

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

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Introduction

2008 was the second year of free movement, characterized by legislative stability, increasing number of European Union citizens using their right to free movement, which is anyway relatively reduced due the recent accession of Romania, and the problematic issues related to the large presence of Romanian citizens in some Member States, especially in Italy or Spain.¹

Granting free movement for European Union citizens in Romania actually is unproblematic. The number of the workers exercising their right to free movement is relatively reduced. The implementation of European rules does not involve complex bureaucratic procedures, and from political point of view, is not controversial.² Compared to the inverse of the situation, the free movement of Romanian workers in the single market, the legal and practical problems are much smaller. The regulation in force on free movement in Romania is still the Government Emergency Ordinance no. 102/2005 on the free movement of citizens of the Member States of the European Union and the European Economic Area on the Romanian territory.³ The Emergency Ordinance transposed the Directive 2004/38/EC, and 2008 the Emergency Ordinance or the application methodology remained unchanged.⁴

The Emergency Ordinance no. 102/2005 lays down the regulations for the conditions governing the exercise of the right of free movement, residence and permanent residence within the Romanian territory by the citizens of Member States of European Union or European Economic Area and their family members and the limits placed on these rights on grounds of public order, national security or public health.

The European Union citizens and their family members who exert the right of free movement and residence on Romanian territory shall benefit from the following rights and freedoms recognized by the Treaty:

- a) General protection of persons and property, guaranteed by the Constitution and other laws, as well as from other rights provided for by the European Union and other international treaties Romania is a party to.

1 For general data and analyses: Dimitris Papadimitriou & David Phinnemore, *Romania and the European Union: from marginalisation to membership*, Routledge 2008; Steven Blockmans & Adam Lazowski, *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, Cambridge University Press 2006, the chapter dealing with Romania;

2 Frank Schimmelfennig & Ulrich Sedelmeier (eds), *The Europeanization of Central and Eastern Europe*, Cornell University Press 2005, p. 112-134.

3 This emergency ordinance entered into force at the date of Romania's accession to the European Union. But before the accession, 1st January 2007, the ordinance was modified three times and were elaborated methodological norms for its application:
 - by the Law. no. 260/2005;
 - by the Government ordinance 30/2006;
 - methodology adopted through Government Decision 1864/2006;
 - by the Law no. 500/2006.

4 The legal instrument of harmonization was the emergency ordinance. The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and has the obligation to give the reasons for the emergency status within their contents. The 'exceptional case' was the harmonization necessity itself and the Schengen Action Plan. An emergency ordinance shall only come into force after it has been submitted for debate in an emergency procedure to the Chamber having the competence to be notified, and after it has been published in the Official Gazette of Romania. If not in session, the Chambers shall be convened by all means within 5 days after submittal, or, as the case may be, after forwarding. If, within 30 days at the latest of the submitting date, the notified Chamber does not pronounce on the ordinance, the latter shall be deemed adopted and shall be sent to the other Chamber, which shall also make a decision in an emergency procedure. An emergency ordinance containing norms of the same kind as the organic law must be approved by an absolute majority.

- b) They may move freely and establish their residence or, by case, domicile anywhere on the Romanian territory;
- c) Social protection measures from the state, under the same conditions as the Romanian citizens;
- d) They have the right to check the personal data written on official documents issued by Romanian authorities and, if the case may be, to request the correction or exclusion of data that do not correspond to reality;
- e) They have unlimited access to the Romanian labour force market, under the condition, if the case may be, of applying the provisions of the transitory measures stipulated in the Treaty of Romanian Accession to EU, as well as they are allowed to carry on other economic activities, according to the law applicable to the Romanian citizens.
- f) They have unlimited access to the educational and training activities within the national educational system.

The dependants, as well as the partner, benefit of the rights granted to the family members of the Union European citizen regarding the entry and residence in/on the Romanian territory under the conditions stipulated by the emergency ordinance. Exerting any rights or fulfilling any administrative formality by the European Union citizens or their family members shall not be conditioned by the possession of documents issued by the Romanian authorities under the provisions of the Romanian law, if the concerned person proves by any means of proof that he/she is the beneficiary of that right.

Anyway, during their stay in Romania, the European Union citizens and their family members are compelled to comply with the provisions of Romanian legislation.

The major issue in 2008 is indirectly related to the free movement of the *Jipa case*.⁵ The problem itself generated in Romania hundreds of cases before the national courts.

According to the Law no. 248/2005 the exercise of the right of free movement abroad for Romanian citizens *may be limited* only temporarily in the cases and under the conditions provided for in the present Law; any such limitation shall take the form of a suspension of or, as the case may be, a restriction on the exercise of that right. Any restriction on the exercise of the right of free movement abroad [of Romanian citizens] shall consist of a temporary prohibition of travel to specified States, imposed by the competent Romanian authorities, in accordance with the conditions laid down by the law.

The law⁶ in force in present as well, states that the Romanian citizen's right to free movement abroad, for a period up to 3 years, can be limited if the respective person is returned in Romania according to a readmission treaty. The restriction measure now can ordered by the Bucharest Tribunal, as an exclusively competent court, before all the Tribunals were materially competent.

The practice was divided, some resolutions showed that Romania had not fulfilled his duty to adopt the directive in its national law system, as the provisions of Law 248/2005 are in contradiction with the provisions of the EU-directive regarding the restrictions, because the imposing of the restriction does not depend on the preliminary investigation of the action or misconduct leading to the expelling from the point of view of public health, order and security. Other solutions imposed the restrictions.

5 C 33/07. For details see Gyula Fabian & Emod Veress, *The possibility of restricting the free movement of the own citizens. Comments on the Jipa-case*, forthcoming.

6 Article 38 of the Law no. 248/2005.

The European Court of Justice solved the case, concluding that

‘Article 18 EC and Article 27 of Directive 2004/38/EC ... do not preclude national legislation that allows the right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he has previously been repatriated from the latter Member State on account of his ‘illegal residence’ there, provided that the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it. It is for the national court to establish whether that is so in the case before it.’

From now on, the national courts may refer to the *Jipa* case whenever they are obliged to apply a measure of restriction quoting general prevention, or based on a not fully documented and reasoned decision of a foreign authority.

Chapter I

Entry, Residence, Departure

As detailed information on the transposition of Directive 2004/38/EC was already provided in the 2007 report on Romania, in this chapter the object of examination is, firstly, the transposition of provisions specific for workers (1), and secondly, the situation of jobseekers (2).

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

1.1. Art. 7(1a) from Directive 2004/38/EC

According to the referred text, ruling the right of residence for more than three months, all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they are *workers or self-employed persons* in the host Member State.

The Government Emergency Ordinance no. 102/2005 on the free movement of citizens of the Member States of the European Union and the European Economic Area on the Romanian territory transposed the specific provisions of the Directive correctly.

According to the Emergency Ordinance, the European Union citizens shall have the residence right in Romania for a period over three months if they carry out *dependent or independent activities*, according to the law.⁷ There is no legal definition for dependent and independent activities, but the provisions on the registration certificate established that, in order to be registered and to be granted the registration certificate, the European Union citizens shall submit to the competent territorial branch of the Immigration Authority, within 90 days starting the date of their entry on the Romanian territory, an application accompanied by the national identity document or valid passport, as well as the *employment contract* or a *certificate issued by the employer* or the *authorization* for carrying out the independent activities.

Therefore, the principal situations are as follows:

- a) the European Union citizen concluded a labour contract with an employer, in concordance with the Romanian Labour Code (Law no. 53/2003, with subsequent modifications);
- b) the European Union citizen concluded a management contract with an employer, in concordance with the Law no. 31/1990 on commercial companies, with subsequent modification and acts as an executive officer of a business entity;
- c) the European Union citizen obtained an authorization under the specific regulations to carry out independent activities.

Before 2008, were required a legalized copy of the authorization issued by the mayor. According to the previous legislation, those authorizations for most of independent activities were issued by the mayor.⁸ Recent legislative changes, adopted in 2008, respectively the Government Emergency Ordinance No. 44/2008 for carrying out economical activities by authorised individuals, individual enterprises and family enterprises, took away this power

⁷ Art. 13 (1) a) from Emergency Ordinance no. 102/2005.

⁸ Law no. 300/2004, with subsequent amendments.

from mayors, mainly due the non-unitary administrative practice at the level of different administrative-territorial units.⁹ Now any permanent, temporary or occasional economic activity carried out in Romania by authorised individuals, individual enterprises and family enterprises must be registered and authorised by the Trade Registry. The legal text explicitly opens all three forms of independent activities for European Union citizens and EEA citizens also.

In the practice of the Immigration Authority, there are accepted the certificates issued by the Trade Registry, but for more consistency, the Emergency Ordinance no. 102/2005 must be updated.

1.2. Art. 7 (3 a-d) from Directive 2004/38/EC

According to the Directive, a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

- a) he/she is temporarily unable to work as the result of an illness or accident;
- b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
- c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
- d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

The Government Emergency Ordinance no. 102/2005 transposed these rules accordingly.¹⁰

As a general rule, the right of residence has a duration determined by the period in which the entitled person is employed or carries out independent activities. But:

- The resident, who performs dependent or independent activities for more than one year and has subsequently become unemployed, under the conditions of the law, has the right of residence, during the period of his unemployed status.
- The resident who had an employment contract for a limited period, less than one year, or was performing dependent or independent activities for maximum 12 months period and has subsequently become unemployed, shall benefit of the right of residence for 6 months starting the date of obtaining the unemployed status.
- The resident who was performing dependent or independent activities, but has not subsequently become unemployed and who is registered in a vocational training program, has the right of residence on condition that the training is related to the field of the previous job and just for its duration.¹¹

9 The Ordinance does not apply to liberal professions and certain other economic activities, which are regulated by special laws.

10 Art. 13 from Emergency Ordinance no. 102/2005.

11 See also ECJ cases C-3/90 *Bernini* and C-357/89 *Raulin*.

- During the period into which the resident performing dependent or independent activities has temporarily lost capacity to work due to a disease or an accident, the resident has the right of residence.

1.3. Art. 8(3a) from Directive 2004/38/EC

The Directive states that for the registration certificate to be issued, Member States may only require that Union citizens, workers or self-employed persons, to present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons.

The Romanian regulation is in accordance with the community rules.

For the issuance of the registration certificate, the European Union citizen must submit the following documents to the competent territorial branch of the Immigration Authority:

- application form;
- national identity document or valid passport;
- the employment contract or a certificate issued by the employer. The contract or the certificate must be registered before at the territorial labour inspectorate;
- or the authorization for carrying out independent activities.¹²

On the basis of the documents, the competent authorities are issuing the registration certificate on the same day when the application was submitted.

1.4. Art.14 (4 a-b) from Directive 2004/38/EC

The Directive states that an expulsion measure may in no case be adopted against Union citizens or their family members if: (a) the Union citizens are workers or self-employed persons, or (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

The rule was transposed by Government Emergency Ordinance no. 102/2005, which states that the leaving order of Romanian territory can not be issued against European Union citizens and their family members, if the European Union citizen carries out dependent or independent activities or proves by any means that is searching for employment and has real prospective to be employed.¹³

1.5. Art.17 from Directive 2004/38/EC

The provisions of article 17 from the Directive are transposed duly into the Romanian legislation. The European Union citizens who have a continuous legal stay of more than 5 years

¹² Art. 15 from Emergency Ordinance no. 102/2005.

¹³ Art. 24-3 from Emergency Ordinance no. 102/2005.

shall benefit of the right of permanent residence.¹⁴ By way of derogation, the right of permanent residence shall be granted, before completion of a continuous period of five years, to the residents who:

- are carrying out dependent or independent activities and who, at the moment they cease activity, have the right an old age pension or whose working contract ceases with entitlement to early retirement according to the law, provided that they have been working in Romania for at least the preceding twelve months and have stayed legally and continuously for more than three years on the Romanian territory. For the residences carrying out a liberal profession the conditions referring to the retirement age shall be considered fulfilled when reaching the age of 60 years if otherwise provided by the law;
- are carrying out dependent or independent activities and who have a continuous stay on the Romanian territory for more than 2 years and stop working due to totally loosing or losing at least half of the capacity to work. If such incapacity is the result of an accident at work or an occupational disease, no condition shall be imposed as to length of residence;
- after three years of residence, working dependently or independently, start to work in an employed or self-employed capacity in another Member State, while retaining their place of residence in Romania, to which they return, as a rule, each day or at least once a week.

Periods of unemployment, medical leave or ceasing of activity due to illness or accident as well as any other periods of ceasing activity for reasons which are not imputable to the person concerned shall be taken into account when establishing continuity of the periods. The conditions as to length of residence and employment and the condition as to length of residence shall not apply if the person concerned who is employed or carries out independent economic activities is married to a Romanian national. Irrespective of nationality, the family members of the European Union national who has permanent residence, are entitled to permanent residence only if they are members of the household of the respective EU national.

If, however, the resident who carries out dependent or independent activities dies while still working but before acquiring the right of permanent residence, his family members who are also members of the household shall acquire the right of permanent residence, on condition that:

- the resident had, at the time of death, resided continuously on the territory of Romania for two years; or
- the death resulted from an accident at work or an occupational disease; or
- the surviving spouse lost the Romanian nationality following marriage to the EU national, bearer of the primary stay right.

14 Continuity of residence shall not be affected by:

- temporary absences not exceeding a total of six months a year;
- absences of a longer duration for compulsory military service;
- absence of a maximum of twelve consecutive months from the Romanian territory for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a relocation in another Member State or a third country.

The right of permanent residence shall be lost in the case of an absence from the Romanian territory longer than two consecutive years.

1.6. Art. 24 (2) from Directive 2004/38/EC

Article 24 of the Directive regulates the right to equal treatment. The second paragraph contains derogation from the general principle of equal treatment. According to the legal text, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period when a European Union citizen is continuing to seek employment and he/she have a genuine chance of being engaged, nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

The Government Emergency Ordinance no. 102/2005 states as a general rule that the European Union citizens benefit social protection measures accorded by the state, in the same conditions as the Romanian citizens. There are no other rules in the Emergency Ordinance transposing article 24 (2) of the Directive.

2. SITUATION OF JOBSEEKERS

There are no detailed rules in the Government Emergency Ordinance no. 102/2005 on jobseekers. The term itself occurs only once in the text of the act, where referring the banning of removal, in case when the EU citizen can prove by any means that he/she is looking for a job and there are real possibilities to be employed, analyzed above.

In other cases, where the Directive uses the term jobseeker, the Romanian rule operates with the word unemployed.¹⁵

In order to reflect the achievements of case law,¹⁶ and to put into practice the recital 9 of the Directive, with a programmatic value, stating that ‘Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to jobseekers as recognised by the case-law of the Court of Justice’, there can be indentified methods to regulate better this specific issue of jobseekers.

¹⁵ See above, 1.2.

¹⁶ For example, ECJ cases C-292/89 *Antonissen*; C-138/02 *Collins*.

Chapter II

Access to Employment

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

The *freedom to work* is guaranteed by the Constitution. This freedom includes that the right to work cannot be restricted. Therefore all persons shall be free to choose their work place and profession, trade, or activity to carry out. No one may be forced to work or not in a certain work place or profession, whatever that might be. The detailed regulation is the Romanian Labour Code, in force from 2003, with several subsequent modifications. The provisions of the Labour code apply to European Union citizens.

Within the work relationships, the principle of the equal treatment for all employees and employers shall apply; therefore it is prohibited to discriminate – directly or indirectly – the European Union citizens also. This is the case of employment agency services also, where the information and services must be granted to European Union citizens as well.

There are specific anti-discrimination rules in the Romanian legislative system. All direct or indirect discrimination towards an employee, based on criteria such as sex, sexual orientation, genetic characteristics, age, national origin, race, colour of the skin, ethnic origin, religion, political options, social origin, disability, family conditions or responsibilities, trade union membership or activity, are prohibited.¹⁷ A direct discrimination shall be represented by any actions and acts of exclusion, differentiation, restriction, or preference, based on one or several of the criteria mentioned above, the purpose or effect of which is the failure to grant, the restriction or rejection of the recognition, use, or exercise of the rights stipulated in the labour legislation. An indirect discrimination shall be represented by actions and facts apparently based on criteria other than mentioned above, but which cause the effects of a direct discrimination to take place. Any employee who performs a work must benefit from adequate work conditions for the activity carried out, social protection, labour safety and health, as well as the observance of his/her dignity and conscience, with no discrimination.

An employee's main rights include the right to equal opportunities and treatment. Men and women shall get an equal pay for equal or equivalent work, guaranteed by the Law no. 202/2002 on equal opportunities and treatment between men and women.¹⁸

When establishing and granting the *wages*, all discrimination is prohibited for criteria such as gender, sexual orientation, genetic characteristics, age, national origin, race, colour of the skin, ethnic origin, religion, political options, social origin, disability, family situation or responsibility, or trade union membership or activity.

Any employee who performs a work shall benefit from *adequate work conditions* for the activity carried out, social protection, labour safety and health, as well as the observance of his/her dignity and conscience, with no discrimination. They have the right to collective negotiations, right to personal data protection, as well as right to protection from unlawful dismissal. The employees and also the employers may associate freely for the defence of their

17 The Labour Code implements directives as 97/80/EC, 2000/43/EC, 2000/78/EC.

18 The mentioned law transposed Directive 76/207/CEE, art. 1, 2, 4, 5, 6 and 7 from Directive 75/117/CEE, art. 10 and 12 from directive 92/85/CEE, Directive 97/80/CE, clause 2, points 5 and 6 from Directive 96/34/CE, Directive 86/613/CEE.

rights and the promotion of their vocational, economic, and social interests. In general, labour relationships are based on the principle of consensus and good faith. To ensure a proper progression of labour relationships, the participants in labour relationships shall inform and consult one another, in compliance with the law and the collective labour contracts.

The clauses of the individual labour contract¹⁹ may not contain contrary provisions or rights below the minimum level set up by the laws or collective labour contracts. It is prohibited, under the sanction of absolute nullity, to conclude an individual labour contract for the purpose of performing an illicit or immoral work or activity. An individual labour contract must be concluded based on the parties' consent, in written form, in Romanian. There is no obstacle to conclude the contract in two languages, but to have a Romanian version is mandatory. The employer has the obligation to conclude the individual labour contract in written form.²⁰

Since 2000, in Romania is in force a Government Ordinance on the prevention and sanctioning all forms of discrimination.²¹ The normative act adopts a sanctionatory approach towards discrimination, punishing as contraventions the discriminatory conducts. A section of the ordinance is dealing with equality in economic activity, employment and profession. The equality of treatment is mandatory for the natural persons and legal entities involved in work mediation and distribution. Any person looking for a working place shall have free and equal access to information regarding available working places or qualification opportunities.

There is no limitation regarding citizenship for the administrators of commercial companies. (A third country national can be also an administrator of a Romanian commercial company). For the experts in legal medicine (forensic medicine) the regulation in force requires Romanian citizenship.²² During 2007, the statute of teaching personnel also states that the higher education teaching positions are reserved for Romanian citizens, and only as an exception, in this type of functions can be appointed other citizens, for a determined period, as associated lecturers. The rule was modified only in 2008, through the Emergency Ordinance 88/2008, and some universities faced problems during the years 2007 and 2008 because the national regulation was in contradiction with EU law. The Law No 51/1995 regarding the organisation and practice of *lawyer's* profession, through its modifications, implemented the Directives no. 77/249/EEC and 98/5/EC. The Law no. 35/1995 requires Romanian citizenship for public notaries.²³

No cases of discrimination can be reported for 2008.

19 Individual labour contract is a contract based on which a natural entity, called employee, undertakes to perform work for and under the authority of an employer, who is a natural or legal entity, in exchange for a pay, called wages.

20 If an individual labour contract has not been concluded in written form, it must be presumed it has been concluded for an unlimited period, and the parties may make the proof of the contract provisions and the work performed by means of any other piece of evidence.

21 Government Ordinance no. 137/2000.

22 Order 938/2005.

23 Article 16. It can be discussed if the public notary is a private sector or a public sector function. According to current interpretations, because is invested with specific powers by the state, article 39 (4) from the EC Treaty applies.

2. LANGUAGE REQUIREMENT

In general, the language requirements in the private sector are not regulated. In practice, in some cases the language requirements can be found discriminatory, if the mandatory knowledge of a certain language is not necessary for the concrete function in the private sector, but there is no jurisprudence yet in this sense. According to the Law no. 35/1995 the knowledge of the Romanian language is mandatory for public notaries.²⁴

In some cases, there are regulations on language requirements. For example, in the case of credit institutions, if no one of directors or the members of the directorate has Romanian citizenship, at least one of them must know the Romanian language. If this person does not have documents about his language proficiency, it is enough to prove his/her language abilities in the discussions with the Romanian National Bank.²⁵

3. RECOGNITION OF DIPLOMAS

In 2008 there were some changes in the legislation. The Law no. 117/2008 approved the Government Emergency Ordinance 109/2007 on the modification of Law no. 200/2004. The most important change is that there is now an express rule that language knowledge evaluation is not a part of the recognition procedure.

²⁴ Article 16. See the comment in the previous footnote too.

²⁵ Romanian National Bank Regulation no. 11/2007.

Chapter III

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS

The Romanian Labour Code, within the work relationships, the principle of the equal treatment for all employees and employers shall apply. The directly applicable Regulation no. 1612/68/EEC necessitates Romania to provide equal treatment in the field of social and tax advantages. The Government Ordinance on the prevention and sanctioning all forms of discrimination, analyzed above, is applied for natural persons, public or private legal entities, in the area of conditions for access to employment, recruitment, selection and promotion criteria and conditions, access of all forms and levels of professional orientation, formation and perfection. The principle of non-discrimination refers also on social protection and security and access to public services.

The access to trade unions is not conditioned to citizenship. All persons legally working in Romania can join a trade union.²⁶ A restriction in force is that one person can have a membership in only one trade union. There is no statistical data on trade union memberships of EU citizens.

2. SOCIAL AND TAX ADVANTAGES

Regarding the taxation, the EU citizens pay the same taxes on income as Romanian citizens (16% personal income tax). One of the basic principles of fiscal policy is the neutrality of fiscal measures. From the point of view of taxation, any natural person, regardless citizenship, is considered as a resident if has its domicile in Romania or the center of the vital interests is in Romania or is present in Romania more than 183 days in a 12 month period. The income tax is paid by resident natural persons, non-resident natural persons who carry out independent activities through a permanent establishment in Romania, non-resident natural persons who carry out dependent activities in Romania and non-resident natural persons who obtain other incomes in Romania.

3. OTHER OBSTACLES FOR FREE MOVEMENT OF WORKERS

Nothing to report.

²⁶ Art. 2 from the Law no. 54/2003 on trade unions.

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

4.1. Frontier workers

The specific Romanian regulation on frontier workers deals with third country nationals only. The frontier workers are defined in the Emergency Ordinance No. 56/2007 about the engagement to work and the detachment of an alien on the Romanian territory, published on 26th June 2007. The frontier worker is that alien engaged in work in the frontier localities from the Romanian Territory, and who is going back every day, or at least once in a week in the frontier zone of a state which has common border with Romania, and he has the residence there, and also has that states citizenship. In conclusion, the frontier workers enjoy all the rights granted to migrant workers in Romania.²⁷ There is no undergoing debate regarding frontier workers in Romanian politics, administration or between legal academics. There are no specific schemes for frontier workers and there are no bilateral agreements dealing with the issue of frontier workers.

Regarding the case C-212/05 *Hartmann*, the following points can be showed:

- The Law no. 61/1993 on state allowance for child, with subsequent modifications, established that the allocation is granted non-discriminatory. The allocation is available also for child of foreign citizens and of persons without citizenship, if they are resident in Romania, and the child live together with parents. Trough interpretation of the text, can be concluded that the residence condition applies only in case of third country nationals. No practical problems reported on the application of the above mentioned law.
- Government Emergency Ordinance no. 105/2003 on the additional family allowance and on the single-parent support allowance states that the allowances are available to Romanian citizens living in Romania, and for citizens of other states and of persons without citizenship, if they are legally resident in Romania. The same comment can be made as in the previous point. No practical problems reported on the application of the above mentioned law.
- Identical regulation is included in several other normative acts, such as into the Law no. 448/2006 about protecting and promoting the rights of persons with handicap, Law no. 416/2001 on the minimal guaranteed income, Government Emergency Ordinance no. 5/2003 on the award of dwelling heating aids as well as some facilities to the population for the payment of the thermo energy,
- Government Emergency Ordinance no. 158/2005 regarding the leaves and indemnities for health insurance established that benefits from the provisions of the law the persons with domicile or residence in Romania. Similar rules are in the Government Emergency Ordinance no. 148/2005 regarding the support of the family to raise the child.

4.2. Sportsmen / sportswomen

The legal provisions in the Romanian law are in conformity with community law. Some statutes of sport organisations states that foreign citizens cannot be members in the managing

²⁷ Regulation no. 1408/71/CEE is directly applicable in Romania too.

boards of the federations or other structures (for example, art. 15 from the Statute of the Romanian Federation of Alpinism and Climbing, art. 37 of the Statute of the Romanian Federation of Gymnastics, art. 33 and 34 of the Statute of Romanian Federation of Sportive Dance, art. 38 of the Statute of Romanian Canoeing Federation etc.). It cannot be excluded that there are restrictive provisions, especially in transfer regulations.

4.3. The Maritime sector

In the case of naval commanders ('captain' of maritime ships) and naval chiefs ('captain' of fluvial ships) the current regulation, the current, in force version of the Government Ordinance 42/1997 does not require the condition of Romanian citizenship. Art. 5 of the mentioned act, as modified in 2006,²⁸ defines the Romanian naval personal as all of the persons, regardless citizenship, which possesses a licence or a capacity certificate, obtained or recognized under the provisions of the law, which grants the right to hold functions on the ships. This is a labour relationship, not a civil service, even in the case when the employer is the state.

4.4. Researchers/artists

EU nationals are treated equally, they are considered to have the same legal status as national researchers/artists.

4.5. Access to study grants

The major universities have a clear procedure of giving study grants, in accordance with the Community law. For example:

- the study grant regulation of the Babes-Bolyai University clearly states that study grants can be accessed by Romanian, EU member states, ECC states and the Swiss Confederation citizens (art. 3);
- the study grant regulation of the Bucharest University does not contain any criteria regarding citizenships.

There were no complaints regarding study grants for EU citizens. In fact, the number of EU citizens studying in Romania for a hole cycle is relatively reduced in present, but certainly will be a gradual rise of the number of workers and students.

²⁸ Government Emergency Ordinance no. 74/2006.

Chapter IV

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

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, with further amendments is excluded from application if the territorial, personal or material scope of regulation is not fulfilled.²⁹ In such cases article 39 and the Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community is applicable anyway.

In special, administrative problems and delays are complained, by persons who worked in Romania for a period, and migrated into another EU member state in time, and now are requesting pensions from the Romanian State.

There can be reported a pioneer decision of the Bucharest Tribunal (case no. 5536/3AS/2008, judgement no. 5601/10.09.2008), which stated in general terms the obligation of Romanian administrative authorities to solve in the legally provided period these complaints. In April 2009 the Bucharest Court of Appeal rejected both appeals declared by the national and local pension authorities, therefore the decision is irrevocable. A large number of such petitions waits to be solved by the National House of Pensions and Other Social Insurance Rights and subordinated authorities. The social effect of such delays is high (persons can receive only partial pensions or no pensions at all until the petitions are solved). The importance of the problem is showed also by the fact that the Legal Research Institute of the Romanian Scientific Academy organized a workshop at 20th May 2009, discussing especially this pioneer decision.

²⁹ Frans Pennings, *Introduction to European Social Security Law*, Antwerp: Intersentia 2003.

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

There was no modification on nationality condition for access to positions in the public sector during 2008. Romania, based on the article 39 (4) from the EC Treaty, reserved for its citizens the civil service positions, and most of the political dignities. According to the constitutional provisions in force on the equality of rights, access to public – civil or military – positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania.³⁰

A *civil servant* is a person who has been appointed to officiate as a public functionary. Civil service represents the ensemble of prerogatives and responsibilities established with regard to the law, by central, local or autonomous public authorities, in order to fulfil their attributions. The civil servant has a service relationship with the public authority (there is no labor contract, but an appointing administrative act). There are several regulations on the general and special civil services. The general regulation is the Law no. 188/1999 on the Statute of civil servants, with the subsequent modifications, the latest in 2008 and 2009, but without influence on the question observed here. According to article 54 a) of the Law no. 188/1999, in order to work as a civil servant a person must fulfil the condition of *Romanian citizenship* and the condition of *domicile* in Romania.³¹ The special regulations reiterate the general rule, for example: Law no. 293/2004 on the Statute of civil servants of the National Administration of Penitentiaries (art. 11), Law no. 7/2006 on the Statute of parliamentary servants (art. 11), Law no. 44/2007 on the organization and operation of the National Agency for Integrity (art. 17-18) etc.

In the judicial branch of power, judges and prosecutors must have also Romanian citizenship. This condition is mandatory for candidates to the National Magistrate Institute also.³² The National Magistrate Institute trains the future judges and prosecutors, and candidates must hold a degree in law. The citizenship condition is applicable in the case of the judicial assistants – representing the interests of employers and employees in labour litigation. The situation is the same for law clerks.³³

As a measure of ‘political integration’ of EU citizens, EU citizens can:

- participate and be elected at local elections for the functions of local or county councillor. The function of mayor, vice-mayor, president of the county council and vice-president of the county council are excluded.³⁴
- participate and be elected at European Parliamentary elections.³⁵

30 Art. 16 of the 1991 Constitution, revised in 2003.

31 The first version of the legal text conditioned the appointment as a civil servant to the exclusive Romanian citizenship; starting with year 2003, persons with another citizenship beside the Romanian, can be civil servants (permissive regulation for the persons with dual citizenship).

32 Law no. 303/2004; Law no. 304/2004.

33 Law no. 567/2004.

34 Law no. 67/2004, with subsequent modifications.

35 Law no. 33/2007, with subsequent modifications.

The article 39 (4) from the EC Treaty must be interpreted in a way that public sector employment includes only those posts which involve direct or indirect participation in the exercise of powers conferred by the public law in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities.³⁶ In line with this interpretation, in Romania functions like teachers³⁷, nurses³⁸, post officers³⁹ etc. are not considered civil servant positions.

Anyway, there are no discussions for opening-up the public sector for European Union citizens, the civil service being considered as a territory belonging to national sovereignty.

1.2. Language requirement

For civil servants, the knowledge of the Romanian language – spoken and written – is mandatory. In certain administrative-territorial units, where the percentage of a national minority is above 20% of the total population, the knowledge of the minority language is mandatory for the civil servants dealing with public relations.

In the case of criminal experts also, which is considered a civil servant position⁴⁰, the knowledge of the Romanian language is mandatory.⁴¹

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

Because the access to public service is restricted to Romanian citizens only, the issue presents no relevance in this report.

2. WORKING CONDITIONS

Because the access to public service is restricted to Romanian citizens only, the issue presents no relevance in this report.

36 Roger Blanpain, *European labour law*, The Hague: Kluwer Law International 2003, p. 311-31; Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford: Oxford University Press 2007, p. 481; ECJ case C-149/79.

37 ECJ case C-33/88.

38 ECJ case C-307/84 *Commission v. France*.

39 ECJ case C-152/73.

40 Government Decision no. 368/1998.

41 Order 177/2008.

Chapter VI

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

1. RESIDENCE RIGHTS: TRANSPOSITION OF DIRECTIVE 2004/38/EC

General overview

The notion of family member, according the Romanian regulation in force, the Government Emergency Ordinance no.102/2005, includes:

- the spouse;
- direct descendents of the European Union citizen or of the spouse, irrespective of their citizenship, who are under the age of 21 or those who are in their care;
- direct ascendants of the European Union citizen or of the spouse, irrespective of their citizenship, who are in their care.

The dependent and the partner, which can be recognized as family members are defined also by the law. *Dependent* is any other family member, irrespective of citizenship, who is not covered by the definition provided above and who, in the origin or provenience country, is in the care, is a member of the household of the European Union citizen or due to serious health grounds requires personal care by the Union citizen. *Partner* is the person who lives together with the European Union citizen if the partnership is registered in accordance with the conditions laid down in the relevant legislation of the origin or provenience country or in case the partnership is not registered the durable relationship can be duly attested.

As a general rule, the family members of a European Union citizens may move freely and establish their residence, or, by case, domicile anywhere on the Romanian territory.

The family members who are not citizens of the European Union may *enter the Romanian territory* on the basis of a valid passport and an entry visa, exempt those cases when, the requirement to obtain an entry visa had been abolished under the conditions of the law. The Romanian diplomatic missions and the consular offices shall grant the entry visa on Romanian territory to the third-country family members. The family members who are not citizens of the European Union but are holding a valid document attesting the residence in another Member State as a family member of a European Union citizen, shall be exempted from the requirement to obtain an entry visa.

Within 15 days from the entry date on Romanian territory, the family members have to present themselves to the nearest territorial branch of Romanian Police, Romanian Border Police or Immigration Office, in order to declare their presence in Romania.

The family members of the European Union citizens, irrespective of citizenship, accompanying or subsequently joining the EU citizen, benefit of *3 months stay right* from the date of entry in Romania, without fulfilling any supplementary conditions.

Family members who do not have the European Union citizenship may benefit of the *residence right for a period over three months* if they accompany or subsequently join the European Union citizen, who fulfils one of the conditions established by the law (carries out dependent or independent activities, according to the law; has means of support for themselves and for their family members, usually, at least at guaranteed minimum income level in

Romania and they have medical insurance accredited by the Romanian health insurance system or they are registered at a institution from Romania, accredited by the law, having as main purpose educational and vocational training activities, they have social health insurance accredited by the Romanian health insurance system and they declare by their own liability that they have means of support for themselves and for their family members, usually, at least at the guaranteed minimum income level in Romania).

In order to be registered in the database and to be granted the *registration certificate*, the family members with an EU or EEA citizenship of a Union European citizen shall submit to the competent territorial branch of the Immigration Office, within 90 days starting the date of their entry on the Romanian territory, an application accompanied by the national identity document or a valid passport as well as, as the case may be, the following documents:

- the civil status document attesting the marriage or, by case, documents attesting the existence of a family relationship with the resident;
- the registration certificate of the European Union citizen whom they are joining, if the European Union citizen has been previously registered in the data base.

The procedure is applicable for dependants and partner, citizens of the European Union, case in which they shall present the documents issued by competent authorities, as well as the documents issued by the competent authority in the origin or provenience country attesting these qualities.

The right of residence granted to the family members holding the European Union citizenship is valid for the whole period of the right of stay of the Union European citizen whose family members they are as well as in the following situation until the deadline for obtaining a permanent residence is fulfilled:

- when the European Union citizen leaves Romania or in case of death, or
- in case of spouses, when the marriage has been dissolved or annulled,
- in case of partners, when the registered partnership is dissolved or annulled.

In the situations when the European citizen leaves Romania or in case of death, the right of residence for children or for the parent entrusted with their care is still valid till the finalization of their studies if the following conditions are cumulatively fulfilled:

- the children live in Romania
- the children are enrolled in an educational institution from Romania.

In order to be register in the database record and to be issued the residence card, the family members who do not have the European Union citizenship may benefit of the residence right for a period over three months if they accompany or subsequently join the European Union citizen who fulfils the legal conditions.

They shall submit to the competent territorial branch of the Immigration Office, within 90 days starting the date of their entry in Romania, an application accompanied by the following documents:

- valid passport;
- the civil status document attesting the marriage or, if the case, the existence of a family relationship with the European Union citizen, accompanied by a legalized copy in case the document is not issued by the authorities of a member state
- the registration certificate of the European Union citizen who is joined by family members, in case European Union citizen was prior registered in the data base record.

The same provisions shall be applied subsequently to the persons who are in the care of the resident as well as to the partner, which are not European Union citizens, exempt presenting the civil status document attesting the marriage or, if the case, the existence of a family relationship with the European Union citizen, accompanied by a legalized copy in case the document is not issued by the authorities of a member state, in which situation they shall present, following the case, documents issued by the competent authority from the origin state or provenience, attesting these qualities.

Upon submission of the application, the competent authorities issue to the applicant a certificate, attesting the right of residence, valid until the residence card is granted. The residence card shall be issued within maximum 90 days starting the day the application was submitted.

Within the period of 90 days, the competent authorities do all the necessary checks, ascertaining that the conditions for granting the residence card are fulfilled, including, if the case may be, the conditions referring to the elements on which can be proved a convenience marriage, in compliance with the provisions of the Government Emergency Ordinance no.194/2002 on aliens' regime in Romania.

In case, on the basis of the checks, the competent authorities who have received the application ascertain that the conditions stipulated by the law for granting the right of residence are fulfilled, they issue to the applicant 'the residence card for a family member of a European Union citizen'. In case the competent authorities ascertain that the conditions provided by the law for granting the residence right are not fulfilled, they shall notify in writing the refusal of granting the residence card, the grounds on which the decision was based, mentioning in the same time the competent court and the period of time within which the decision can be appealed. The refusal of granting residence card can be appealed before the competent specialized administrative court.

The validity of residence card for the family members who do not have the European citizenship, is up to 5 years from the issuing date and it shall not exceed the period of residence of the European Union citizen whose family member is.

This residence card loses his validity in the case of a temporary absence of the bearer from the Romanian territory for more than 6 months within a year, with the following exceptions:

- the absence from the Romanian territory for the performance of military duty, irrespective the period;
- the absence from the Romanian territory justified by the pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country, for a period of maximum 12 consecutive months.

The right of residence of the family member who do not have the citizenship of European Union shall be valid for the entire period of the stay right of the European Union citizen whose family members they are, as well as in the following situations, during the period they prove that they have the means of support for themselves at least at the guaranteed minimum income level in Romania, as well as in the following situations until the deadline for obtaining the permanent residence is fulfilled:

- in case the European Union citizen whose family member they are, is deceased, provided the family member had the residence right for at least one year having this status, or
- in case of spouses, if the marriage is dissolved or annulled in the following conditions:

- at least 3 years had passed from the conclusion of marriage up to the moment when the competent court was notified for dissolving, declaring the nullity or annulling the marriage, from which a period of at least 1 years (they lived having this status) on the Romanian territory;
 - by the spouses' agreement or by court decision, the spouse who is not European Union citizen was entrusted to bring up and educate the child of the European Union citizen;
 - the court decided the dissolving of the marriage based on the fault of the European Union citizen;
 - by the spouses' agreement or by court decision, the court establishes the right of the spouse who is not European Union citizen to visit the minor child. In this case, the court has to specify in the decision that the visits shall be done on the Romanian territory, stating precisely the period of time for which the right is granted.
- in the case of partners, when the partnership is dissolved or annulled, the rules are accordingly applicable.

The persons who do not have the European Union citizenship and have a continuous residence on Romanian territory at least 5 years, as family members of a European Union citizen who is a resident or permanent resident, shall benefit of the provisions of the right of permanent residence.

Irrespective of citizenship, the family members of the European Union national who has permanent residence, are entitled to permanent residence only if they are members of the household of the respective EU national. If, however, the resident who carries out dependent or independent activities dies while still working but before acquiring the right of permanent residence, his family members who are also members of the household shall acquire the right of permanent residence, on condition that:

- the resident had, at the time of death, resided continuously on the territory Romania for two years; or
- the death resulted from an accident at work or an occupational disease; or
- the surviving spouse lost the Romanian nationality following marriage to the EU national, bearer of the primary stay right.

The persons fulfilling the conditions shall submit to the competent territorial branch of the Immigration Office an application for issuing the permanent residence card for European Union citizens, respectively permanent residence permit for family members who are not citizens of the European Union.

The validity of the permanent resident card for family members who are not European Union citizens shall be of 10 years from the issuing date and shall be renewed upon request. If Immigration Office ascertain the fulfilling the conditions for issuing the permanent resident card it shall grant within 90 days from the date of submitting the application the permanent residence card for family members who are not European Union citizens. It is a difference, the term is shorter for EU citizens: within 30 days from the date of submitting the application the permanent residence card for European Union citizens. In case it is a certain that the condition provided by the present law are not fulfilled, the competent authorities shall notify in written the refusal of issuing the permanent residence card, the grounds on which the decision was based mentioning in the same time the competent court and the pe-

riod of time in which the decision can be appealed. The refusal of issuing the documents mentioned can be appealed before the competent specialized administrative court.

The law seems to provide for no big distinction to the situation of family members of EU national who are EU nationals and those, who are nationals of third countries. The family members who are not citizens of the European Union may enter the Romanian territory on the basis of a valid passport and an entry visa, while the EU citizens do not need an entry visa.

Another thing is, that only the marriages between an EU citizen and a national of third countries are verified by the authorities, to see if it is a *convenience marriage*, excepting that situation, if the non EU citizen had benefit a right of residence in another member state on the base of this marriage. These verifications are made on the basis of the Emergency Ordinance no. 194/2002 of the Alien's Law in Romania, containing verifications, declarations of the married people, other people declaration, interviews, or documents.

Regarding to the permanent residence, for the length of the stay in Romania for the third country citizens family members, we have to calculate the period which he had stayed here on the base of the Alien's Law, but just in case if he/she was a family member of an EU citizen.

The family members who do not have the EU citizenship, may benefit of the residence right for a period over three months just in case if they accompany or subsequently join the European Union citizen who fulfils one of the conditions (being a worker, self-employed, or a student). They get a residence card, and the EU citizens will obtain just a certificate. In comparison with the alien's regime, the family members of the EU nationals have got a better situation: they do not have to present the documents when they enter in the territory of Romania regarding the purpose of stay, financial means for the return to their home country, guarantees for leaving the Romanian territory when they are in transit etc.

Concerning the applicability of *Akrich judgement*,⁴² the Emergency Ordinance no. 102/2005 says that the family members who are not citizen of the European Union but are holding a valid document attesting the residence on other Member State as a family member of a European Union citizen shall be exempted from the requirement to obtain an entry visa. The border police authorities shall not apply an entry or exit stamp in the passports of these persons.

1.2. Application of Metock judgement

The conclusion of the *Metock judgement*⁴³ is that Directive 2004/38/EC precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive. Secondly, article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that

42 C-109/01.

43 C-127/08.

directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.

The national law of some member states made the right of residence for non-EU family members contingent on them having lived in another EU Member State before they arrived in that state.

The Romanian regulation – Government Emergency Ordinance no.102/2005 – does not require prior lawful residence in another Member State for third country national’s family members. The interpretative arguments are similar as the European Court of Justice used:

- According to the Romanian regulation, the family members who are not citizen of the European Union may *enter the Romanian territory* on the basis of a valid passport and an entry visa.⁴⁴ The family members who are not citizens of the European Union but are holding a valid document attesting the residence in another Member State as a family member of a European Union citizen shall be exempted from the requirement to obtain an entry visa. Therefore can enter into Romania a third-country family member of a European Union citizen with no residence card – and without any previous residence in another Member State, of course, if it complies with the other conditions stated by the law (valid passport and the entry visa, if necessary).
- The documents requested for the issuance of a registration certificate are the national identity document, especially the valid passport, the civil status documents and the residence card of the European Union citizen whom they are joining, if the European Union citizen has been previously registered. Therefore is not necessary the presentation of a registration certificate from another Member State, because the previously mentioned has exhaustive character.

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

According to art. 35 of the Directive, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.⁴⁵

Upon submission of the application, the competent authorities issue to the applicant a certificate, attesting the right of residence, valid until the residence card is granted. The residence card shall be issued within maximum 90 days starting the day the application was submitted.

The competent Romanian authorities do the necessary checks, ascertaining that the conditions for granting the residence are fulfilled, including, if the case may be, the conditions referring to the elements on which can be proved a convenience marriage, in compliance with the provisions of the Government Emergency Ordinance no.194/2002 on aliens’ regime in Romania. The detailed regulation on convenience marriage is in that normative act. The Romanian authorities can use declarations, documents, interviews or other methods to investigate if there is a convenience or genuine marriage (or partnership) situation. These verifications are proportionate and reasonable, with the only objective to identify the possible fraud. In front of the courts there were at least some cases related convenience marriages, but

44 Except those cases when the requirement to obtain an entry visa had been abolished under the conditions of the law.

45 Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

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all of the identifiable cases are related to Emergency Ordinance no.194/2002, and not to the Directive 2004/38 and Emergency Ordinance no.102/2005.

2. ACCESS TO WORK

Regarding the situation of family members of jobseekers there are no specific regulations, the general rules apply.

Chapter VII

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

C-287/05 Hendrix

According to the Court, a special non-contributory benefit may be granted only to persons who are resident in the national territory. However, implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. It is for the national court, which must, so far as possible, interpret the national legislation in conformity with Community law, to take account, in particular, of the fact that the worker in question has maintained all of his economic and social links to the Member State of origin.⁴⁶

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

b. C-527/06 Renneberg

According to the Court, Article 39 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which a Community national who is not resident in the Member State in which he receives all or almost all of his taxable income cannot, for the purposes of determining the basis of assessment of that income in that Member State, deduct negative income relating to a house owned by him and used as a dwelling in another Member State, whereas a resident of the first Member State may deduct such negative income for the purposes of determining the basis of assessment of taxation of his income.

There is no similar deduction rule in the Romanian Fiscal Code.⁴⁷ The deductions are granted only reported at the level of income and the number of supported dependants. Therefore such deduction of the negative income is not possible, even is the house is situated in Romania.

c. C-94/07 Raccanelli

The European Court of Justice, interpreting the concept of ‘worker’, affirmed that a researcher, preparing a doctoral thesis on the basis of a grant contract, can therefore be acknowledged to have the status of worker only if the referring court were to establish the existence of subordination and the payment of remuneration in return for the activities performed. The Court affirmed also that a private-law association must observe the principle of

⁴⁶ *C-287/05 Hendrix*.

⁴⁷ For details: Article 56 from the Romanian Fiscal Code.

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non-discrimination based on nationality in relation to workers within the meaning of Article 39 EC. The eventually discrimination must be established by the national court.

At this moment, similar problema could not be identified in Romanian jurisprudence.

Chapter VIII

Application of Transitional Measures

In 2007, the first membership year, at the beginning Romania applied the principle of the correlation towards the EU member states. Therefore, if a Member State applied restriction in the relation with Romania, similar restrictions were imposed by Romania also. The Romanian Government, on the base of reference of the Work Minister admitted a memorandum about liberalizing the labour market, so the EU citizens do not need work permission to work in Romania.

The decision not to apply any restriction for the EU citizens was discussed in May 2007 with the Commissioner for Employment, Social Affairs and Equal Opportunities. It was not necessary another notification to the European Commission, because Romania decided to eliminate all the restrictions in the field of free movement of the people. The Romanian Work Minister had the opinion that the holding of the restriction would have created tensioned diplomatic relationships. On the other side, this decision to liberalize the labour market maybe can change the decision of those states which apply restrictions toward Romanian citizens.

In conclusion, Romania during 2008 at in the present moment does not apply any transitional measures.

Chapter IX

Miscellaneous

1. Recent studies, reports, legal literature

Gabriel Blaj, *Restrangerea dreptului la libera circulatie a cetatenilor romani in U.E.*, Jurisprudenta nationala si comunitara, Ed. Hamangiu 2009.

Costel Galca (ed.), *Codul european al muncii si securitatii sociale*, Wolters Kluwer 2009.

Catrinciuc Petre, *Regimul juridic al strainilor*, C.H. Beck 2008.

Cristina Popa Nistorescu, Libera circulatie a lucuratorilor in spatiul comunitar, *Revista de Stiinte Juridice*, nr .4/2008.

Adrian Constantin Tatar, *Strainul rezident in Romania*, C.H. Beck 2008.

Alexandru Ticlea, *Tratat de dreptul muncii*, Universul Juridic 2009.

Alexandru Ticlea: *Dreptul securitatii sociale*, Universul Juridic, 2009

An international conference will be held in Oradea, on November 5th -7th, 2009 on Post-Communism and the New European Identity, organized by the Research Centre on Identity and Migration Issues within the Faculty of Political Science and Communication, University of Oradea. The main topics of the conference include such questions as identity and mobility in Europe. The Research Centre on Identity and Migration Issues also publishes the Journal of Identity and Migration Studies.⁴⁸

2. References to national organisation, bodies where citizens can launch complaints for violation of Community law on free movement for workers (apart from SOLVIT centres).

Complaints can be addressed to the competent national authorities, especially to the Ministry of Labour, Family and Social Protection and subordinated authorities, or the Immigration Authority. Beside the national courts, which can give the most effective protection in case of a breach of the law, on the possible problems can be informed also the ombudsman. Due to the relatively reduced number of EU citizens working in Romania, there is no intensive civil activity regarding the violation of Community law on free movement. The increasing importance of free movement issues is shown by the recent Romanian SOLVIT Report (January-June 2009): 35% of the cases were related on recognition of diplomas and professional qualifications, 11% of the cases were social security related issues and 8% residence problems. These are the first three categories of complaints, all the other categories represented are under 3% of the SOLVIT cases.

48 <http://jims.e-migration.ro/>.

Romania comments on the draft report on the free movement of workers in Romania in 2008 – 2009 and the draft European Report on the free movement of workers in Europe in 2008-2009

1. Free Movement of Workers Report 2008-2009 - ROMANIA

Introduction

The enumeration from page 4 containing the rights from which the EU citizens benefit on Romanian territory is limitative and this is not according to the national legislation (art.3.1 from G.E.O. no.102/2005 with further modifications and completions). The correct introductory text before enumeration should be:

“The European Union citizens and their family members who exert the right of free movement and residence on Romanian territory shall benefit from the following rights and freedoms recognized by the Treaty, such as:”

aa) Art. 7(1a) from Directive 2004/38/EC

The report says that “There is no legal definition for dependent and independent activities” which is against the provisions of art.2.2 from G.E.O. no.102/2005 with further modifications and completions: *For this emergency ordinance, the wording dependent activity and independent activity are defined according to art.7 from Law no.571/2003 on Fiscal Code, with further modifications and completions.*

Chapter VI: Members of the worker's family (especially treatment of third-country family members)

a. Residence rights – transposition of Directive 2004/38/EC

aa) General overview pag.23

The report says that the family members who do not have European citizenship should present „*the civil status document attesting the marriage or, if the case, the existence of a family relationship with the European Union citizen, accompanied by a legalized copy in case the document is not issued by the authorities of a member state*”.

The national law stipulates that they should present “the civil status document attesting the marriage or, upon the case, the document attesting the family relationship with the European citizen, according to the conditions mentioned in art.10 paragraph (3)”. This paragraph provides three situations:

- When the document was concluded in a state which is a member of the Hague Convention on 5 October 1961, it has to contain the Apostille;

- When the document was concluded in a state which signed a juridical assistance treaty with Romania, the document is exempted of supplementary formalities;

When the document is not in one of the previous two situations, it has to be legalised.

At page 7 of the Report regarding the Free movement of workers in the period between 2008-2009 in Romania, the last paragraph of section a) alignment aa. within chapter 1, it is mentioned that Emergency Government Ordinance no. 102/2005 concerning the free movement of Member State citizens of the European Union and of the European Economic Area must be updated taking into account the fact that the amendments in the economic area, since the entering into force of the Emergency Government Ordinance no. 44/2008 concerning the carrying out of economic activities by the authorized civilians, individual and family enterprises. We do not agree with this conclusion considering the fact that the provisions of art.15 alignment a) of the Emergency Government Ordinance no. 102/2005 concern the “ license to carry out of independent activities which is issued according to the law”, therefore, the accepting procedure by the Romanian Immigration Office of the documents which are issued by the Registry of Commerce has a legal basis.

At page 10 of the Report regarding the Free movement of workers in the period between 2008-2009 in Romania, within section b of chapter 1, there is a presentation of the regulation regarding the situation of EU citizens who are looking for a job. From the analysis of the provision of Emergency Government Ordinance no. 102/2005 there is no stipulation regarding the establishing of the community worker statute in Romania, the right to stay and the EU citizen statute being the fundament on which the legal construction on free movement of EU citizens in Romania was built. This is why the amendment of Emergency Government Ordinance no. 102/2005 is necessary, the points under discussion which were briefly presented in the Report are valid.

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

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