parliament at <http://www.parliament.bg/?page=app&lng=bg&aid=4&action=show&lid=2133>.

The permanent residence card for family members who are not nationals of a Member State is issued within one month of the submission of the application. The application shall be submitted two months before the residence card expires. (Art. 19, Paras.2 and 3 LERD)

SPECIFIC ISSUES

1.1. Situation of family members of job seekers

There is *no transposition* in Bulgarian law of Art. 14 (4) (b) of the EU Citizens Directive providing that ‘Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged’. As explained above, LERD makes no reference to a right of residence *over three months* of EU citizens who are documented job-seekers. Art. 6 LERD recognizes a right of residence for *up to three months* to family members who are not EU citizens, on the basis of their passport.

1.2. How are the problems of abuse of rights (marriages of convenience) tackled?

There is no specific transposition of Article 35 of the EU Citizens Directive. However, it falls within the scope of Article 24 LERD regulating *discontinuance of the right to residence* in the Republic of Bulgaria. One of the grounds for application of this provision is that ‘it has been established that the person provided false data when given the right to residence’.

However, the procedural safeguards provided for in Articles 30 and 31 of the EU Citizens Directive are not correctly transposed in LERD. Here are some problems in the national regulation in this regard:

1. LERD does not transpose the requirement in Art. 30 (1) of the EU Citizens Directive that the notification shall be in such a way that the person is able to comprehend its content and the implications for him/her;
2. Art. 30 (2) of the EU Citizens Directive is not transposed at all;
3. With regard to the time allowed to leave the territory under Art. 30 (3) of the EU Citizens Directive, the exception phrased as ‘save in duly substantial cases of urgency’ has been transposed very broadly in Bulgarian law. Art. 27 (3) LERD allows exception from the rule when ‘the person continues to pose a threat to the national security, the public order and the public health’;
4. Art. 31 (3) of the EU Citizens Directive is not transposed. Lack of explicit transposition of the rule that the redress procedures shall ensure *that the decision is not disproportionate* threatens to lead to inadmissibility of such a review. Under general principles of Bulgarian administrative law, the scope of judicial review encompasses only the legality of the administrative acts and not their proportionality unless the latter review is explicitly envisaged in law;

1.3. Application of the Metock judgment

The Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD) does *not* stipulate an explicit requirement for *previous lawful residence* of EU citizens’ family members who are third country nationals, *nor* does it

pose any explicit conditions on *when and where the marriage took place and how the national of a non-member country entered Bulgaria*. The list of required documents for issuance of a residence card of a family member does not contain requirements in this regard (Article 12, Para.3 and Article 19, LERD).

At the same time, however, the guarantees in the Metock judgment are not applied to third country family members of *Bulgarian* citizens. They are explicitly excluded from the scope of LERD and inserted into the scope of the Law on the Foreigners in the Republic of Bulgaria, which leads to reverse discrimination.

1.3. How are the problems of abuse of rights (marriages of convenience) tackled?

1.3.1. Reverse discrimination with regard to family members of Bulgarian nationals

The problem of reverse discrimination in Bulgaria has persisted in 2008 and currently the issue is an object of pending applications against Bulgaria before the European Court of Human Rights.

The problem

As mentioned above, the regulation of the entry and residence rights of the family members of EU citizens is found in the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD). However, Art. 1, Para.2 of the *Law on the Foreigners in the Republic of Bulgaria* (LFRB) stipulates that *third-country nationals that are family members of Bulgarian citizens* fall under its scope. This explicitly excludes family members of Bulgarian citizens from the facilitated regime of entry and residence for family members of other EU nationals.

Under Art. 24 of the Law on the Foreigners in the Republic of Bulgaria, a foreigner can receive a permit for continuous residence (valid for up to 1 year), *only after entering Bulgaria with a long-term visa (called 'D-type')*. This precludes the legalization of the status of many third-country nationals who are family members of Bulgarian citizens, but for some reason have remained as undocumented immigrants and/or there are deportation orders pending against them. In order to complete the legal requirements of Art. 24 LFRB, they need to go out of Bulgaria and re-enter with a D-visa. However, such a D-visa is refused to persons against whom there has been a deportation order. Furthermore, deportation orders are usually accompanied by an explicit ban to enter Bulgaria for a number of years (from 3 to 10 years). Therefore, these third country nationals that are family members of Bulgarian citizens either remain in Bulgaria as illegal immigrants or are separated from their families by not allowing them re-entry to Bulgaria once they have come out of the country to get a D-visa.

By excluding family members of Bulgarian citizens from the ambit of the law transposing Directive 2004/38 – the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD) – a presumption is created for their *exclusion from the application of the guarantees stipulated in the MRAX judgment (C-459/99) and the Metock judgment (C-127/08) of the ECJ*.

1.3.2. Pending cases before the European Court of Human Rights

In 2008 two applications were lodged against Bulgaria before the European Court of Human Rights, in which one of the complaints invokes Article 14 in relation to Article 8 of the European Convention on Human Rights for reasons of reverse discrimination.

Case of Nassar and Others v. Bulgaria (Application No.33655/08)

Hasan Ali Nassar is a Lebanese national who is married to a Bulgarian citizen, Polia Lazarova, with whom they have three minor children, Bulgarian nationals. In spite of the official marriage under Bulgarian law between Hasan and Polia, Hasan was refused issuance of a residence permit in Bulgaria, because he had entered the country illegally, after having been refused a visa. A deportation order was issued against him in September 2006, on which ground he was detained at the detention centre for undocumented immigrants. He was deported to Lebanon one year later, in September 2007. Although Polia went to Lebanon so that they could apply together for a visa for him to enter Bulgaria, such a visa was refused to Hasan in December 2007 with the argument that a deportation order had been executed against him and there was a ban on Hasan to enter Bulgaria for 10 years.

Case of Rahmani and Dineva v. Bulgaria (Application No. 20116/08)

Ahmed Rahmani is an Algerian national who is married to a Bulgarian citizen, Dimka Rahmani. On the ground of his official marriage under Bulgarian law, Ahmed was issued a residence permit. However, at that time his wife had to undergo an urgent and expensive surgery and they could not afford to pay the state fee for the residence permit on time. As a result of that, a deportation order was issued against Ahmed, on the basis of which in August 2005 he was detained at the detention centre for undocumented immigrants, where he remained for almost three years until in 2008 he was released in Bulgaria because of impossibility to have his deportation executed. After Ahmed was detained, Dimka paid the fee together with the fine for the residence permit; however, this was considered not to change the circumstances that had led to the issuance of the deportation order. The order is not executed yet, although it has entered into force. Since August 2005 Ahmed stays in Bulgaria as an illegal immigrant and is obliged to report daily at the local police station.

It is to be seen whether the Court will adjudicate that this reverse discrimination constitutes a violation of the prohibition of discrimination under Article 14 in relation to Article 8, ECHR. The right to free movement of EU citizens under EC law comprises also the freedom to remain in one's own country and should not entail unfavourable consequences for those EU nationals who choose not to leave their country of nationality.

1.3.3. Other forms of reverse discrimination

The reverse discrimination against the family members of Bulgarian nationals also concerns:

- *The scope of the 'family members' notion*

According to Art. 2 (2) of the Law on the Foreigners in the Republic of Bulgaria, the partners under Art. 2 (2) of the EU Citizens Directive are not included in the 'family' notion.

- *The administrative fee for issuing the residence permit*

The fee for the issuance of a continuous or permanent residence permit under LERD is 7 levs (3.5 Euro).

The fee for the issuance of a *continuous* residence permit of family members of Bulgarian citizens under LFRB is 500 levs (250 Euro), if the residence permit is for a period of up to 1 year, and 200 levs (100 Euro), if the residence permit is for a period of up to 6 months.

The fee for the issuance of a *permanent* residence permit under LFRB is 1000 levs (500 Euro) in principle. There is an exception only for the spouses of Bulgarian citizens where the fee is 150 levs (75 Euro).

2. ACCESS TO WORK

With the entry into force on 01 January 2007 of the Treaty of Accession to the European Union, Bulgaria *exempted family members of EU citizens from the general work permit obligation.*

Under Art. 4, para. 1, point 11 and para. 6 of the Ordinance on the Conditions and Procedure for Issuance, Rejection and Withdrawal of Work Permits for Foreigners in the Republic of Bulgaria, *family members* of EU citizens, EEA citizens and Switzerland are not required work permits, but until they are given permanent residence *their employer shall declare the fact of their employment* at the local Employment Office within a period of 7 days of its initiation.

Art. 18 of the *Law on Employment Promotion* formally envisages *a right of registration to seek work* at the local employment office of the Employment Agency at the Ministry of Labour and Social Policy. Registered job-seekers that are members of the families of EU citizens have the same rights and obligations under the Law on Employment Promotion as Bulgarian nationals, with the exception of cases in which Bulgarian citizenship is explicitly required. However, LERD makes *no reference to a right of residence over 3 months of documented job-seekers.* The residence regime is within the exclusive competence of the National Police Service at the Ministry of the Interior. Its powers with regard to the residence of EU citizens and their family members are exhaustively regulated in LERD.

Contradictions in the web site of the Employment Agency explained in the 2007 report with regard to the document certifying address registration of the job seekers (required for their registration at the employment office) seem not to reflect contradictions in practice. This suggestion is based by analogy on additional data published in the same web page with regard to non-EEA citizens that are family members of EEA citizens.¹² However this issue will continue to be an object of further reporting.

3. EQUAL TREATMENT TO SOCIAL BENEFITS AND TAXES

See Section III.B. above

12 http://www.az.government.bg/eng/internal_en.asp?CatID=12&WA=JobSeekers/RegBT_EAAen.htm.

Chapter VII

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

C-287/05 Hendrix

The Law on the Integration of Disabled People (In Bulgarian: *Закон за интеграция на хората с увреждания*) and the Regulation for its Implementation, which regulate the provision of special non-contributory benefits to disabled people, do not stipulate an explicit requirement for residence in Bulgaria.

C-527/06 Renneberg

On 19 March 2009 the European Commission announced the issuance of a reasoned opinion (second step of the infringement procedure provided for in Article 226 of the EC Treaty) formally requesting Bulgaria to change its tax provisions according to which certain types of Bulgarian source income are subject to a withholding tax on a gross base when paid to non-residents whereas Bulgarian residents may deduct expenses related to the same income. The reference number of the case at the Commission is 2007/4881.

Under Bulgarian taxation law, any income under an employment contract or derived from rendering services is considered to have been derived from a Bulgarian source where labour has been extended or services have been delivered on the territory of the country, regardless of the source of payment for the labour extended or services rendered. Bulgarian tax residents are all individuals who have their permanent domicile in the country, spending more than 183 days in any 365-day period ending within the calendar year in question.

According to the Bulgarian rules (mainly the Law on Taxation of the Incomes of Physical Persons), certain types of Bulgarian source income of individuals and legal persons resident in other EU Member States or EEA/EFTA states are subject to withholding tax on a gross basis. However, the tax on similar income earned by Bulgarian residents is assessed on a net basis and Bulgarian residents may deduct expenses for the purposes of determining the basis of assessment of taxation of their income. This particularly concerns income from rewards and remuneration paid to scientists, artists and sportsmen, technical services fees, including any consultancy fees, income from franchise and factoring agreements, management fees, income from immovable property, interest, royalties and lease of movable property.

If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Communities.

C-94/07 Raccanelli

The rules on the legal relations between a PhD researcher and the relevant university in Bulgaria are regulated in Rules of Procedure adopted autonomously by the university itself. Normally these relations are not regarded as ones of a labour contract. This is valid for Bulgarian and other nationals alike.

According to a judgement of the Bulgarian Constitutional Court (Case No.4/2000) regarding the Code on Social Security, PhD researchers have no obligation to make *social* insurance payments, that is, they are not socially insured unless they work under a labour contract or are otherwise self-employed.

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Health insurance is provided with money from the State budget to PhD researchers who have been inscribed as such according to a State commission as differentiated from private organizations' grants. More favourable treatment could be provided for in international tailor-made treaties concluded by Bulgaria.

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

There are no developments with regard to implementation of cases discussed in the 2007 report.

Chapter VIII

Application of Transitional Measures

Bulgaria acceded to the European Union on 01 January 2007. In accordance with the provisions of the Accession Treaty, some European countries have availed of the possibility to apply transitional arrangements for the access to their labour market by workers who are Bulgarian citizens. *Bulgaria has not applied reciprocate restrictions to those EU Member States.*

Chapter IX Miscellaneous

1. Short analysis of existing policies, legislation and practices of a general nature that have a clear impact on free movement of Community workers

The Law on the Foreigners in the Republic of Bulgaria (LFRB) provides that *citizens from EU, EEA and Switzerland are no longer considered foreigners*. According to Art. 2 (1) ‘a foreigner under this law is every person who is not a Bulgarian citizen or a citizen of a Member State of the European Union, the European Economic Area or Switzerland.’ This conceptual change has the practical consequences that EU citizens and their family members no longer fall under the scope of the provisions of the Law on the Foreigners that allow for important limitations to basic human rights. For example, under LERD, *the coercive measure ‘a ban to leave the country’ is inadmissible*, while under LFRB it is one of the possible measures imposed on foreigners. Furthermore, since *LERD does not envisage the measure ‘deportation’ (coercive return)*, but only expulsion on national security or public order grounds, no deportation could be imposed on an EU citizen or a member of his/her family. The only possible measure is ‘discontinuance of the right to residence’. Unlike the Law on the Foreigners, LERD guarantees the grant of a period for voluntary return of a person with an expulsion order. This constitutes *an important guarantee against immigration detention*, which under the Law on Foreigners can be imposed (and in practice usually is imposed) at the moment of notification of the deportation or expulsion order. Furthermore, since LERD does not envisage a possibility for immigration detention and EU citizens and their family members no longer fall under the scope of the Law on Foreigners, currently in Bulgaria there is no legal ground for administrative detention of this category of persons (a measure massively applied to undocumented immigrants from third countries).

The above conceptual change also provides for *stronger procedural guarantees in the judicial review of expulsion orders*, issued on national security or public orders grounds. Under Art. 46 (2) and (3) LFRB, the expulsion order does not state the factual grounds for its issuance and is subject to only one-instance judicial review. Under Art. 28 of LERD, expulsion orders are appealed under the general regime according to the Code on Administrative Procedure. That is, expulsion orders against EU citizens and members of their families are subject to two-instance judicial review.

Another change of general nature that might affect the free movement of workers within the European Union is the transposition in the Bulgarian Law on the Foreigners of *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*. This was done with the legislative amendments of 6 April 2007 (State Gazette No29). A new Chapter III ‘a’ of the LFRB now deals with the residence of foreigners who have received a long-term residence permit in another Member State of the European Union.

Bulgarian legislation (LFRB and the Law on Asylum and Refugees) has also been amended with a view to transposing *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*. However, there is a problem with regard to the issue of state discretion in deciding on the applications. A *right to family reunification* is recognized by Bulgarian law only to third country nationals, who are already long term residents in another EU MS and have established a family there, and have received a long term residence in Bulgaria. For all other third country nationals (including those, who are long term residents of another EU MS, but have established their family in a country outside the EU), the law does not say that they have the

right to reunite, but that they can be authorised reunification. The Law on Asylum and Refugees also provides for the right of the refugee to apply for family reunification and not for a right to family reunification.

An important development with repercussions on free movement of workers is the creation of the new Bulgarian *State Agency for National Security* (SANS), the law on which was adopted in December 2007. One of the functions of the new agency is to exercise control over the stay of immigrants in Bulgaria. SANS organises and implements operative-discovery and operative-technical activities of surveillance and control of people, objects and activities. The Head of SANS has powers to issue orders for coercive administrative measures under LERD and LFRB.

Another important development since 2007 in Bulgaria is the creation of *specialized first-instance courts dealing only with administrative law cases*.

2. Studies, seminars, reports, legal literature

In 2008 a thorough legal research was published in the form of a book titled 'The Rights of Migrant Workers'. Its author is Plamenka Markova. Chapter 3 of Part III is dedicated on the legal regulation of the rights of migrant workers who are EU Citizens. Chapter 4 is dedicated to the legal analysis of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Chapter 5 examines the rights of migrant workers under Bulgarian national law. The language of the book is Bulgarian.

3. National organisations or bodies where citizens can launch complaints for violation of Community law on free movement of workers (apart from SOLVIT centres)

Workers who are members of associations of employees or professional and trade unions could eventually search their assistance or advice in cases of violations. However the reporter has not found special bodies where complaints regarding rights of EU workers could be lodged.

REPORT
ON THE FREE MOVEMENT OF WORKERS
IN THE REPUBLIC OF BULGARIA IN 2008

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GENERAL INTRODUCTION

This is the second annual report on the Free Movement of Workers in the Republic of Bulgaria after the country became a Member State of the European Union on 01 January 2007. The 2008 report aims to provide information on the most important developments with regard to specific issues highlighted by the Commission. Background description could be sought in the first report concerning the year 2007.

In 2008 there is still little legislative, administrative, judicial and research practice in respect of the operation of the rules on free movement of workers in Bulgaria. However, in comparison with the state of play in the previous year, in 2008 essential positive amendments of the legal regulation took place. Major changes concern the abolition of the nationality requirement for access to work as civil servants in the public sector and as a captain of a ship, and the recognition of periods of employment in other Member States.

Although the number of EU citizens from other Member States working and resident in Bulgaria is still small and application of the rules - limited, Bulgaria has been exerting efforts to improve the transposition of the Community provisions into national law. Problematic issues, such as the one with regard to taxation law addressed in the reasoned opinion of the European Commission on 19 March 2009 (discussed in Chapter VII of this report), will continue to be an object of further follow-up and reporting.

CHAPTER I: **ENTRY, RESIDENCE, DEPARTURE**

The European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereafter “the EU Citizens Directive”) is transposed in Bulgaria by means of the **Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family** (hereafter “LERD”), separate from the Law on the Foreigners in the Republic of Bulgaria.

I.A. STATE OF TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

- **Art.7 (1) (a) of the EU Citizens Directive** is transposed in Art.8 (1) (1) LERD. Right of residence for more than three months (“*continuous residence*” as it is called in LERD) is recognized to EU citizens if they are workers or self-employed persons in the Republic of Bulgaria.
- **Art.7 (3) (a-d) of the EU Citizens Directive** is transposed into Art.8 (3) LERD. The conditions for retention of status are the same as stipulated in the EU Citizens Directive, except for one divergence in the transposition of Art.7 (3) (d) of the EU Citizens Directive. Art. 8 (3) (4) LERD stipulates that when the Union citizen is involuntarily unemployed, vocational training *shall not be* related to the previous employment. This goes contrary to the idea of the EU Citizens Directive that in those cases vocational training not related to the previous employment is allowed, but it is not envisaged to exclude the one related to the previous employment. In the cases under Art.8 (3) (c) of the EU Citizens Directive, the period through which the status is retained is six months.
- **Art.8 (3) (a) of the EU Citizens Directive** is transposed into Art.9 (2) LERD. The national law requires “*a document proving the existence of the circumstances*” under Article 7 (1) (a) of the Directive. The same wording is found in Circular No.I3-487 from 28 March 2007 on the procedure and organization of the issuance of the documents under LERD.
- **Art.14 (4) (a-b) of the EU Citizens Directive** is not transposed.
- **Art.17 of the EU Citizens Directive**: There is a substantial mistake in the transposition of the main rule regarding eligibility for the right of permanent residence under Art.16 and Art.17 of the EU Citizens Directive. Art. 16 LERD provides that an EU citizen or his/her family member who is an EU citizen is given a permanent residence certificate, if that person has resided continuously in the Republic of Bulgaria for five years **and** he/she fulfills any of the requirements under Art.17 of the EU Citizens Directive.
- **Art.24 (2) of the EU Citizens Directive** is not transposed.

I.B. SITUATION OF JOB SEEKERS

There is **no transposition in Bulgarian law of Art.14 (4) (b) of the EU Citizens Directive** providing that “Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged”.

Under Art.18 of the **Law on Employment Promotion**, EU citizens and their family members formally have **a right of registration to seek work** at the local employment office of the Employment Agency at the Ministry of Labour and Social Policy.

However, **LERD makes no reference to a right of residence over 3 months of EU citizens who are documented job-seekers**. The residence regime is within the exclusive competence of the National Police Service at the Ministry of the Interior. Its powers with regard to the residence of EU citizens and their family members are exhaustively regulated in LERD.

According to Article 24, LERD, **discontinuance of the right of residence in the Republic of Bulgaria** is imposed if the person ceases to meet the requirements stipulated in Art. 8 LERD (Art. 8, LERD, transposes Art.7 (1) (a) – (c) of the EU Citizens Directive).

Contradictions in the web site of the Employment Agency explained in the 2007 report with regard to the document certifying address registration of the job seekers (required for their registration at the employment office) seem not to reflect contradictions in practice. This suggestion is based by analogy on additional data published in the same web page with regard to non-EEA citizens that are family members of EEA citizens.¹ However this issue will continue to be an object of further reporting.

¹ http://www.az.government.bg/eng/internal_en.asp?CatID=12&WA=JobSeekers/RegBT_EAAen.htm

CHAPTER II: **ACCESS TO EMPLOYMENT**

EU citizens can exercise their right to free movement for work purposes in the territory of Bulgaria, without need for a work permit.

II. A. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

According to the Law on Employment Promotion, registered job-seekers that are EU citizens or members of their families have **the same rights and obligations** under the Law on Employment Promotion **as Bulgarian nationals**, with the exception of cases in which Bulgarian citizenship is explicitly required. However, as explained in the previous chapter, LERD makes no reference to a right of residence over 3 months of EU citizens who are documented job-seekers.

Services offered by the National Employment Agency to those actively seeking employment are:

- Information and Consultation/ Career Orientation
- Employment Mediation²
- Psychological Support³
- Career (Professional) Orientation⁴
- Enrollment in appropriate Programmes⁵ and Employment Measures⁶
- Qualification and Motivation Training⁷

The **Law on Protection against Discrimination** has a special section on equal treatment in the field of employment. Discrimination on the basis of nationality is explicitly prohibited, save in cases where the nationality requirement is stipulated by law.

² More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/02&WA=JobSeekers/HelpJobSeek_en.htm (accessed on 06 March 2009)

³ More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/03&WA=JobSeekers/Psiho_en.htm (accessed on 06 March 2009)

⁴ More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/04&WA=Training/Orientation_en.htm (accessed on 06 March 2009)

⁵ More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/05&WA=Projects/Programmes.htm (accessed on 06 March 2009)

⁶ More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/06&WA=Projects/UnemplMeasures_en.htm (accessed on 06 March 2009)

⁷ More information on this service is published at the web site of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/07&WA=Training/Training_en.htm (accessed on 06 March 2009)

II.B. LANGUAGE REQUIREMENT

In general there are no explicit requirements in law for knowledge of Bulgarian language for employment in the **private sector**. As a rule, this is to be decided by the employer, subject to rules on contractual freedom, if the nature of the job so requires. Art.7 (1) (2) of the Law on Protection against Discrimination stipulates that there is no discrimination if certain treatment/requirement is reasoned with the nature of a particular occupation or activity, or of the conditions in which it is performed, if such a characteristic constitutes an essential and decisive occupational requirement, the aim is legitimate and the requirement does not go beyond what is necessary for its achievement.

There could be language requirements for some professions in the private sector, justified on public interest grounds.

With regard to EU, EEA or Swiss citizens whose medical professional qualification has been recognized in Bulgaria, Article 186, Paragraph 2 of the **Law on Health** provides that the Ministry of Health and the high schools should provide them with conditions for acquiring the necessary language knowledge and professional terminology in Bulgarian “when this is in their interest and in the interest of their patients”. In comparison, Paragraph 3 of the same provision stipulates that third country nationals are allowed to practice their medical profession in Bulgaria only after it has been established in accordance with the rules in a Minister’s ordinance that they know Bulgarian language and the respective professional terminology in Bulgarian.

With regard to lawyers and legal assistants, it is noteworthy that the official language in Bulgarian institutions (including judicial hearings) is Bulgarian. According to the **Attorney’s Act** (Articles 11 – 19a), a lawyer who is an EU, EEA or Swiss citizen is allowed to practice in Bulgaria only together with a barrister from the Bulgarian Bar. Membership in the Bulgarian Bar is allowed after a thorough exam in Bulgarian national law (in Bulgarian). That possibility for membership of non-Bulgarian citizens is given only to persons who have acquired their professional qualification in an EU Member State, but it is conditioned by knowledge of Bulgarian law and language.

CHAPTER III:
EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY.
OBSTACLES TO FREE MOVEMENT

III.A. WORKING CONDITIONS (DIRECT, INDIRECT DISCRIMINATION)

Texts in force:

- Law on Employment Promotion

Art. 18 (3) (5) – this provision has been added explicitly in 2008 (State Gazette No.26) with regard to guaranteeing equal treatment of third country nationals who are family members of EU citizens

Art.70 (3) – this is the legal basis on which EU citizens can enter into *labour relations* or *be self-employed* on the same conditions as Bulgarian nationals. They are exempted from the requirement to be in possession of a work permit;

Art.71 (1) (2) - EU and EEA citizens are exempted from the general rule that a local employer can hire a foreign employee provided that for the immediately precedent 12 months the total number of foreigners employed by the domestic employer does not exceed 10 percent of the average number of the people on the payroll, hired under labour contracts, who are Bulgarian nationals and/or refugees.

- Ordinance on the Conditions and Procedure for Admitting Posted Workers or Civil Servants - *Posted workers* for provision of services on the territory of the Republic of Bulgaria who are EU citizens are also exempted from the work permit requirement set out for other foreigners.

- Law on Protection against Discrimination - Art. 13, Art.14, Art.15 and Art.21 explicitly prohibit discrimination on the basis of nationality with regard to working conditions, remuneration, the possibilities for professional qualification and career development and the reasons for dismissal respectively.

- Law on Health and Safety at Work - Art.2 provides that the law “shall apply to all enterprises and places, where work or training are carried out, regardless of the form of organization, type of ownership or legal grounds on which the work or the training are performed”.

- Labour Code - Art.4 provides that employees are entitled, with no prior permission, to freely form, by their own choice, trade union organizations; to join and leave them on a voluntary basis, showing consideration for their statutes only.

With regard to **the right of association of employees** and access to professional and trade unions, there are no legal obstacles to the exercise of this right by EU citizens and their family members.

- Constitution of the Republic of Bulgaria

Art.49 recognizes the workers’ right to association;

Art.26 (2) provides that foreigners in the Republic of Bulgaria have the same rights and obligations as Bulgarian citizens, unless the Bulgarian citizenship requirement has been explicitly provided for in the Constitution or in a law.

III.B. SOCIAL AND TAX ADVANTAGES

a) Social Advantages

As a general remark – point should start with the concept of social advantage under art.7 of R 1612/68 – what is now written below applies to R 1408/71 and 2 EC acts should be clearly explained as separate and different. Coordination of social security is not based on art.7 of R 1612/68.

This report should concentrate on if and how Bulgaria applies art.7 of R 1612/68.

EU citizens and their family members are entitled to the same social insurance rights under the same conditions valid for Bulgarian nationals according to the **Code on Social Insurance**.

Article 3 (5) of the **Law on Family Allowances for Children** (in Bulgarian: *Закон за семейни помощи за деца*) provides that pregnant women who are foreign citizens and families of foreign citizens who permanently reside in Bulgaria and look after their children in the country have a right to family allowances for children if that is envisaged in an international treaty to which Bulgaria is a party. By analogy with the Law on Employment Promotion, the Treaty on the Accession of Bulgaria to the European Union could be regarded as falling within the scope of Article 3 (5). – no, this act is coordinated under R 1408 and acquisition of family allowances is subject to the coordination regulation!

Article 2 (4) of the **Law on Social Assistance** (in Bulgarian: *Закон за социално подпомагане*) provides that a right to social assistance is recognized to persons who are not Bulgarian citizens when that is envisaged in an international treaty to which Bulgaria is a party. By analogy with the Law on Employment Promotion, the Treaty on the Accession of Bulgaria to the European Union could be regarded as falling within the scope of Article 2 (4).

The relevance of this law is found with regard to allowances for job-seekers. Detailed rules on the conditions and the procedure for providing social assistance are found in the Rules on the Implementation of the Law on Social Assistance.

The Law on integration of People with disabilities - to be developed as regards the material scope of art 7 of R 1612/68

With regard to these issues, in the database of the Supreme Administrative Court of Bulgaria there are no cases involving EU citizens and their family members. The practice in this matter will continue to be an object of follow-up reporting. – no, the issues submitted to BG courts relate to R 1408/71 not to 1612/68!

b) Tax Advantages

The taxation legislation envisages rules preventing double taxation of incomes already taken into consideration in an EU Member State or an EEA country (Art.37, Para. 7 of **the Law on Taxation of the Incomes of Physical Persons**). Problems with regard to non-deduction of expenses for the purposes of determining the basis of assessment of

taxation of the income are described in Chapter VII in relation with the analysis of the *Renneberg* case.

Under Chapter IV of the Law on Taxation of the Incomes of Physical Persons, the following tax advantages are applicable, regardless of nationality:

- Tax reduction for disabled persons;
- Tax reduction for voluntary social insurance;
- Tax reduction for young families with mortgage to pay;
- Tax reduction for having children;
- Tax reduction for donation.

With regard to these issues, in the database of the Supreme Administrative Court of Bulgaria there are no cases involving EU citizens and their family members.

III.C. OTHER OBSTACLES TO FREE MOVEMENT OF PERSONS?

At the present moment there is nothing more to report apart from what is already covered by the other chapters of the Report. Bulgaria is new to the law on free movement of workers and obstacles are yet to be identified with augmentation of administrative practice.

III.D. SPECIFIC ISSUES: FRONTIER WORKERS, SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

Please note that this section will look at issues other than taxation. Problems with regard to non-deduction of expenses for the purposes of determining the basis of assessment of taxation of the income are described in Chapter VII in relation with the analysis of the *Renneberg* case.

III.D.1. Frontier Workers (Other than social security issues)

Social security issues with regard to frontier workers have been addressed in the 2007 report. This year's report is required to focus on the issue of existence of residence clauses within the meaning in the case of *Hartmann* (C-212/05).

The only source of special legal regulation of the issue of frontier workers in Bulgaria is found in intra-institutional instructions. **These are Administrative Instructions No91-01-286/28.12.2007 and No 91-01-13/21.01.2008 by the National Social Insurance Institute.** – no, they only relate to social insurance issues and thus it's contradictory to what is required under this point! The report doesn't investigate and represents the BG legislation – there are residence clauses in issues other than social security (not to be mixed with social insurance only) and they must be analysed here- especially as regards employment.

So far they seem not to contradict the findings of the ECJ in the judgment in the *Hartman* case. Neither transfer of residence, nor lack of permanent residence in the country, seems to be obstacles to equal treatment in Bulgaria. However for the time being administrative and judicial practice is lacking to confirm these theoretical suggestions. With augmentation of the number of frontier workers in Bulgaria we will follow whether any practical problems in this regard will arise.

III.D.2. Sportsmen/ Sportswomen – to be elaborated in a separate questionnaire

The rules on the transfer of foreigners in sports clubs in Bulgaria, as well as on the possible nationality quotas in this regard, are adopted by the relevant National Federations in each sport area and approved by the head of the State Agency for Youth and Sport at the Bulgarian government. According to Art.8 of the Implementing Regulation of the Law on Physical Education and Sport, within a 6-months period from the receipt of their license, the Federation has to propose to the head of the State Agency for Youth and Sport Rules on the recognition, discontinuance and withdrawal of competition rights and on the status of amateur and professional sportsmen/sportswomen that participate in the activities of the sport clubs that are federation members.

Below there is information on concrete sports in Bulgaria:

Football

There are no nationality quotas for EU citizens in the areas of football. Recently the Bulgarian Football Union took a decision to decrease the number of third country nationals in the sports clubs, but this decision does not affect EU citizens.

Volleyball

According to Art.4 (6) of the Rules on the Competition Rights and Internal Transfer of the Bulgarian Volleyball Federation, a volleyball club from the prime league should not have more than three players with foreign nationality, and only two of them can play in a game at a time. There are no exceptions provided for EU citizens. The quotas rule does not apply to foreigners with long-term residence.

Basketball

According to Art.16 of the Rules on the Competition and Transfer Rights of the Bulgarian Basketball Federation, the Board of Directors of the Federation decides on the number of foreign nationals allowed to participate in a basketball club.

After an official request for the purpose of writing this report, on 19 March 2008 I received the following information from the Head Secretary of the Bulgarian Basketball Federation:

1. With regard to the number of foreigners that could be members of a basketball club, there are no quotas at all. However, the Ordinance on the National Championships for Men and Women stipulates the following limitation:

„In the team list for each game within the National Championship or Bulgaria Coup for men and women there could be a maximum of six foreigners, within which number only three could be with nationality outside Europe”

2. With regard to international transfers, there is equal treatment of the sportsmen/sportswomen, regardless of their nationality. For each permission for international transfer of a Bulgarian or a foreign national the Bulgarian Basketball Federation charges an administrative fee of 100 Euro, payable by the new club of the sportsman/sportswoman.

3. There is equal treatment between Bulgarian and EU nationals with regard to the membership fee in Bulgaria – 5 levs (2.5 Euro). However, in this regard a problem

has arisen with FIBA who treats every sportsman/ sportswoman with a non-Bulgarian passport as a foreigner, regardless of his/her EU citizenship. For that reason the Bulgarian Basketball Federation is required to pay FIBA 125 Euro for each basketball-woman and 250 Euro for each basketball-man that are non-Bulgarians and this has led to charging the Bulgarian basketball clubs with that additional sum of money.

Handball

According to Art.12 of the *Rules on the Competition Rights and the Membership of the Handball Players* adopted by the Bulgarian Handball Federation, competition rights are recognized only with regard to Bulgarian citizens or foreigners with permanent residence status in Bulgaria. There are no exceptions provided for EU citizens.

Ice Hockey

According to Art.15 of the *Rules on the Status of Persons Participating in Training and Competition Activities and on the Transfer of Competition Rights of Ice Hockey Players in the Republic of Bulgaria*, adopted for the season 2008/2009, competition rights are recognized only with regard to Bulgarian citizens or foreigners with long-term residence in Bulgaria. There are no exceptions provided for EU citizens.

III.D.3. The maritime sector

There are positive legislative developments in 2008. At the time of writing the report for 2007, the Merchant Shipping Code (in Bulgarian: *Кодекс на търговското корабоплаване*) stipulated that “in all cases, the captain and the chief engineer officer of the ship shall be Bulgarian nationals”. However Art.88 (4) of the Merchant Shipping Code was amended in August 2008 (State Gazette No.71/12.08.2008) to provide that **the captain and the chief engineer officer of the ship should be Bulgarian nationals or EU, EEA or Swiss citizens.**

The rest of the crew may be formed of qualified foreign seafarers – nationals of Member States of the European Union, holding competency certificates, issued in compliance with the International Convention on Standards of Training, Certification and Watch keeping for Seafarers 78/95 (STCW 78/95) or with the Recommendations on Preparation of the Ship Drivers and their Provision with Competency Certificates for International Shipping of the Inland Transport Committee of the United Nations Economic Commission for Europe and the Danube Commission, **without discrimination based on nationality of the workers regarding hiring, payment and other labour conditions, but knowing a language common on the ship.**

Ordinance No6 of 22 November 2007 (published in State Gazette No101 of 4 December 2007) on the Competences of Maritime Personnel in the Republic of Bulgaria, issued by the minister of transport regulates the procedure for recognition of the right of EU citizens, acquired in those Member States, to occupy positions in ships sailing under the Bulgarian flag.

III.D.4. a. Researchers

For the time being no legal or practical obstacles have been identified with regard to equal treatment of researchers who are EU nationals.

The **Law on Higher Education (LHE)** was amended as early as in 2005 (State Gazette No83/2005), with amendments entering into force on 01 January 2007, in order to facilitate integration of EU citizens into the higher education system of Bulgaria.

According to Art.68 (6) LHE the admission of students, doctoral students and researchers who are citizens of EU Member States or of EEA states, is realized under the conditions and procedure provided for Bulgarian nationals.

According to Art.95 (7) LHE, students, doctoral students and researchers who are citizens of EU Member States or of EEA states pay education fees according to the conditions and procedure provided for Bulgarian nationals.

III.D.4. b. Artists

The **Law on Copyright and Neighboring Rights** was amended as early as in 2005 (State Gazette No99/2005), with amendments entering into force on 01 January 2007 to enlarge its scope to EU citizens, based on the equal treatment principle.

III. D. 5. Access to study grants

The **Law on Employment Promotion** (Chapter Seven) envisages qualification and motivation training for unemployed and employed job seekers. The training programmes are carried out either by the Labour Office Directorates or by licensed educational institutions. Access to these trainings is not conditioned on any residence requirements with regard to EU, EEA and Swiss nationals and members of their families.⁸

According to Art.91 (5) (4) of the **Law on Higher Education**, unlike other foreigners, citizens of EU Member States or of EEA states are not excluded from state-subsidized scholarships.

⁸ For more detailed information on this issue, please visit the web page of the National Employment Agency at http://www.az.government.bg/eng/internal_en.asp?CatID=12/07&WA=Training/Training_en.htm (accessed on 06 March 2009)

CHAPTER IV:
RELATIONSHIP BETWEEN REGULATION 1408/71 AND ARTICLE 39 EC
AND REGULATION 1612/68

As general remark - this chapter should concentrate on the correlation art.7 R 1612 – R 1408. Below almost no information is provided on such an issue! Information is going merely on some basic info on the coordination of social security in BG – extremely poor and insufficient!

There should be a good analysis of the personal scope differences in both regulations, material scope differences of art.7 and R 1408, the development of these issues in the new R 883, how that is reflected in BG national law and is there need to be reflected– nothing of that is mentioned.

Amendments made in the Law on Health Insurance, the Code on Social Insurance and the Code on Taxation and Social Insurance Procedure in transposition of the relevant provisions of Regulation 1408/71 and Regulation 574/72 have been described in the 2007 report.

The Coordination regulations are published in Bulgarian language on the site of the Ministry of Labour and Social Policy - <http://www.mlsp.government.bg/bg/integration/agreements/index1.htm>.

Information on applicable legislation and Instruction to how the rules are applied at national level is published on the web-site of the National Revenue Agency - <http://www.nap.bg/ospage?id=184>.

Some administrative instructions on the Application of the EU regulations for Coordination of the Social Security Schemes and some of the E forms – regarding cash benefits and pensions administered by the NSII, are published at the web site of the National Social Insurance Institute, under the “European Integration” section: <http://www.nssi.bg/index.html>.

Information on the benefits in kind, European Health Insurance Card and the other medical treatment in EU – under the coordination regulations and under the national

legislation – is provided on the web page of the National Health Insurance Fund - <http://www.nhif.bg/bg/default.phtml?w=1024&h=734>.

With regard to the relationship between Regulation 1408/71, on the one hand, and Article 39 EC and Regulation 1612/68, on the other hand, it is important to note that neither material, nor procedural national laws in Bulgaria contain detailed provisions on their interaction. The laws enumerate and refer to the EU regulations with regard to their direct applicability.

However, legislative amendments in 2008 have been made in response to practical problems that have arisen in cases not covered by the **transposition of Regulation 1408/71** – not true, the regulation is not subject to transposition! Problems regarding direct application of art 39 TEC are not connected to R 1408/71! This paragraph must be deleted.

Legislative amendments refer to legal **recognition of periods of employment in another Member State** on which equal treatment with regard to remuneration might be dependent. Recognition of length of labour experience could affect also one's professional promotion or seniority, right to leave of absence, unemployment benefits, etc. In order to address this problem, changes were introduced in the **Ordinance on the Structure and the Organization of the Salary** (In Bulgarian: *Наредба за структурата и организацията на работната заплата*)⁹ in relation to Article 11 of the Labour Code.

In the first place, Article 12 (4) (3) of the Ordinance has been amended to stipulate that when defining the size of the additional remuneration given for continuity of employment and professional experience, the employer should take into account periods of employment in the same or similar position of EU citizens and their family members in other Member States.

Secondly, Article 12 (4) (4) of the Ordinance provides for recognition of work in another Member State that has not been done under a labour contract as period of employment in labour contract relations. This is applicable in cases when the worker concludes a labour contract in Bulgaria and has been socially insured for the work done in the other Member State¹⁰.

When adopting the amendments, the Council of Ministers of the Republic of Bulgaria stated that they aimed at harmonizing Bulgarian legislation with ECJ jurisprudence in Case C-87/96 and Case C-195/98.

With regard to application of the new rules (Art.12, Para.4, Subparagraphs 3 and 4) in practice, the national reporter obtained the following information from the “Free Movement of Workers and Coordination of the Social Security” Section at the Ministry of Labour and Social Policy:

⁹ State Gazette No.11/05.02.2008

¹⁰ The Ordinance defines as a “Member State” each State that is a member of the EU, EEA or Switzerland.

The documents required in Bulgaria for proving periods of employment in other Member States are not the e-forms under Regulation 1408/71, but labour contracts or other documents issued by the employer or by the relevant state institution in that country.

These documents must include the obligatory elements (pieces of information) required for the validity of a labour contract under Bulgarian legislation. They are presented to the Bulgarian employer. If employers have doubts with regard to the authenticity of the documents presented, they shall turn for information to the competent authorities of the respective Member State or to its embassy in Bulgaria. The “Free Movement of Workers and Coordination of the Social Security” Section at the Ministry of Labour and Social Policy receives many requests for information by employers who are unwilling or unsure whether to recognize documents presented in a foreign language and originating from another State.

A confusion observed by the Ministry is the lack of differentiation between periods of *employment* and periods of *social insurance*. – this is not true – the Bg legislation clearly differentiates both concepts- the Social Insurance Code has a legal notion of “period of insurance” and the Labour Code has a legal concept of “period of employment”. This paragraph must be deleted.

BG citizens who have worked in another MS reportedly often present documents certifying their social insurance periods and their rights under the social security schemes (E forms under R 1408/71), but not proving their periods of employment. This hinders the application of art.12 of the Ordinance.

In order to solve in general the question of recognition of periods of employment in other Ms-s for the purposes of labour law rights in Bulgaria, MLSP prepared amendments to the labour Code which will introduce the full assimilation of facts.

CHAPTER V: **EMPLOYMENT IN THE PUBLIC SECTOR**

IV.A. ACCESS TO THE PUBLIC SECTOR

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

The nationality requirement for access to positions in the public sector in Bulgaria is found both in the Constitution and in the laws. Although it might be still questionable whether all the positions for which Bulgarian nationality is required fall within the narrow understanding of the public service by the ECJ, there is a **significant legislative change in 2008**:

According to Art.12 (1) of the **Law on the Administration**, the activity of the administration shall be carried out by two categories of employees:

- a) State servants (appointed according to an administrative act);
- b) Persons working under labour contracts.

According to Art.116 of the Constitution of the Republic of Bulgaria **state servants** realize the will and the interests of the nation. The conditions for their appointment and dismissal are provided for in law.

Before the legislative amendments in 2008, Art.7 (1) (1) of the **Law on the State Servant** stipulated that only Bulgarian nationals could be appointed to be state servants. However, in 2008 (State Gazette No.43/29.04.2008) the provision was amended to include also EU, EEA and Swiss citizens as eligible to be appointed as state servants.

High ranking positions and certain sections from the public sector, however, are still reserved for Bulgarian citizens:

- Art.19, Para.5 of the **Law on the Administration** explicitly requires Bulgarian nationality for the following posts: the chairmen, the vice-chairmen and the members of state agencies, state commissions, executive agencies and state institutions functioning in connection with the implementation of the executive power and established by a law or decree of the Council of Ministers.
- Art. 67 (1) of the **Law on the Judiciary** stipulates that members of the juries in penal law cases shall be Bulgarian nationals. According to Art.162 of the Law on the Judiciary only a Bulgarian national can be appointed as a judge, a prosecutor or an investigator. The posts of the assistants of judges and prosecutors are also reserved to Bulgarian nationals only (Art.245).
According to Art.295 of the Law on the Judiciary, an interneer-lawyer (with regard to obligatory state practice, necessary for the recognition of rights to practice the lawyer's profession) can also be an EU citizen or a foreigner who has graduated Law in Bulgaria or whose Law diploma has been recognized accordingly.

- **The Constitution of the Republic of Bulgaria** requires Bulgarian nationality for the following positions: Art.59 – positions in the army; Art.65 – members of the National Parliament; Art.93 (2) – President of the Republic of Bulgaria; Art.110 – members of the Council of Ministers (the government).
- There is no constitutional requirement for Bulgarian nationality of mayors and members of municipal councils. However, Art. 4 of the **Law on Municipal Elections** stipulates that only a Bulgarian national can stand to be elected as a mayor. As far as the members of municipal councils are concerned, in 2007 a new Art.4a was added stipulating that an EU citizen is eligible, provided that he/she has no other nationality outside the EU, has a continuous or a permanent residence status and before scheduling of the elections has lived on the territory of the respective municipality.
- According to Art.179 of the **Law on the Ministry of the Interior**, a requirement for occupying any post at the Ministry of the Interior is Bulgarian nationality. This is valid not only for civil servants (employed according to an administrative act), but also to labour contract employees. The Ministry of the Interior encompasses the policemen and the firemen.

2. Language requirement

Art.3 of the Constitution of the Republic of Bulgaria stipulates that the official language in the Republic is Bulgarian. Art.36 of the Constitution provides that studying and usage of the Bulgarian language is a right and an obligation of all Bulgarian citizens. Art.36 (3) states that the cases in which only the official language is used are stipulated by law. Although such explicit language requirements are rarely found in laws, since Bulgarian is the official language in the State, knowledge of it is presumed as naturally needed in order to perform one's functions.

Art.13 of the **Law on the Judiciary** stipulates that all procedures before the judiciary bodies (courts, prosecutors and investigators) are carried out in Bulgarian language.

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

The legal amendments made in 2008, which were reported in Chapter IV with regard to relationship between Regulation 1408/71 and Regulation 1612/68 in cases not covered by the former, are most relevant for employment in the public sector. They allow for recognition of professional experience of EU citizens and their family members in another Member State when that employment period should be taken into account under the national laws of that State.

IV.B. WORKING CONDITIONS

As reported in Chapter IV above, amendments made in the **Ordinance on the Structure and the Organization of the Salary** have been meant to put Bulgarian

legislation in line with the judgment in the Case C-187/96 *Commission v. Hellenic Republic*. Recognition by Bulgaria of periods of employment in the national public service of another Member State currently guarantees equal treatment with regard to salary, grade and seniority. Application of legal amendments in practice will continue to be an object of further reporting.

CHAPTER VI. FAMILY MEMBERS

(especially treatment of third-country family members)

V.A. RESIDENCE RIGHTS

The European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereafter “the EU Citizens Directive”) was transposed in Bulgaria by means of the **Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family** (hereafter “**LERD**”), separate from the Law on the Foreigners in the Republic of Bulgaria. Only *family members of Bulgarian citizens* explicitly have been provided for to fall under the scope of the *Law on the Foreigners*, Art.1 (2) of which stipulates: “this law is applied to members of the family of Bulgarian nationals that are not EU citizens or nationals of an EEA country or of Switzerland”.

There is literal transposition of Art.5 (2) and (3) of the EU Citizens Directive in Art.4 (2), (3) and (4) of LERD. LERD stipulates that **visas** are issued to third-country national family members free of charge and in a special procedure that shall be stipulated in an act of the Council of Ministers, which has not been adopted yet.

The transposition of Art.2 (2) of the EU Citizens Directive is found in §1.1 of the Additional Provisions of LERD, which gives a **definition of a “member of the family of an EU citizen”**. The national norm includes all the categories of family members enumerated in Art.2 (2) of the EU Citizens Directive, with the following two types of exceptions:

1) Exceptions that narrow the scope of family members:

1.1.) With regard to Art.2 (2) (c) of the EU Citizens Directive, §1.1.LERD does not mention the direct descendants *of the partner* as defined in Art.2 (2) (b) of the EU Citizens Directive;

1.2.) With regard to Art.2 (2) (d) of the EU Citizens Directive, §1.1.LERD does not mention the direct relatives in the ascending line *of the partner* as defined in Art.2 (2) (b) of the EU Citizens Directive.

2) Exceptions that enlarge the scope of family members:

2.1.) With regard to Art.2 (2) (c) of the EU Citizens Directive, §1.1.LERD does *not* mention the word “*direct*” when referring to descendants, which shall mean that grandchildren are also included;

2.2.) With regard to Art.2 (2) (d) of the EU Citizens Directive, §1.1.LERD does not mention the word “*direct*” when referring to relatives in the ascending line, which shall mean that grandparents are also included.

Art. 5 LERD stipulates that “*a right to entry, residence and departure of the Republic of Bulgaria is recognized also to*”:

1) “another member of the family, irrespective of his/her citizenship, who does not fall within the definition of §1.1.LERD and who in the country, from where

he/she comes, is a dependant person or a member of the household of the EU citizen, that has a right to free movement, or in cases where serious health reasons necessarily require personal care for the family member by the EU citizen”;

- 2) “the person with which the EU citizen has certified factual partnership”.

Art. 5 LERD seems to equal the rights of beneficiaries under Art.2 (2) and Art.3 (2) of the EU Citizens Directive. Art.5 LERD refers to recognition of “*a right to entry, residence and departure of the Republic of Bulgaria*” and not to just facilitation.

However, **it is not clear how Art.2 (2) (b) and Art.3 (2) (b) of the EU Citizens Directive will be applied in Bulgaria.** On the one hand, §1.1(a) LERD refers to “factual partnership”. On the other hand, Art.5 (1) (2) LERD requires “*certified* factual partnership”. The law does not elaborate on the issue *how* the factual partnership should be proved or certified or under what circumstances it is recognized as such.

According to the EU Citizens Directive, the partner under Art.2 (2) (b) is recognized as a family member, “if the legislation of the host Member State treats registered partnerships as equivalent to marriage”. This issue is currently questionable in Bulgaria. The Family Code in force does not envisage such a partnership at all and therefore does not treat it as equivalent to marriage. There is a legislative proposal for a new Family Code, which provides for “factual spouse partnership” that could be either registered or non-registered one. At the moment the latter is still a draft submitted by the Council of Ministers and approved at first reading by the National Parliament on 02 October 2008¹¹. The National Parliament has powers to adopt it after a second reading. It could be argued that the term “factual spouse partnership” is gaining legal recognition in Bulgaria by including it in several legal acts - the Law on Protection against Domestic Violence, the Law on Asylum and Refugees, etc. However the problem of proving that partnership remains since the inclusion of the term is usually a consequence of literal transposition of EU provisions and it is not clear how those texts will be implemented in practice.

Art. 5 (2) LERD literally transposes the last paragraph of Art.3 (2) of the EU Citizens Directive, without any elaboration as to how the provision will be applied in practice.

Art.6 LERD recognizes a **right of residence for up to three months** to family members who are not EU citizens, on the basis of their passport.

Bulgaria has opted for the requirement in Art.8 (1) of the EU Citizens Directive. Union citizens and their family members shall **register** at the Ministry of the Interior for periods of **residence longer than three months**. The deadline for registration is 3 months from the date of arrival.

Union citizens and their family members, who are themselves Union citizens, are issued **a registration certificate on the same day** of the submission of the relevant documents. Family members who are not nationals of a Member State are issued **a residence card** no later than *three months* from the date on which they submit the application.

¹¹ The draft and the state of play of the legislative proposal is published at the web site of the National Parliament at <http://www.parliament.bg/?page=app&lng=bg&aid=4&action=show&lid=2133>

Retention of the right of residence of family members as provided for in Art.12 and 13 of the EU Citizens Directive is transposed in national law with the following discrepancies concerning family members who are not nationals of a Member State:

- in the event of divorce, annulment of marriage or termination of registered partnership, along with the requirements set out in Art.13 (2) of the EU Citizens Directive, Art.15 (3) LERD requires presence of the conditions in Art.7 (1) (a) or (b) of the EU Citizens Directive in order for the right of residence to be retained (not in order to acquire permanent residence);

- Art.13 (2) (c) of the EU Citizens Directive is transposed as to referring only to cases of being a victim of domestic violence and not to “other particularly difficult circumstances”.

Right of permanent residence

There is a substantial mistake in the transposition of the main rule regarding eligibility for the right of permanent residence under Art.16 and Art.17 of the EU Citizens Directive. Art. 16 LERD provides that an EU citizen or his/her family member who is an EU citizen is given a permanent residence certificate, if that person has resided continuously in the Republic of Bulgaria for five years **and** he/she fulfills any of the requirements under Art.17 of the EU Citizens Directive.

The permanent residence card for family members who are not nationals of a Member State is issued within one month of the submission of the application. The application shall be submitted two months before the residence card expires. (Art.19, Paras.2 and 3 LERD)

SPECIFIC ISSUES:

1.1. Situation of family members of job seekers

There is **no transposition in Bulgarian law of Art.14 (4) (b) of the EU Citizens Directive** providing that “Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged”. As explained above, **LERD makes no reference to a right of residence over 3 months of EU citizens who are documented job-seekers**. Art.6 LERD recognizes a **right of residence for up to three months** to family members who are not EU citizens, on the basis of their passport.

1.2. How the problems of abuse of rights (marriages of convenience) are tackled? (Art.35 of Directive 2004/38)

There is no specific transposition of Article 35 of the EU Citizens Directive. However it falls within the scope of Article 24 LERD regulating **discontinuance of the right to residence in the Republic of Bulgaria**. One of the grounds for application of this provision is that “it has been established that the person provided false data when given the right to residence”.

However the **procedural safeguards** provided for in Articles 30 and 31 of the EU Citizens Directive are not correctly transposed in LERD. Here are some **problems** in the national regulation in this regard:

- 1) LERD does not transpose the requirement in Art.30 (1) of the EU Citizens Directive that the notification shall be in such a way that the person is able to comprehend its content and the implications for him/her;
- 2) Art.30 (2) of the EU Citizens Directive is not transposed at all;
- 3) With regard to the time allowed to leave the territory under Art.30 (3) of the EU Citizens Directive, the exception phrased as “save in duly substantial cases of urgency” has been transposed very broadly in Bulgarian law. Art.27 (3) LERD allows exception from the rule when “the person continues to pose a threat to the national security, the public order and the public health”;
- 4) Art.31 (3) of the EU Citizens Directive is not transposed. Lack of explicit transposition of the rule that the redress procedures shall ensure *that the decision is not disproportionate* threatens to lead to inadmissibility of such a review. Under general principles of Bulgarian administrative law, the scope of judicial review encompasses only the legality of the administrative acts and not their proportionality unless the latter review is explicitly envisaged in law;

1.3. Application of the Metock judgment

The Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD) **does not** stipulate an **explicit requirement** for **previous lawful residence** of EU citizens’ family members who are third country nationals, nor does it pose any explicit conditions on **when and where the marriage took place and how the national of a non-member country entered Bulgaria**. The list of required documents for issuance of a residence card of a family member does not contain requirements in this regard (Article 12, Para.3 and Article 19, LERD).

At the same time, however, the guarantees in the Metock judgment are not applied to third country family members of *Bulgarian* citizens. They are explicitly excluded from the scope of LERD and inserted into the scope of the Law on the Foreigners in the Republic of Bulgaria, which leads to reverse discrimination.

VI.B. REVERSE DISCRIMINATION WITH REGARD TO FAMILY MEMBERS OF BULGARIAN NATIONALS

The problem of reverse discrimination in Bulgaria has persisted in 2008 and currently the issue is an object of pending applications against Bulgaria before the European Court of Human Rights.

1. The problem

As mentioned above, the regulation of the entry and residence rights of the family members of EU citizens is found in the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD). However, Art.1, Para.2 of the **Law on the Foreigners in the Republic of Bulgaria** (LFRB) stipulates that **third-country nationals that are family members of Bulgarian citizens** fall under its scope. This explicitly excludes family members of

Bulgarian citizens from the facilitated regime of entry and residence for family members of other EU nationals.

Under Art.24 of the Law on the Foreigners in the Republic of Bulgaria, a foreigner can receive a permit for continuous residence (valid for up to 1 year), **only after entering Bulgaria with a long-term visa (called “D-type”)**. This precludes the legalization of the status of many third-country nationals who are family members of Bulgarian citizens, but for some reason have remained as undocumented immigrants and/or there are deportation orders pending against them. In order to complete the legal requirements of Art.24 LFRB, they need to go out of Bulgaria and re-enter with a D-visa. However, such a D-visa is refused to persons against whom there has been a deportation order. Furthermore, deportation orders are usually accompanied by an explicit ban to enter Bulgaria for a number of years (from 3 to 10 years). Therefore, these third country nationals that are family members of Bulgarian citizens either remain in Bulgaria as illegal immigrants or are separated from their families by not allowing them re-entry to Bulgaria once they have come out of the country to get a D-visa.

By excluding family members of Bulgarian citizens from the ambit of the law transposing Directive 2004/38 – the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD) – a presumption is created for their **exclusion from the application of the guarantees stipulated in the MRAX judgment (C-459/99) and the Metock judgment (C-127/08) of the ECJ.**

2. Pending cases before the European Court of Human Rights

In 2008 two applications were lodged against Bulgaria before the European Court of Human Rights, in which one of the complaints invokes Article 14 in relation to Article 8 of the European Convention on Human Rights for reasons of reverse discrimination:

- Case of *Nassar and Others v. Bulgaria* (Application No.33655/08)

Hasan Ali Nassar is a Lebanese national who is married to a Bulgarian citizen, Polia Lazarova, with whom they have three minor children, Bulgarian nationals. In spite of the official marriage under Bulgarian law between Hasan and Polia, Hasan was refused issuance of a residence permit in Bulgaria, because he had entered the country illegally, after having been refused a visa. A deportation order was issued against him in September 2006, on which ground he was detained at the detention centre for undocumented immigrants. He was deported to Lebanon one year later, in September 2007. Although Polia went to Lebanon so that they could apply together for a visa for him to enter Bulgaria, such a visa was refused to Hasan in December 2007 with the argument that a deportation order had been executed against him and there was a ban on Hasan to enter Bulgaria for 10 years.

- Case of *Rahmani and Dineva v. Bulgaria* (Application No. 20116/08)

Ahmed Rahmani is an Algerian national who is married to a Bulgarian citizen, Dimka Rahmani. On the ground of his official marriage under Bulgarian law, Ahmed was

issued a residence permit. However, at that time his wife had to undergo an urgent and expensive surgery and they could not afford to pay the state fee for the residence permit on time. As a result of that, a deportation order was issued against Ahmed, on the basis of which in August 2005 he was detained at the detention centre for undocumented immigrants, where he remained for almost three years until in 2008 he was released in Bulgaria because of impossibility to have his deportation executed. After Ahmed was detained, Dimka paid the fee together with the fine for the residence permit; however, this was considered not to change the circumstances that had led to the issuance of the deportation order. The order is not executed yet, although it has entered into force. Since August 2005 Ahmed stays in Bulgaria as an illegal immigrant and is obliged to report daily at the local police station.

It is to be seen whether the Court will adjudicate that this reverse discrimination constitutes a violation of the prohibition of discrimination under Article 14 in relation to Article 8, ECHR. The right to free movement of EU citizens under EC law comprises also the freedom to remain in one's own country and should not entail unfavourable consequences for those EU nationals who choose not to leave their country of nationality.

3. Other forms of reverse discrimination

The reverse discrimination against the family members of Bulgarian nationals also concerns:

- **The scope of the “family members” notion**

According to Art.2 (2) of the Law on the Foreigners in the Republic of Bulgaria, the partners under Art.2 (2) of the EU Citizens Directive are not included in the “family” notion.

- **The administrative fee for issuing the residence permit**

The fee for the issuance of a continuous or permanent residence permit under LERD is 7 levs (3.5 Euro).

The fee for the issuance of a *continuous* residence permit of family members of Bulgarian citizens under LFRB is 500 levs (250 Euro), if the residence permit is for a period of up to 1 year, and 200 levs (100 Euro), if the residence permit is for a period of up to 6 months.

The fee for the issuance of a *permanent* residence permit under LFRB is 1000 levs (500 Euro) in principle. There is an exception only for the spouses of Bulgarian citizens where the fee is 150 levs (75 Euro).

VI.C. ACCESS TO WORK

With the entry into force on 01 January 2007 of the Treaty of Accession to the European Union, **Bulgaria exempted family members of EU citizens from the general work permit obligation.**

Under Art.4, Para.1, point 11 and Para.6 of the Ordinance on the Conditions and Procedure for Issuance, Rejection and Withdrawal of Work Permits for Foreigners in the Republic of Bulgaria, **family members** of EU citizens, EEA citizens and Switzerland are not required work permits, but until they are given permanent residence

their employer shall declare the fact of their employment at the local Employment Office within a period of 7 days of its initiation.

Art.18 of the **Law on Employment Promotion** formally envisages **a right of registration to seek work** at the local employment office of the Employment Agency at the Ministry of Labour and Social Policy. Registered job-seekers that are members of the families of EU citizens have the same rights and obligations under the Law on Employment Promotion as Bulgarian nationals, with the exception of cases in which Bulgarian citizenship is explicitly required. However, **LERD makes no reference to a right of residence over 3 months of documented job-seekers**. The residence regime is within the exclusive competence of the National Police Service at the Ministry of the Interior. Its powers with regard to the residence of EU citizens and their family members are exhaustively regulated in LERD.

Contradictions in the web site of the Employment Agency explained in the 2007 report with regard to the document certifying address registration of the job seekers (required for their registration at the employment office) seem not to reflect contradictions in practice. This suggestion is based by analogy on additional data published in the same web page with regard to non-EEA citizens that are family members of EEA citizens.¹² However this issue will continue to be an object of further reporting.

VI.D. EQUAL TREATMENT TO SOCIAL BENEFITS AND TAXES

Please, see Section III.B. above

¹² http://www.az.government.bg/eng/internal_en.asp?CatID=12&WA=JobSeekers/RegBT_EAAen.htm

CHAPTER VII. RELEVANCE/ INFLUENCE/ FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGEMENTS

C-287/05 Hendrix – relevance for R 1408 and correlation with art.7 R 1612 – to be analysed from the prospective of BG law

The Law on the Integration of Disabled People (In Bulgarian: *Закон за интеграция на хората с увреждания*) and the Regulation for its Implementation, which regulate the provision of special non-contributory benefits to disabled people, do not stipulate an explicit requirement for residence in Bulgaria.

C-527/06 Renneberg

On 19 March 2009 the European Commission announced the issuance of a reasoned opinion (second step of the infringement procedure provided for in Article 226 of the EC Treaty) formally requesting Bulgaria to change its tax provisions according to which certain types of Bulgarian source income are subject to a withholding tax on a gross base when paid to non-residents whereas Bulgarian residents may deduct expenses related to the same income. The reference number of the case at the Commission is 2007/4881.

Under Bulgarian taxation law, any income under an employment contract or derived from rendering services is considered to have been derived from a **Bulgarian source** where labour has been extended or services have been delivered on the territory of the country, regardless of the source of payment for the labour extended or services rendered. **Bulgarian tax residents** are all individuals who have their permanent domicile in the country, spending more than 183 days in any 365-day period ending within the calendar year in question.

According to the Bulgarian rules (mainly the Law on Taxation of the Incomes of Physical Persons), certain types of Bulgarian source income of individuals and legal persons resident in other EU Member States or EEA/EFTA states are subject to withholding tax on a gross basis. However, the tax on similar income earned by Bulgarian residents is assessed on a net basis and Bulgarian residents may deduct expenses for the purposes of determining the basis of assessment of taxation of their income. This particularly concerns income from rewards and remuneration paid to scientists, artists and sportsmen, technical services fees, including any consultancy fees, income from franchise and factoring

agreements, management fees, income from immovable property, interest, royalties and lease of movable property.

If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Communities.

C-94/07 Raccanelli

The rules on the legal relations between a PhD researcher and the relevant university in Bulgaria are regulated in Rules of Procedure adopted autonomously by the university itself. Normally these relations are not regarded as ones of a labour contract. This is valid for Bulgarian and other nationals alike.

According to a judgement of the Bulgarian Constitutional Court (Case No.4/2000) regarding the Code on Social Insurance, PhD researchers have no obligation to make **social insurance** contributions, that is, they are not compulsory insured unless they work under a labour contract or are otherwise self-employed.

Health insurance contributions are paid from the State budget for PhD researchers who have been inscribed as such according to a State commission as differentiated from private organizations' grants. More favourable treatment could be provided for in international tailor-made treaties concluded by Bulgaria.

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

Worker is a concept of EU law and it doesn't matter what the BG national law would rule on this concept – as regards social security position of a PhD researcher, it is covered by R 1408 in so far as this is a worker and under the new R 883 it wouldn't matter if the person is economically active or not – one more issue for the corealtion with art39 TEC to be discussed

There are no developments with regard to implementation of cases discussed in the 2007 report.

CHAPTER VIII: APPLICATION OF TRANSITIONAL MEASURES

Bulgaria acceded to the European Union on 01 January 2007. In accordance with the provisions of the Accession Treaty, some European countries have availed of the possibility to apply transitional arrangements for the access to their labour market by workers who are Bulgarian citizens. **Bulgaria has not applied reciprocate restrictions** to those EU Member States.

CHAPTER IX. MISCELLANEOUS

1. Short analysis of existing policies, legislation and practices of a general nature that have a clear impact on free movement of Community workers

The Law on the Foreigners in the Republic of Bulgaria (LFRB) provides that **citizens from EU, EEA and Switzerland are no longer considered foreigners**. According to Art.2 (1) “a foreigner under this law is every person who is not a Bulgarian citizen or a citizen of a Member State of the European Union, the European Economic Area or Switzerland.” This conceptual change has the practical consequences that EU citizens and their family members no longer fall under the scope of the provisions of the Law on the Foreigners that allow for important limitations to basic human rights. For example, under LERD, **the coercive measure “a ban to leave the country” is inadmissible**, while under LFRB it is one of the possible measures imposed on foreigners. Furthermore, since **LERD does not envisage the measure “deportation” (coercive return)**, but only expulsion on national security or public order grounds, no deportation could be imposed on an EU citizen or a member of his/her family. The only possible measure is “discontinuance of the right to residence”. Unlike the Law on the Foreigners, LERD guarantees the grant of a period for voluntary return of a person with an expulsion order. This constitutes **an important guarantee against immigration detention**, which under the Law on Foreigners can be imposed (and in practice usually is imposed) at the moment of notification of the deportation or expulsion order. Furthermore, since LERD does not envisage a possibility for immigration detention and EU citizens and their family members no longer fall under the scope of the Law on Foreigners, currently in Bulgaria there is no legal ground for administrative detention of this category of persons (a measure massively applied to undocumented immigrants from third countries).

The above conceptual change also provides for **stronger procedural guarantees in the judicial review of expulsion orders**, issued on national security or public orders grounds. Under Art.46 (2) and (3) LFRB, the expulsion order does not state the factual grounds for its issuance and is subject to only one-instance judicial review. Under Art.28 of LERD, expulsion orders are appealed under the general regime according to

the Code on Administrative Procedure. That is, expulsion orders against EU citizens and members of their families are subject to two-instance judicial review.

Another change of general nature that might affect the free movement of workers within the European Union is the transposition in the Bulgarian Law on the Foreigners of **Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents**. This was done with the legislative amendments of 6 April 2007 (State Gazette No29). A new Chapter III “a” of the LFRB now deals with the residence of foreigners who have received a long-term residence permit in another Member State of the European Union.

Bulgarian legislation (LFRB and the Law on Asylum and Refugees) has also been amended with a view to transposing **Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification**. However, there is a problem with regard to the issue of state discretion in deciding on the applications. A *right* to family reunification is recognized by Bulgarian law only to third country nationals, who are already long term residents in another EU MS and have established a family there, and have received a long term residence in Bulgaria. For all other third country nationals (including those, who are long term residents of another EU MS, but have established their family in a country outside the EU), the law does not say that they have the right to reunite, but that they can be authorised reunification. The Law on Asylum and Refugees also provides for the right of the refugee to apply for family reunification and not for a right to family reunification.

An important development with repercussions on free movement of workers is the creation of the new Bulgarian **State Agency for National Security (SANS)**, the law on which was adopted in December 2007. One of the functions of the new agency is to exercise control over the stay of immigrants in Bulgaria. SANS organises and implements operative-discovery and operative-technical activities of surveillance and control of people, objects and activities. The Head of SANS has powers to issue orders for coercive administrative measures under LERD and LFRB.

Another important development since 2007 in Bulgaria is the creation of **specialized first-instance courts dealing only with administrative law cases**.

2. Studies, seminars, reports, legal literature

In 2008 a thorough legal research was published in the form of a book titled “The Rights of Migrant Workers”. Its author is Plamenka Markova. Chapter 3 of Part III is dedicated on the legal regulation of the rights of migrant workers who are EU Citizens. Chapter 4 is dedicated on the legal analysis of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Chapter 5 examines the rights of migrant workers under Bulgarian national law. The language of the book is Bulgarian.

Info on TRESS seminars and participation of Bulgaria – Sofia University and MLSP;

Info on EURES seminars must be included

Info on legal literature – to be taken from prof. Sredkova’s report for trESS

3. National organisations or bodies where citizens can launch complaints for violation of Community law on free movement of workers (apart from SOLVIT centres)

all migrant workers could lodge claims with MLSP – for any violations of chapter 3 of TEC and the relevant secondary legislation. Subsequently, MLSP could raise the issues at the level of competent working groups and bodies of ECom where it represents Bulgarian government – Technical committee on free movement, Administrative commission for social security of migrant workers.

Workers who are members of associations of employees or professional and trade unions could eventually search their assistance or advice in cases of violations. However the reporter has not found special bodies where complaints regarding rights of EU workers could be lodged.