

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

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Abbreviations

APEH	Hungarian Tax and Financial Control Administration
Constitution	Act XX of 1949 and modified by the Act XXXI of 1989 on the Constitution of the Hungarian Republic
CarA	Act LXXXII of 1991 on motor vehicle tax
CardD	Government Decree No. 17 of 2005, 8 February on the Student Card
ChildA	Act XXXI of 1997 on the Protection of Children and Guardianship
DisabledA	Act XXVI of 1998 on the Rights and Safeguarding of Equal Opportunities of Disabled Persons
EkhoA	Act CXX of 2005 on Simplified Public Contributions
EqualA	Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities
EqualD	Government Decree No. 362 of 2004, 26 December on procedural rules of the Equal Treatment Authority
ETA	Equal Treatment Authority
FamA	Act LXXXIV of 1998 on Support of Families
FeeD	Ministerial Decree of Justice and Law Enforcement No.28 of 2007, 31 May on fees paid by persons being entitled for free movement and residence relating to entry and residence authorisation
FinancD	Decree of the Municipal Affairs Minister No.2 of 2009, 16 January On applying and distribution of state supports in sport sector
FreeA	Act I of 2007 on Free Movement and Right to Residence
FreeD	Government Decree No. 113 of 2007, 24 May implementing the Act I of 2007
FreeMD	Decree of the Minister of Justice and Law Enforcement No. 25 of 2007, 31 May implementing the Act I of 2007 and Government Decree No. 113 of 2007, 24 May
FreeMD	Ministerial Decree of Justice and Law Enforcement No. 25 of 2007, 31 May on executive rules of Act I of 2007 and Act II of 2007
HealthA	Act LXXXIII of 1997 on the Benefits of Compulsory Health Insurance
HighA	Act CXXXIX of 2005 on High-level Education
HouseD	Government Decree No. 12 of 2001, 31 January on the housing-related state subsidies
Labour Code	Act XXII of 1992 (including all amendments)
LandA	Act LV of 1994 on Arable Land
LandD	Government Decree on Acquisition of Real Estate by Foreign Residents
LoanD	Government Decree No. 86 of 2006, 12 April on study loans and on the Study Loan Centre
ManD	Government Decree No. 118 of 2001, 30 June on the registration and operation of agencies for the provision of manpower and private placement agencies
MusD	Government Decree 194 of 2000, 4 November on benefits at museum admission
NKHI	National Office for Research and Technology
OFA	National Employment Foundation
OIN	Office for Immigration and Nationality Affairs (BÁH) under the subordination of the Ministry of Justice and Law Enforcement (IRM)

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PermitD	Decree of the Social and Family Affairs Minister No. 8 of 1999, 10 November On Work Permits Issued to Foreign Nationals in Hungary
PriceA	Act LXXXVII of 2003 on Consumer Price-Supplement
PublicA	Act LXXIX of 1993 Public Education
PuboA	Act XXIII of 1992 on Legal Standing of Public Officials
PubsA	Act XXXIII of 1992 on Legal Standing of Public Servants
QualA	Act C of 2001 on Recognition of Foreign Diplomas and Qualifications
RecipD	Government Decree No. 93 of 2004, 27 April on the rules of labour market reciprocity and the safeguard measure to be applied following the accession of the Republic of Hungary to the European Union
ResD	Government Decree No. 181 of 2007, 6 July on the Accreditation of Research Organisations Receiving Third-country National Researchers and on the Host- ing Agreement
RomD	Government Decree No. 354 of 2006, 23 December on the Transitory rules applicable to free movement of workers by the Republic of Hungary after the Accession of the Republic of Bulgaria and Romania to the European Union
SanitD	Ministerial Decree of Health Care No. 32 of 2007, 27 June on sickness of third-country nationals and persons being entitled to free movement and right to residence endangering public health
ScolD	Government Decree No. 152 of 2005, 2 August on the Scholarships for Pro- moting the Equal Opportunities of Disadvantaged Groups
SocialA	Act III of 1993 on Social Administration and Social Benefits
SportA	Act I of 2004 on Sport
StudD	Government Decree No. 51 of 2007, 26 March on benefits and fees of students in high-level education
TaxA	Act CXVII of 1995 on Personal Income Tax
TaxPA	Act XCII of 2003 on Taxation Procedural Rules
ThirdA	Act II of 2007 on Entry and Residence of Third Country Nationals
ThirdD	Government Decree No. 114 of 2007, 24 May on the implementation of Act II of 2007
TraD1	Government Decree No. 354 of 2006, 23 December on the transitory rules applicable to free movement of workers by the Republic of Hungary after the accession of the Republic of Bulgaria and Romania to the European Union
TraD2	Government Decree No. 355 of 2007, 23 December on the transitory rules applicable to free movement of workers by the Republic of Hungary in respect of persons enjoying the right to free movement and the right of residence
TraD3	Government Decree No. 236 of 2008, 23 September amending the Govern- ment Decree 355 of 2007, 23 December on the transitory rules applicable to free movement of workers by the Republic of Hungary in respect of persons enjoying the right to free movement and the right of residence
TraD4	Government Decree No. 322 of 2008, 29 December amending Government Decree 355 of 2007, 23 December on the transitory rules applicable to free movement of workers by the Republic of Hungary in respect of persons enjoy- ing the right to free movement and the right of residence
TransD	Government Decree No. 85 of 2007, 25 April on advantages in public passen- ger transport

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TWB.A Act LXXIV of 1997 on employment with temporary work book and the simplified payment of public contributions
UnemplA Act IV of 1991 on Job Assistance and Unemployment Benefits

Introduction

During the first half of 2008 there has not been a major change in the labour market situation in general. However, as from November 2008 the Hungarian labour market – along with the worldwide crisis – has been undergoing a step by step decline. In October 2008 the signs of the global crisis were not to be caught. The number of job-seekers was stable and collective redundancies have not been initiated. In November and December, however, the number of job-seekers increased by a total of 53,000 (from 424,000 to 477,000). An interesting addition is given by the trend in collective redundancies. In November 3,090, in December 5,528 employees were subject of these, while in the same period of 2007 it was only 2,693 in November and 720 in December. There is a significant increase. In turn it is important that out of the 5,528 workers 2,000 workers have been collectively fired in the industrially developed Komárom Esztergom region (North West Hungary).¹

On 31 December 2008 the number of Slovak nationals working in Hungary declined to 6358 meaning a 36 % decline. Similarly, the trend of employment by Romanian – and to a very limited extent Bulgarian – nationals showed a dramatic decline in 2008. The number of Romanian nationals was declined by 41 % in 2008, numerically to 15.136 upon 31 December 2008. Two-third of the Romanian nationals (9 853 persons) were employed in sectors where the work permit was issued without the assessment of the labour market. It means that the majority of Romanian nationals performed unskilled work in Hungary (hence for work-permit related jobs no diploma is necessary).

Economic crisis may justify ‘reasonable protectionism in the European Union although free movement and Community preference is a genuine progressive value in the European labour market. However, during the economic depression would enhance prejudices and threats and governments cannot explain why foreign workers are employed. Insufficient crisis management would exclude non-EU nationals from the labour market but only in short term’ – said the rapporteur in the European Parliament.² ‘Nationality of labourer is irrelevant, and our decision on retrenchment depends on performance and wage cost. If retrenchment is necessary, we first terminate contracts with workers employed by manpower companies. Among them the rate of foreigners is much higher’ – summarised the rationale of recent dismissal of Romanian and Slovakian workers by multinational companies.³

Economic recession contributed to political mistrust, so the Prime Minister and the government were removed by a confidential vote in Parliament in April 2009. Due to a constructive non-confidence initiative a new ‘expertise government’ or crisis-managers’ cabinet was immediately set up according to the Constitution. The new government introduces measures making balance in state budget but not relating to free movement of workers. However, re-shaped competences of the authorities and limited social transfers for persons in need may reduce attracting power of labour market in Hungary.

The fully liberalised access rules to the Hungarian labour market were adopted on last days of 2008 that entered into force on 1st January 2009. While in 2008 RecipD and TransD was applicable in a modified version, this whole rather complicated system was finally annulated and all persons under the scope of FreeA (Union citizens and EEA nationals including

1 http://www.afsz.hu/engine.aspx?page=afsz_statisztika_csop_leepites.

2 www.nol.hu 13 February 2009 (Óry Csaba, MP).

3 Financial Director of Flextronics (Vendégmunkások nehéz napjai. *Népszabadság*, 13 February 2009).

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Swiss nationals) can enjoy free access to the Hungarian labour market together with family members regardless of their nationality.

Chapter I

Entry, Residence, Departure

Texts in force

- 2007. évi I. törvény a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról [Act I of 2007 on entry and residence rights of persons being entitled to free movement and right to residence] amended by the Act LXXXII of 2007 (FreeA)
- 113/2007. (V. 24.) Korm. rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény végrehajtásáról [Government Decree No. 113 of 2007, 24 May implementing the Act I of 2007] amended by Government Decree 327 of 2007, 11 November, No. 341 of 2008, 30 December (FreeD)
- 32/2007. (VI. 27.) EüM rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek és a harmadik országbeli állampolgárok magyarországi tartózkodásával összefüggő közegészséget veszélyeztető betegségekről [Ministerial Decree of Health Care No. 32 of 2007, 27 June on diseases of third-country nationals and persons being entitled to free movement and right to residence endangering public health] modified with Government Decree No. 118 of 2008, 8 May that entered into force on 18 May 2008 (SanitD)
- 25/2007. (V. 31.) IRM rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény, valamint a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény végrehajtásáról [Ministerial Decree of Justice and Law Enforcement No. 25 of 2007, 31 May on executive rules of Act I of 2007 and Act II of 2007] amended by the Government Decree No.118 of 2008. 8 May entering into force on 16 May 2008 (FreeMD)
- 28/2007. (V. 31.) IRM rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek, valamint a harmadik országbeli állampolgárok beutazásával és tartózkodásával kapcsolatos eljárások díjáról [Ministerial Decree of Justice and Law Enforcement No.28 of 2007, 31 May on fees paid by persons being entitled for free movement and residence relating to entry and residence authorisation] (FeeD)

A. ENTRY

Entry and residence not exceeding three months

Preconditions of entry regulated by FreeA (Art. 3, 5)

- a) EEA citizens with a valid travel document or personal identity card are entitled to enter the territory of Hungary.
- b) The rules in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (*Schengen Borders Code*) shall also apply to entry. If en-

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try is denied because the entry conditions have not been fulfilled, the border traffic authority shall, upon request of the (very probable) EEA national the opportunity to obtain the necessary documents, or otherwise prove that the entry conditions have been fulfilled, within 72 hours of return being decreed.

- c) An EEA national with a valid travel document or identity card and entering legally, shall have the right of residence for up to 3 months from the date of entry as long as his residence does not become an unreasonable burden on the social assistance system of Hungary.

B. RESIDENCE

Residence exceeding 3 months (Art 6, 9, 10(4), 13, 14(1)):

EEA nationals shall be entitled to residence for more than 3 months if:

- a) the purpose of residence is paid employment;
- b) they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the Republic of Hungary during their period of residence, and have adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law; or
- c) they have been admitted to study at an educational institution falling under the scope of the PublicA and HighA including vocational training and adult education, if the training programme is accredited, and has, at the time of entry, sufficient resources for themselves and their family members not to become a burden on the social assistance system of the Republic of Hungary during their period of residence, and have adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law.

On ceasing paid employment, an EEA national shall retain right of residence as a worker, if s/he

- a) is unable to work due to accident or illness requiring medical treatment;
- b) has become a job-seeker, as defined in separate rules, following the cessation of paid employment; s/he retains their right of residence based on paid employment for as long as they are paid job-seeker support as defined under separate act (6 months), or
- c) is participating in vocational training for performing professional activities at a higher level, providing that he gained the practical experience stipulated for such vocational training during employment.

Leaving territory of Hungary for more than 6 months within one year before obtaining the right of permanent residence means *a waiver the right to residence*. It shall not apply if the reason for absence is compulsory military service or an important reason, with a maximum of twelve months, particularly pregnancy, childbirth, serious illness, study, vocational training or an overseas posting. The *right of residence shall cease* if they no longer fulfil the conditions for the right of residence, or if they are prohibited from entry and residence.

Right to permanent residence (Art. 16-19)

FreeA defines how EEA nationals obtains permanent residence (Art 16-19).

- a) It shall be provided for EEA nationals who have resided legally in the territory of the Republic of Hungary for five years without interruption. The following shall not constitute interruption to residence: residence outside the country of no more than six months per year; absence for compulsory military service; one absence, for an important reason, of a maximum of twelve months, particularly pregnancy, childbirth, serious illness, study, vocational training or an overseas posting. It shall be an interruption of residence if the EEA national stops exercising the right of residence in Hungary (leaving, disappearing).
- b) EEA nationals residing in Hungary for paid employment purposes shall be entitled to permanent residence before the end of the five-year residence period, if:
 1. they have resided in the territory of the Republic of Hungary for more than 3 years from the date of entry, and at the time of ending paid employment have reached the age laid down for entitlement to an old-age pension, or have ceased paid employment in order to take early retirement, assuming that they performed their paid employment in the country in the 12 months prior to retirement;
 2. they have resided in the territory of the Republic of Hungary for more than two years from the date of entry, and gave up paid employment as the result of an accident or illness requiring medical treatment;
 3. their inability to work is the result of an industrial accident or occupational illness entitling them to treatment as defined in separate legislation; or
 4. they have been in paid employment in the territory of Hungary for at least 3 years without interruption, and have subsequently been in paid employment in the territory of another signatory state to the Agreement on EEA, but keep their domicile in the territory of Hungary.The mentioned period of paid employment shall also include time during which the EEA national: qualifies as a job-seeker as defined in separate legislation (UnemplA); or is not in paid employment as the result of accident or illness.
- c) The right of permanent residence shall cease in the event of continuous absence of 2 years or the declaration of a ban on entry and residence.

Documentation proving the right to residence is as follows (Art.21, 24, 26-32):

a) *Registration certificate*: An EEA national, with residence for more than 3 months, shall be obliged to register residence and personal details at the latest by the 93rd day after entry. Documents verifying that the conditions for residence are fulfilled, as defined under separate rules, must be shown or enclosed at the time of registration. Once the conditions given in FreeA are verified, the OIN regional unit shall immediately issue the registration certificate that attests to the fact and date of the registration. The paid employment as purpose of residence shall be certified by a labour contract, property document in a company, entrepreneurship card or other proper way. The minimal monthly income must exceed the lawful minimal pension per month per capita – about 130 € – in the family, or proving assets, real estate or other sources of income, entitlement to social insurance benefits, taking into account the size of the family not to become an unreasonable burden. The study purpose may be proved by enrolment or student status document. In case of ceased employment the EEA national must enter into contact with the regional unit of the OIN proving the condi-

tions for residence exist. Furthermore, the worker status may be certified by an expert opinion issued by an entitled medical institute on limitation/lost his/her work ability, a certificate issued by the labour authority on obtaining a job-seeking allowance and its expiring date, or enrolment to the re/training course together with the certificate on possible length of the training (Section 20-23, 28 of FreeD). The registration certificate shall be invalid if the right of residence has ceased.

b) *Permanent residence card*: it attests to the right of permanent residence of the EEA national. It is issued by the OIN regional unit within 3 months. The permanent residence card shall be invalid if the right of permanent residence ceases.

S/he shall report *his/her first home (address) in Hungary*. For the purposes of issuing an official certificate attesting to the personal identification number and home address, the competent authority shall notify the personal data and address records agency about the personal identification data and address of the EEA national, and also information about the registration certificate or residence card. The local notary shall notify the personal data and address records agency if the registration certificate or residence card is invalid. The EEA national as well as the family members are obliged to report the theft, destruction or loss of their travel document, personal identity card or document proving their right of residence, and also if they find a document believed and reported to be missing. The competent authority (OIN, Police) may issue a search warrant for the document, if the whereabouts of the document are unknown. Moreover, EEA nationals shall be obliged to obtain a new travel document to replace a lost, stolen, destroyed or expired travel document if they do not have a valid personal identity card. An EEA national or family member in residence for more than three months shall be obliged to report with their personal details: the death of a family member living with him/her; name changes; if the death or cause of name change took place outside the country. The EEA national or family members have to present the document verifying his right of residence at the request of the authority empowered to monitor the legality of residence that may be verified in any other acceptable way. (Nationals also are obliged to always carry the ID and show it upon request of the checking authority; its rejection or negligence means a minor offence, and its imposing fine is up to 600 €.) If the EEA national or family member stops exercising the right of residence, he/she shall be obliged to report this to the competent authority.

We have to add that FeeD was modified by the Government Decree No.118 of 2008, 8 May however the relevant fees are stable. For instance, fee for registration card is 1000 HUF (4 €) and for residence/permanent residence card is 1500 HUF (6 € as fee for ID card of nationals). The Government Decree amended the FreeMD in limited extent.

The job seekers' residence

The most relevant provisions can be found in FreeA Art. 6 (1)a, (2), Art.9 (1)b) (2), UnemplA Art 54, 58-59. All EEA nationals shall have the right of residence for a period of longer than three months if they intend to engage in some form of gainful employment. This right of residence shall be applicable for family members of EEA nationals. The Explanatory Report to the Bill (to the FreeA) explains that 'job seekers are considered as persons residing for a purpose of gainful employment. Taking into account the case law of the ECJ the Bill determines no time limit of lawful seeking because only reasonableness is the guiding principle until genuine chance for a job can be proved [*Antonissen*-case, C-292/89].'

An EEA national who is no longer engaged in any gainful employment shall retain his/her right of residence if s/he has registered for the period of eligibility for job-seeking assistance as prescribed in UnemplA. Accordingly, s/he shall be registered upon his/her request if in previous four years s/he had one year period of employment relation, and assistance is available for up to 270 days. While the FreeA regulates on job-seeking assistance in the context of preserved right for residence, the UnemplA provides assistance to private entrepreneur assistance for EEA national, too. On the other side, it considers a person in an active to be a job-seeker who is able and ready to be employed undertaking the co-operation with the Labour Service in job-seeking and to be registered by the Labour Service. This definition shall be implemented on all persons under the ambit of the FreeA (EEA nationals and family members). Also the UnemplA determines that its rules shall be implemented on migrant workers, self-employed (private entrepreneur) persons, students, pensioners and self-sufficient persons and their family members in accordance with the EC law (in particular in job-seeking assistance for EEA nationals, family members and other persons under the Community preferences).

How is a job-seeking position documented? [FreeD (Art 20 (1), 28 (3))]

If the purpose of stay is to engage in gainful employment, the applicant shall supply as proof for a person seeking employment, document to evidence that he/she is actively seeking employment, and there is a probability of entering into gainful employment'. No declaration of support of the family member is required if the EEA national or the Hungarian citizen is engaged in gainful employment.

Upon receipt of any information concerning the termination of gainful employment, in particular from the employer, the EEA national affected shall provide proof for the right of further residence when so requested by the competent OIN regional directorate. Where an EEA national retains his/her right of residence as job-seeker he shall verify compliance with the conditions for residence by a certificate issued by the relevant labour office (employment centre) concerning the payment of job-seeking assistance when requested by the OIN regional directorate. In this case the certificate shall indicate the projected date until which the job-seeking assistance will be provided.

C. DEPARTURE

Departure refers on the following issues (Art. 15(2)-(4), 33-34, 38-48, 64 of FreeA):⁴

- a) If the right of residence ceases, the EEA national must *leave the territory* of the country unless s/he is granted a residence permit under separate legislation. The obligation to leave the country must be fulfilled within 3 months of the decision taking legal effect.
- b) The right of entry and residence can be restricted in accordance with the principle of proportionality and exclusively on the basis of the personal conduct of the individual concerned which represents a genuine, direct and serious danger to any of the fundamental interests of society, particularly public order, public security or public health. Return

⁴ Ministerial Decree of Justice and Law Enforcement No. 27 of 31 May 2007 on alien police detention was modified by the Ministerial Decree No. 51 of 11 December 2007 that entered into force on 1 January 2008. It contains procedural provisions, e.g. claim for compensation of unlawful detention. The Government Decree No. 118 of 8 May 2008 amended the Ministerial Decree of Justice and Law Enforcement No. 26 of 31 May 2007 on deportation provisions since 16 May 2008.

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- and expulsion shall respect non-refoulement (protection against torture, death penalty, persecution).
- c) *Entry and residence is prohibited* if in respect of him/her Hungary has undertaken an international legal obligation to enforce a prohibition of entry and residence; or anyone in respect of whom the Council of the European Union has decided to enforce a prohibition of entry and residence. The authority shall determine the duration of a prohibition of entry and residence up to 3 years in the first instance, which may be extended by a maximum of 3 years on each occasion, if the conditions for it still exist upon the expiry of the prohibition. It must be repealed if the grounds for prohibition no longer exist.
- d) The competent authority may *expel an EEA national or family member* (1-5 years) who:
1. has not fulfilled the obligation to leave the territory of the country by the deadline stipulated;
 2. does not have the right of entry or residence but who has nevertheless referred the competent authority to false information or untrue facts in order to verify a right of entry or residence. The authority in both cases must evaluate the nature and severity of the crime committed; the age and state of health of the individual concerned; the family situation of the individual concerned, and the duration of family relations; the number and age of any children of the individual concerned, and the means and frequency of his/her contact with them; whether there is another state where there is no legal obstacle to the family continuing to live together, taking into account any difficulties the family members might encounter if they were forced to settle in the territory of that state; the financial situation of the individual concerned; the duration of the individual's residence in Hungary; the social and cultural integration of the individual concerned, and the closeness of his links to the country of origin.
 3. at the instigation of the public health authority, on public health grounds if s/he suffers from, could infect with, or is carrying a disease dangerous to public health as defined in separate rules, and does not undergo compulsory treatment for these, unless he contracts, could infect with, or carries the disease after three months have passed from the date of entry;
 4. has stayed legally in the country for less than 10 years and is not a minor (unless expulsion takes place in the interest of the minor), or
 5. has committed an offence and the court imposed the expulsion.

Against the expulsion and prohibition of residence there is a court review with suspensive effect on enforcement. The court shall rule on the application within 8 days of its arrival. The EEA national or family member must also be heard in person at the proceedings if a request for this is made. A hearing in person may be dispensed if the EEA national or family member cannot be summoned at the given address, or has moved to unknown whereabouts. The court may amend the decision. There shall be no further right of appeal against the decision of the court.

- e) An EEA national prohibited from entry and residence at the same time as his/her expulsion as an alien may, after one year has passed since the date of expulsion, request that the prohibition of entry and residence be repealed with reference to a change in his state of health or family situation that justifies his residence in the territory of Hungary. The competent authority shall decide on the application within 3 months. If the competent authority ends the prohibition of entry and residence, it shall see to its repeal.

- f) An EEA national may not leave the territory of Hungary if s/he is under arrest pending criminal proceedings, under house arrest, forbidden from leaving his/her place of residence, in custody, in extradition custody, under arrest pending extradition, under arrest pending handover, under arrest pending temporary handover, or undergoing temporary, compulsory medical treatment. The competent authority shall decide to withhold the travel documents in the cases mentioned. There is no right of appeal against this decision.

The ‘*unreasonable burden*’ as regularly returning exclusive precondition means that an EEA national has not at least the minimal lawful old age pension per month per capita in the family – as the general threshold for social benefit – or has obtained for at least 3 months (continuously or in parts within a calendar year)

- regular social allowance,
- regular age benefit, or
- nursing benefit on the grounds of SocialA.

However, the authority shall evaluate the prior length of residence in the country, length of provided social benefits and reasons for material shortage of the family or the persons in concern (e.g. timely shortage or standard need). (Section 21 and 35 of FreeD) Its amount is really solid but we have to add that all non-nationals (EEA nationals, family members and third country nationals) entering the territory of the country have to prove as minimal source 1000 HUF (4 €) for residence *per entry*⁵ and not per capita per day. It is obviously anachronistic but today is in not in harmony with the ‘social burden rule’ which is applicable per capita. Due to kin-minorities living across the (EU) borders this amount has not been lifted up for years.

Residence of an EEA national shall meet *public health conditions*. The OIN may contact epidemiologic authorities in favour of controlling or defining certain behaviour for family members. According to the SanitD *public health is endangered by the following diseases*, or in being of the pathogen condition of

- Tuberculosis
- HIV-infection⁶
- Lues
- Typhoid or paratyphoid in pathogen condition, or
- Hepatitis B.

If the sanitary authority recognized one of these, this fact is noticed officially to the OIN regional office as a general alien policing rule.

Recent legal literature

Gellérné Lukács, Éva, Munkavállalók szabad mozgása az Európai Unióban – Gondolatok egy 40 éves évfordulóra [Free movement of workers in the European Union– to the 40th anniversary] *Föld-rész*, 2009/1, p. 9-23.

⁵ Section 25 of FreeMD.

⁶ Since the mid-90s human rights organisations have criticized HIV-infection and AIDS as being treated as usual, traditional epidemiological appearances in public law in Hungary, www.tasz.hu.

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- Hajduk, Annamária (ed.), *Esély vagy veszély? Bevándorlás Magyarországra* [Immigration to Hungary: chance or threat?]. DEMOS 2008.
- Pap, András László, *Mozgásszabadság. Alkotmányjogi és nemzetközi jogi alapok* [Freedom of movement – its constitutional and international legal basis], Budapest: L'Harmattan 2009.
- Tóth, Judit, Munkaerőmozgás és az Európai Unió bővítése az átmeneti rendelkezések tükrében [Movement of workers and transitional provisions in the enlarged EU] *Romániai Magyar Jogtudományi Közöny*, 2008/12, p. 5-10.
- Tóth, Judit, Is There a Strategy on the Foreign Labour Force in Hungary?, in *Minorities Research* (A Selection of Studies by Hungarian Authors), Budapest: Lucidus, 2008, No. 10, p. 9-24.
- Tóth, Judit, Közérdek az Európai Bíróság előtt, in: Katalin Szamel (ed.), *Közérdek és közigazgatás* [Public interest in the caselaw of the ECJ], MTA Állam-és Jogtudományi Intézet, Budapest 2008, p. 140-168.

Chapter II Access to Employment

Texts in force

- 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról [Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities] in a consolidated version (EqualA)
- 362/2004. (XII.26.) Kormány rendelet az Egyenlő Bánásmód Hatóság előtti részletes eljárásról [Government Decree No. 362 of 2004, 26 December on procedural rules of the Equal Treatment Authority] that was amended by the Government Decree No. 332 of 2006, 23 December entering into force on 1st January of 2007;
- 2001. évi C. törvény a külföldi bizonyítványok és oklevelek elismeréséről [Act C of 2001 on Recognition of Foreign Diplomas and Qualifications] (QualA),
- 1997. évi LXXIV. törvény az alkalmi munkavállalói könyvvel történő foglalkoztatásról és az ahhoz kapcsolódó közterhek egyszerűsített befizetéséről [Act LXXIV of 1997 on employment with temporary work book and the simplified payment of public contributions]. (TWB.A)
- 1992.évi XXII. törvény a Munka Törvénykönyvéről [Act XXII of 1992 on Labour Code];
- 1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról [Act IV of 1991 on Job Assistance and Unemployment Benefits] (UnemplA)

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT: NON-DISCRIMINATION

One of the main objectives of Regulation 1612/68/EEC is to guarantee the principle of non-discrimination enshrining in particular in Articles 1-4. Pursuant to these objectives, nationals of the Member States and their respective family members, shall, irrespective of their place of residence, have the right to take up an activity as an employed person, and to pursue such activity within the territory of another Member State with the same priority as nationals of that State and in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.

The non-discrimination can be divided into two main pillars: the free access to the Hungarian labour market by EEA nationals and their family members, and the non-discriminative conditions during the recruitment process (including job-offers), the legal employment relationship and in connection with other rights laid down in the Regulation (e.g. access to training in vocational schools, housing, trade union rights). The free access to the Hungarian labour market is subject to limitations in terms of the Act of Accession that is described in detail in Chapter VIII. In this Chapter the focus is on the second aspect of non-discrimination, namely to the conditions surrounding the concrete legal employment relationship.

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The three main pillars of Hungarian law as regards the principle of equal treatment are:

- a) the Constitution (Art.70/A),
- b) the Labour Code,
- c) the EqualA.

There have not been such amendments of these laws during 2008 that affect migrants.

Ad (a): Regardless of accession the constitutional rule-of-law requires respect for equality of citizens in all types of legal conditions, such as the labour issues. Three provisions shall be underlined as relevant guarantees to non-discrimination in employment:

- The Republic of Hungary shall respect *the human rights and civil rights* of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.
- The Republic of Hungary shall ensure the equality of *men and women* in all civil, political, *economic*, social and cultural rights.
- The law shall provide for strict *punishment* of discrimination on the basis of upper restriction. Moreover, the state shall endeavour to implement equal rights for everyone through *measures that create fair opportunities* for all.

The basic law settles down direction, methods of major non-discrimination policy and legislation, Labour Code, Act on Labour Control or Penal Code as well as other provisions, action plans together intending to provide equal access to remunerating work.

Ad (b): The principle of equal treatment is embedded *expressis verbis* in the Labour Code in two main areas. First, the principle of equal treatment is laid down in general terms. Section 5 of the Code states that in connection with employment relations the principle of equal treatment must be strictly observed and any consequence of the breach of the principle of equal treatment shall be properly remedied; the remedy shall not result in any violation of or harm to the rights of another worker.

The Labour Code expressly deals with the equal treatment principle in terms of *remuneration for work*. Already the Constitution – Art. 70/B – requires equality in work.⁷ Art. 142/A (1) of the Labour Code states the principle of equal pay by determining that in respect of the remuneration of employees for the same work or for work to which equal value is attributed, the principle of equal treatment must be observed.⁸ Paragraph (2) states that

‘The equal value of work for the purposes of the principle of equal treatment shall be determined based on the nature of work, its quality and quantity, working conditions, vocational training, physical and intellectual efforts, experience and responsibilities’.⁹

Pursuant to paragraph (4) the wages of employees – whether based on the nature or category of the work or on performance – shall be determined in compliance with the principle of equal treatment as enshrined in Art. 5.

7 (1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession.
(2) *Everyone has the right to equal compensation for equal work, without any discrimination whatsoever.*
(3) All persons who work have the right to an income that corresponds to the amount and quality of work they carry out.

8 This section can be regarded as the implementation of Dir. 75/117/EEC.

9 For the purposes of Subsection (1) ‘wage’ shall mean any remuneration provided to the employee directly or indirectly in cash or kind based on his/her employment.

Ad (c): The personal and institutional scope of the EqualA *also covers private and public labour relations*, thus all definitions of prohibited behaviour (direct/indirect discrimination, segregation, harassment, retorsion, instruction for discriminative action) and sanctions shall be applicable to this part of life. However, Chapter III of the EqualA (Arts. 21-23) determining further specific requirements expressly refers to *employment*. Pursuant to Article 21 it is considered a particular violation of the principle of equal treatment if the employer inflicts direct or indirect negative discrimination upon an employee, especially when the following provisions are made or applied:

- a) access to employment, especially in public job advertisements, hiring, and in the conditions of employment;
- b) a provision made before the establishment of the employment relationship or other relationship related to employment, related to the procedure facilitating the establishment of such a relationship;
- c) establishing and terminating the employment relationship or other relationship related to employment;
- d) relation to any training before or during the work;
- e) determining and providing working conditions;
- f) establishing and providing benefits due on the basis of the employment relationship or other relationship related to work, especially in establishing and providing wages;
- g) relation to membership or participation in employees' organisations;
- h) the promotion system;
- i) the enforcement of liability for damages or disciplinary liability.

The provisions laid down in Article 21 of the EqualA mirror the obligations of a Member State pursuant to Regulation 1612/68/EC. In compliance with the Regulation the EqualA prescribes non-discriminative advertisements and hiring procedures, training, working conditions, membership in certain organisations and increment opportunities.

Employment with temporary work book

A unique instrument of Hungarian labour law falling within the area of atypical employment is the employment with temporary work book (TWB). There have not been changes in the regime during 2008.

The construction stems from 1997 as a possible instrument to legalise in part the shadow economy and rising up economic activity in working ages. The essence of this legal instrument is to provide for a very flexible way of employment for both the employer and the employee to which simplified administrative procedures, reduced labour law consequences and special social security arrangements are attached. The recruitment and dismissal of the employee is easier than in a typical employment relationship, the amount of public contributions and the benefits obtainable from the social security system are also fixed at a reduced level.

Pursuant to the Act a worker possessing a temporary work book is entitled to work a maximum number of 120 days in a calendar year with different employers (but a maximum of 90 days with the same employer). During one month the maximum number of working days can not exceed 15 days. The Act determines both the minimum and maximum salary (first column) to be attributed to this kind of work and also the amount of the payable public

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contributions (taxation and social insurance contribution, second column). The payment of public contributions entitles the worker to in kind health care and health accident benefits, however, health care and maternity cash benefits are excluded. The third column shows the so-called financial basis for pension and unemployment benefits. If the person gets unemployed or reaches pensionable age this income basis will be taken into account instead of his/her salary (similar to the concept of gross wage).

Minimum and maximum salary (HUF/day)	Public contributions (HUF/day)	Basis for pension (HUF/day)
1,800 – 2,399	400	2,700
2,400 – 2,999	700	3,600
3,000 – 3,599	900	4,500
3,600 – 4,600	1,100	5,400

The possibility to apply for a temporary work book is open to non-nationals. Applicants must comply with the provisions of the Labour Code (Art. 72¹⁰) according to which only persons qualifying as workers can apply for the temporary work book. It means that foreign persons who do not need a work permit to enter the labour market are automatically eligible. From 1 January 2008 it encompasses every Union citizen who carries out a regulated occupation (see Chapter VIII for more). These persons can apply for the book with horizontal applicability (Article 1 (2) points a)-b)). Other foreigners can only get the ‘green temporary book’, which entitles them to perform certain types of activities (seasonal work for a maximum period of 60 days per year).

The popularity of employment with TWB has increased in the last years due to the advantages affiliated with it, in particular its flexibility and simplicity of procedure. However, the growing popularity and usage of employment with TWB raises several new questions that are crucial for the legality of this kind of employment. A summary of unsettled legal issues mentions *inter alia* the following: the daily salary is fixed, however, it is not specified whether this involves 8-10-12 hours of work; problem of double employment relationships: is it permissible for the employer to employ the same worker in a typical legal employment relationship while also employing him/her with TWB for a different kind of work? Albeit the usage (validation) of the TWB is really simple, administrative infringements are not rare. These include e.g. working with an empty (not signed) TWB, working without the possession of the TWB (alleging that it was left at home).

Precisely because of these kinds of problems the reform of the TWB was continuously on the agenda in 2008. In November 2008 the Employment Committee of the Hungarian

10 Art 72: (1) All persons entering into an employment relationship as employees must be at least sixteen years of age. (2) Persons of diminished capacity may also enter into an employment relationship without the permission of their legal guardians. (3) For the purposes of employment-related matters, employees under eighteen years of age shall be construed as young workers. (4) Notwithstanding Subsection (1) above, an employment relationship may be entered into by a person of at least fifteen years of age pursuing elementary school, vocational school or secondary school full-time studies during the school vacation period. (5) Young persons under sixteen years of age may enter into an employment relationship only with the consent of their legal guardians. (6) No deviation from the provisions set forth in Subsections (1)-(5) shall be considered valid. (7) Young persons subject to compulsory full-time schooling may be employed by way of derogation from the provisions laid down in Subsections (1) and (4) for the purposes of performance in artistic, sports, modelling or advertising activities upon prior authorization by the competent authority.

Parliament discussed the matter and concluded that – albeit the intention was to combat illegal work – the TWB became one of the most popular means of illegal employment. Driven by this the competent ministry announced that the most problematic economic branches – building industry, tourism and processing industry – will be taken out of the material scope of the Act meaning that the TWB employment will be reserved mostly for minor work (e.g. domestic work). The statistics on issued TWBs and its practice in 2008 have not been published yet.

Assistance by employment agencies

UnemplA regulates the eligibility conditions for labour market services and job assistance subsidies (Chapter 3). Pursuant to Art 13/A the Government Employment Service shall provide services to assist job seekers to find employment, and for employers to find appropriate personnel and in maintaining existing jobs. Labour market services shall include the following:

- a. providing information pertaining to the labour market and employment,
- b. consulting on work, career and employment opportunities, and rehabilitation and local (regional) employment policies,
- c. providing for placement services.

Additionally, job-seekers are also entitled to apply for training assistance or assistance to become an entrepreneur. Employers can also apply for certain assistance: assistance to create new jobs, to employ incapacitated workers, or to employ workers in unconventional employment relationship (part-time, temporary work book). Employers can apply for social security contribution reductions.

Access to the job-seeker services is guaranteed to all persons who are legally entitled to enter the Hungarian labour market (Hungarian nationals, foreign persons possessing an immigration/settlement permit, refugees, EEA and Swiss nationals and their family members). EEA and Swiss nationals are placed on an equal footing with Hungarian nationals, hence they are qualified as ‘job-seeker’ and enjoy this status. The principle of Community preference is also applied, hence EU citizens are entitled to use job-seeker assistance services by the employment agencies regardless of the fact whether they are required to hold a work permit or not. Moreover, employers are entitled to take into account these workers when applying for certain benefits as if they were Hungarian nationals.

It is worth mentioning that there are no statistical data on how many Union citizens took part in active labour market measures. The statistics are built-up according to the sex – age – schooling of the job-seekers but not on the basis of their nationality.

For the consequences of the ITC case see Chapter VII on ECJ cases.

2. LANGUAGE REQUIREMENTS

Article 3 of Reg. 1612/68/EEC declares that language requirements are not *per se* prohibited, only those that are not necessitated by the job at issue. This has been confirmed in the cases

of the ECJ too (*Groener, Angonese*).¹¹ Article 7 (2) b) of the EqualA, in this spirit, lays down that the obligation of equal treatment shall not be complied with if it has a reasonable justification based on a careful and objective deliberation of the concrete legal employment relationship. In case of language skills necessary for a certain job this exemption from the obligation of non-discrimination can be deemed lawful.

Language requirements can be found in Hungarian law in two aspects. First, in the laws regarding recognition of foreign diplomas, and second, in the acts dealing with the legal status of civil servants and public officials (see in Chapter 5). In other world, the private sectors' practice is unknown and not regulated.

In QualA the rules dealing with language requirements are found in Part III on recognition of EEA diplomas of EEA nationals and their family members. Art. 22 (3) defines that the EEA national and family member applicant is only entitled to exercise a regulated profession in Hungary if s/he disposes of the language skills *necessary for the pursuit of the concrete profession*. Art 28 (14) of the Act on the aptitude test states that an aptitude test is a test made by the competent authorities of the host Member State *in Hungarian language* with the aim of assessing the practical and theoretical ability of the applicant to pursue a regulated profession in Hungary. The aptitude test takes into account the fact that the applicant is a qualified professional in the Member State of origin and the test concerns only those abilities which are inevitable in the pursuit of the said profession in Hungary. Moreover, pursuant to Art 38 (5) on the rules applicable in case of free provision of services, the competent authority may require the applicant to evidence that she /he obtained the necessary information on Hungarian laws and ethical rules. Ministerial Decree No.31 of 2004 on the recognition of health care diplomas, in its Article 8, regulates the language requirement in the same spirit. It declares that the competent authority informs the applicant in Hungarian or English language about the professional and ethical rules, the applicable social security laws and the possibilities on learning Hungarian language.

Employers in Hungary are free to offer employment on terms laid down by them. In these cases the degree of necessary language abilities is set by the employer, however, they are required to comply with the case law of the ECJ. Some articles and news prove how competition among professionals may upgrade the level of tests.

Administrative practice

The provisions of the EqualA is implemented through a complain procedure if a violation is supposed. The Equal Treatment Authority (ETA) – inter alia – can act on the basis of an application but *ex officio* as well. ETA was given strong competencies and sanction imposing power. Some procedural rules – fact finding and burden-of proof related procedural provisions – have been amended with effect from January 2007. This amendment meant more or less the final stage of legal approximation. The task foreseen for the next years is the fine-tuning and simplification of the system as regards definitions, exemptions and some procedural rules (see in articles by Gyulavári, Demeter and Ambrus).

11 379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* (1990) ECR-3967, C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA eset* (2000) ECR I-4139.

The ETA publishes regularly its yearly report.¹² The most important decisions of the ETA are also available in English. In the year of 2008 50 percent more applications have been submitted (together 1153) than in 2007. ETA announced the breach of equal treatment in 37 cases the most of which concerned discrimination in employment. For instance, rejection of non-national applicant for a job as public servant was lawful, so ETA could not investigate scrutiny. Complaints submitted to ETA are related neither to nationality nor other relevant discrimination to Union citizens in 2008 but sanction in previous year was successful.¹³

ETA receives complaints for (supposed) discriminative regulation or measures of local self-governments. In these cases it sends a signal to the County Administration Office that is responsible for control of lawful operation of local self-governments (municipals) or to inform claimants how to request a constitutional review on municipal decree. It is a rare case if ETA competence clearly fits these complaints.

Draft legislation

The government intends to modify the rules on TWB.A, due to high rate of misuse disclosed by the Labour Inspection (e.g. there were 117 000 unlawfully employed workers at the yearly controlled 172 000 employers, and the only in harvest the implied fine was 145 million HUF including irregularly employed Slovak workers¹⁴). This plan was hindered by the economic and governmental crisis in 2008. However, the modification is soon probable replacing the TWB paper booklet by an electronic registry system on short-term, atypical employment. Accordingly, before start of work employer has to register worker by mobile phone or internet, and charges of labour have to be paid in advance. Moreover, the yearly time frame of work (maximal 120 days in a calendar year by a private employer or 200 days by a public charity organisation) will be deleted but length of work at the same employer by the same worker will be limited (maximal 15 days per month or 90 days per calendar year) in order to prevent misuse (e.g. not to be employed with TWB for a full-time, regular, open-ended work just because of easier dismissal or lower charges). The other direction of possible modification is upgrade of charges (30 percent of labour cost instead of the actual 20 percent) but providing job-seeking allowance that is not eligible now for TWB holders. Due to high popularity of TWB (there were 1 million TWBs issued up to August 2008) the modification would cause trouble in the labour and social market (70 percent of workers with TWB were registered job-seekers, 11 percent were students or retired persons), in particular in depressive zones.¹⁵ The Taxation Office also is defined combating illegal employment:

12 <http://www.egyenlobanasmod.hu> In English: Report [on the activities of the Equal Treatment Authority in 2007](#).

13 A discriminative exclusion from credit contract service on the ground of citizenship was reported in 2007 report. Romanian national who possessed a permanent residence permit, worked in Hungary since 2004 and owned a flat in Budapest wished to buy a TV on 22 November 2006 and to pay in instalments. The Accord Hungary Co. refused to let him to buy the TV in instalments referring to its Code of Conduct in which it stated that only Hungarian nationals are eligible for instalments. The Office declared that the defendant breached the principle of equal treatment by allowing only Hungarian nationals to buy certain goods in instalments hence it could not put forward a reasonable and objective justification for its practice. The company was fined 1 million HUF (4000 €). Due to this sanction the Code of Conduct was modified deleting the requirement of citizenship. EBH 36/2007.

14 Szüreteltek a munkaügyi ellenőrök. Népszabadság, 25 October 2008.

15 Garai Katalin: Január elsejétől átfogóan módosítják az alkalmi munkavállalást. 6 August 2008, www.ugyvezeto.hu.

fine can be imposed for non-registered employment by employer or/and owner up to 500,000 HUF (2000 €). The average fine amount per case was 107,000 HUF in 2007 and 287,000 HUF in 2008.¹⁶

According to recent information from the Ministry of Finance, the legal changes cannot be introduced before 2010.¹⁷

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- Kiss, György, A magyar munkajog megújulásának esélye az Európai Unió munkaügyi politikájának tükrében [Chances of reform in Hungarian labour law in light of labour law policies of the EU], *Pécsi Munkajogi Közlemények*, 2008/1, p. 7-32.
- Tóth, Norbert, Az egyenlőség elve és a diszkrimináció tilalma a munka világában, in: Balázs Majtényi (ed.) *Lejtős pálya. Antidiszkrimináció és esélyegyenlőség* [Anti-discrimination rules in labour], Budapest: L'Harmattan Kiadó 2009, p. 183-200.

¹⁶ www.apeh.hu (2009) and www.nol.hu (3 January 2009).

¹⁷ <http://www.adoblog.hu/2009/07/14/megszunhet-az-alkalmi-munkavallaloi-konyv> (3 July 2009).

Chapter III

Equality of Treatment on the Basis of Nationality

Texts in force

- 2005. évi CXXXIX. törvény a felsőoktatásról [Act on high-level education (Act CXXXIX of 2005)] (HighA)
- 2005. évi CXX. törvény az egyszerűsített közteherviselési hozzájárulásról [Act CXX of 2005 on simplified public contributions] amended by Act CXXXVI of 2007 on the amendment of tax acts (54-58. §) entering into force 1 January 2008 (EkhoA)
- 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról [Act on Equal Treatment and Promotion of Equal Opportunities] (EqualA)
- 2003.évi XCII. törvény az adózás rendjéről [Act XCII of 2003 on taxation procedural rules] (TaxPA)
- 1995. évi CXVII törvény a személyi jövedelemadóról [Act CXVII of 1995 on personal income tax] (TaxA)
- 1994. évi LV. törvény a termőföldről [Act LV of 1994 on Arable Land, amended by Act XXXVI of 2004 and by Act XXXVI of 2008] (LandA)
- 1992. évi XXII. törvény a Munka Törvénykönyvéről [Act XXII of 1992 on Labour Code]
- 1991. évi LXXXII. tv. a gépjárműadóról [Act LXXXII of 1991 on motor vehicle tax] (CarA)
- 194/2000. (XI. 24.) Korm. rendelet a muzeális intézmények látogatóit megillető kedvezményekről [Government Decree on benefits at museum admission] amended by the Government Decree No. 281 of 2007, 25 October with effect from 1 January 2008 (MusD)
- 7/1996. (I. 18.) Korm. rendelet a külföldiek ingatlanszerzéséről [Government Decree on Acquisition of Real Estate by Foreign Residents] amended by Government Decree 118 of 2008, 8 May (LandD)
- 1993. évi III. törvény a szociális igazgatásról és a szociális ellátásokról [Act on Social Administration and Social Benefits] amended by Act CXXI of 2007, the consolidated text entered into force 1 January 2008 (SocialA)
- 1998.évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról [Act XXVI of 1998 on the Rights and Safeguarding of Equal Opportunities of Disabled Persons] amended by Act CXXI of 2007, the consolidated text entered into force 1 January 2008 (DisabledA)
- 2003.évi LXXXVII. törvény a fogyasztói árkiegészítésről [Act LXXXVII on consumer price-supplement] in a consolidated text (PriceA)
- 12/2001. (I. 31.) Korm. rendelet a lakáscélú állami támogatásokról [Government decree on the housing-related state subsidies] as amended by Government Decree 391 of 2007, 23 December entering into force 1 February 2008 and by Government Decree 165 of 2008, June 27 entering into force 1 July 2008 (HouseD)
- 85/2007. (IV. 25.) Korm. rendelet a közforgalmú személyszállítási utazási kedvezményekről [Government decree on advantages in public passenger transport] TransD

- 17/2005. (II. 8.) Korm. rendelet a diákigazolványról [Government Decree on the Student Card] amended by Government Decree 118 of 2008, 8 May (CardD)
- 35/2000. (XI.30.) BM rendelet a közúti közlekedési igazgatási feladatokról, a közúti közlekedési okmányok kiadásáról és visszavonásáról [Decree of the Minister of the Interior on Road Traffic Administration Tasks and Issuance and Withdrawal of Road Traffic Licenses]
- 51/2007. (III. 26.) Korm. rendelet a felsőoktatásban részt vevő hallgatók juttatásairól és az általuk fizetendő egyes térítésekről [Government Decree on Benefits and Fees of Students in High-level Education] amended by the Government Decree 372 of 2007, 23 December with effect from 1 January 2008 (StudD)
- 86/2006. (IV.12.) Korm. rendelet a Diákhitel Központtól [Government Decree No. 86 of 2006, 12 April on study loans and on the Study Loan Centre] amended by Government Decree No. 10 of 2008, 26 January with effect from 29 January 2008 (LoanD)
- 152/2005. (VIII. 2.) Korm. rendelet az Útravaló Ösztöndíjprogramról [Government Decree on the Scholarships for promoting the equal opportunities of disadvantaged Groups] amended by the Government Decree No. 155 of 2008, 6 June with effect from 9 June 2008 (ScolD)
- 2004.évi I.törvény a sportról [Act I of 2004 on Sport] (SportA)

1. WORKING CONDITIONS

The principle of equal treatment enshrines *expressis verbis* in the Labour Code, it is laid down in general terms in Section 5: in connection with employment relations the principle of equal treatment must be strictly observed and any consequences of the breach of the principle of equal treatment shall be properly remedied; the remedy shall not result in any violation of or harm to the rights of another worker. The Labour Code expressly deals with the equal treatment principle in terms of remuneration for work. Already the Constitution – Art.70/B – requires equality in work.¹⁸ Art. 142/A (1) of the Labour Code states the principle of equal pay by determining that in respect of the remuneration of employees for the same work or for work to which equal value is attributed the principle of equal treatment must be observed.¹⁹ Paragraph (2) states that ‘The equal value of work for the purposes of the principle of equal treatment shall be determined based on the nature of work, its quality and quantity, working conditions, vocational training, physical and intellectual efforts, experience and responsibilities’.²⁰ Pursuant to paragraph (4) the wages of employees – whether based on the nature or category of the work or on performance – shall be determined in compliance with the principle of equal treatment as enshrined in Art. 5.

The importance of working conditions is highlighted also with respect to special groups of workers. Art 75 of the Labour Code lays down that women and young persons shall not be employed in work which may result in detrimental effects with a view to their physical con-

18 (1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession. (2) *Everyone has the right to equal compensation for equal work, without any discrimination whatsoever.* (3) All persons who work have the right to an income that corresponds to the amount and quality of work they carry out.

19 This article can be regarded as the implementation of Dir. 75/117/EEC.

20 For the purposes of Subsection (1) ‘wage’ shall mean any remuneration provided to the employee directly or indirectly in cash or kind based on his/her employment.

dition or development. The particular jobs for which women or young persons may not be employed, or may only perform if specific working conditions are provided or on the basis of a preliminary medical examination, shall be determined by legal regulation. Article 85 of the Labour Code provides that a woman, from the time her pregnancy is diagnosed until her child reaches one year of age, shall be temporarily reassigned to a position suitable for her condition from a medical standpoint, or the working conditions in her existing position shall be modified as appropriate, on the basis of a medical report pertaining to employment. The new position shall be designated upon the employee's approval.

Chapter III of the EqualA (Art. 21-23) expressly refers to employment. Pursuant to Article 21 it is considered a particular violation of the principle of equal treatment if the employer inflicts direct or indirect negative discrimination upon an employee, especially when the following provisions are made or applied in the conditions of employment by:

- establishing and terminating the employment relationship or other relationship related to employment;
- determining and providing working conditions;
- establishing and providing benefits due on the basis of the employment relationship or other relationship related to work, especially in establishing and providing wages;
- the promotion system;
- the enforcement of liability for damages or disciplinary liability.

The principle of equal treatment is not violated if

- a) the discrimination is proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions, or
- b) the discrimination arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.²¹

2. SOCIAL AND TAX ADVANTAGES

Article 7 (2) of Reg. 1612/68/EEC requires Member States to provide for equal treatment in the field of social and tax advantages. There are a series of cases of the ECJ that deal with the definition of social advantages stating that

‘social advantages should be interpreted as meaning all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community’.²²

The ECJ extended the scope of this term not only to the benefits available for the workers themselves, but for their family members too (educational rights, benefits for disabled chil-

²¹ Art. 23 of EqualA.

²² *Even* (207/78) para 22, *Meints* (C-57/96) para 39.

dren, loans etc.).²³ This concept essentially means that Community workers are *quasi* nationals in terms of the aptitude of their entitlements.

Equal treatment in personal income taxation advantages is applicable for all persons whose domicile or centre of economic interests is in Hungary or whose income is coming from Hungary regardless of nationality pursuant to TaxA [Art. 2 (4), 3 (2)]. The taxation procedure also covers on all subjects of taxation including on-line service providers making taxable income from Hungary [TaxPA, Art 3 (1)]. In cases of mixed situations where part of the income comes from another Member State or tax deductions are foreseen adjustments are necessary and not only EC law but other international law commitments (agreements on the avoidance of double taxation, OECD norms) are applicable. Moreover, since the accession to the EU a Government Decree has regulated the execution and legal aid procedure of taxes between the Hungarian and other taxation authorities in Member States.²⁴

However, other issues as regards deductibility from income tax for resident or non-resident tax payers are worth mentioning. The TaxA provides for the possibility of tax refund in several cases (Art. 7). These exemptions are applicable to persons who are liable to submit their income-tax return in Hungary. In this sense no discrimination is foreseen between Hungarian and other Union citizens. Issues relevant from the perspective of free movement are the deductibility of *life insurance and voluntary retirement and sickness insurance fees*.²⁵ The general rule is that payments for and from the voluntary mutual insurance funds (sickness and pension) do not form the basis of personal income tax [Art. 7. (1) points e) and j)]. Consequently no personal income tax shall be payable after them. The core issue is what organisations can qualify as voluntary mutual insurance funds. Act XCVI of 1993 on the voluntary mutual insurance funds defines that a fund can be established by its members only pursuant to the rules of the Act. It means that only funds formed under Hungarian law having a Hungarian seat can fall within its terms. Accordingly, funds formed under laws of other Member States do not fall within this category, namely the payments for and from these funds are out this exception mentioned above. Hence these payments are private and deal with supplementary sickness and pension benefits. It seems that they have a lot in common with the characteristics of the life insurance fees in terms of tax law.

In case of life insurance contracts, deductibility is guaranteed if the contract was concluded with a Hungarian resident company. Hungarian law regulates the deductibility of life insurance contributions paid on the basis of a contract entered into with companies established in Hungary but it excludes the deductibility of life insurance contributions paid to companies not established in Hungary. For this reason not all taxpayers are entitled to tax refund on the basis of contracts. In this regard Hungarian tax law does not provide for tax advantages for every person falling within its jurisdiction thereby not placing them on equal footing. However, as the case *Bachmann* (C-204/90) shows, justification may be given if the cohesion of the applicable tax system explains this discrimination. Taking into account the reasoning laid down in *Bachmann* (and the C-150/04 *Commission v Denmark* case) Hungarian law has several common features with Belgian law in terms of life insurance fees that is why it seems that Hungarian tax law safeguards its coherence when not granting the tax relief for life insurance fees paid to non-resident Hungarian companies. The compatibility of

²³ *Lair* (39/86), *Brown* (197/86), *Reina* (65/81), *Inzirillo* (63/76).

²⁴ Government Decree No. 7 of 22 January 2004.

²⁵ Prior to January 2007 several exemptions derived from payment of credits on immovable property (flat, house) these exemptions have been, however, erased and only ongoing loans may give rise to exemptions.

Hungarian law with EC law on free movement and taxation could, however, in the future would be assessed by the ECJ.

As regards the free movement of persons and companies, the APEH clarified its position on the question of Hungarian dividend tax on dividend received in Slovakia by a Hungarian person owning a company in Slovakia. According to the TaxA persons whose domicile or centre of economic interests is in Hungary shall be liable for tax in Hungary according to the Hungarian rules on taxation even if their revenue from their company (the dividend) is accrued on Slovakia. Domicile and centre of interest is measured on the basis of the 183 days rule [Art. 3 (2) b) of TaxA].²⁶ In effect it means that persons living in Hungary can not fully enjoy the tax benefits existing in other Member States, e.g. in Slovakia. In their case the equal treatment means that they fall within the same rules as other Hungarians and they can not even be positively discriminated.

Hence tax law is not a fully harmonised area of EC law the existence and scope of tax advantages is rather limited but the differing provisions of bilateral agreements are duly taken into account.

Prior to the EU accession, EEA nationals were not entitled to claim entitlements to *social advantages*. Relevant changes occurred firstly upon accession entitling Community workers and their family members to obtain the same benefits as Hungarian nationals. The date of 1 January 2008 is probably the second biggest milestone since the EU accession. Referring to the personal scope of FreeA several social laws and governmental decrees have been amended resulting in a clear extension of the circle of beneficiaries. From 1 January 2008 the former approach based on the requirement of economic activity has been revisited in a number of cases and the concept of Union citizenship has been pronounced.²⁷ In this spirit not only Community workers and their family members but every Union citizen and their family members (including the family members of Hungarian nationals) became entitled to claim social advantages if they are residing lawfully in Hungary and are properly registered. In this sense Hungarian law went *beyond EC law* that does not require full equal treatment for economically inactive persons.

It shall be emphasised, however, that the practical implementation of the concept of social advantages is still very difficult for it concerns potentially the whole body of law, and inequalities might remain hidden for quite a time.

Most importantly, Union citizens and their family members can be entitled to all benefits enshrining in the SocialA. The Act contains both cash and in kind benefits, the most of which are means tested and awarded by the self-governments. Prior to January 2008 the benefits regulated in the SocialA were only granted to Hungarian nationals, refugees, persons with permanent residence permits and Community workers and their family members falling within the ambit of Reg. 1612/68/EEC.²⁸ With effect from 1 January 2008 the reference to Reg. 1612/68/EEC has been deleted from the SocialA and the wording of the personal scope of FreeA is cited.²⁹ According to FreeA every Union citizen (irrespective of

26 The bilateral co-operation and agreement between Slovakia and Hungary is mentioned in this article as a rather negative appearance: the entrepreneur/owner has to pay the taxation on spare money (from lower tax rate) in the country of his/her habitual (regular) residence. Szlovákia, adóparadicsom. Dr. Bócai Levente és Sebestyén Tibor a szlovákiai cégalapításról [Slovakia: a tax-paradise. How to establish companies – by attorney at law] *Ügyvédkalendár* 2007/10:14-15.

27 Most prominently Act CXXI of 2007 on social laws

28 It means that not all persons can avail themselves of Reg. 1408/71/EEEC, but only workers can enjoy social assistance.

29 Art. 100 of FreeA.

economic activity) and their family members qualify as „*entitled persons*’ which is a departure from the concept concentrating on workers only. It means that from 1 January 2008 the personal scope has been extended, from this date not only Community workers and their family member but every Union citizen residing lawfully in Hungary for more than 3 months and being registered in the permanent address register is eligible to apply for social and family benefits. The personal scope has been extended to the family members of Hungarian nationals as well meaning that reverse discrimination in this regard was terminated.

DisabledA aims at mitigating the disadvantages suffered by disabled by enhancing their equal opportunities and by changing the attitude of the society towards disabled issues. The purpose of the DisabledA is to define the rights of people with disabilities, to determine the instruments of asserting such rights, to regulate comprehensive rehabilitative services to be offered to persons with disabilities, and as a result, to ensure an independent living and active involvement in social life for persons with disabilities. The Act has a general personal scope stating that a disabled person is

‘anyone who, to a significant extent or entirely, is not in possession of sensory functions, specifically vision and hearing, of locomotor functions or mental capacity, or who is significantly limited in communication, which constitutes a long-term disadvantage in active participation in social life’.³⁰

The definition of disabled is determined without referring to nationality. However, in one Article that concerning the cash benefit for the disabled (Art 23 on disabled benefit) the DisabledA tightens the general personal scope. Prior to 1 January 2008 the benefits regulated in the DisabledA were only granted to Hungarian nationals, refugees, persons with permanent residence permits and Community workers and their family members falling within the ambit of Reg. 1612/68/EEC.³¹ With effect from 1 January 2008 the reference to Reg. 1612/68/EEC has been deleted from the DisabledA and the wording of the personal scope of FreeA is cited.³² According to FreeA every Union citizens (irrespective of economic activity) and their family members qualify as ‘*entitled persons*’ which is a departure from the concept concentrating on workers only. It means that from 1 January 2008 the personal scope has been extended, from this date not only Community workers and their family member but every Union citizen residing lawfully in Hungary for more than 3 months and being registered in the permanent address register is eligible to apply for the cash benefit for disabled. The personal scope has been extended to the family members of Hungarian nationals as well meaning that reverse discrimination in this regard was terminated.³³ If the beneficiary leaves for another EU Member State the benefit is not withdrawn until benefit is granted in that other Member State. The changing paradigm related to disabled persons and workers, namely from a medicalisation model to a social model based on adaptation to special needs of disabled persons as defined in the 2000/78/EC Directive and the case law of ECJ³⁴ – has not happened in Hungary.

30 DisabledA, Art.4 (a).

31 Art. 23 (2) (a) of the DisabledA.

32 Art. 116 of FreeA.

33 Act CXXI of 2007 (its Art. 65 (1)) changed the personal scope of the Act with effect from 1 January 2008. The reference to Reg. 1612/68/EEC has been deleted and FreeA is cited. It means that from 1 January 2008 the personal scope is again extended, from this date not only Community workers and their family members but every Union citizen residing lawfully in Hungary for more that 3 months is eligible.

34 See *Sonia Chacón Navas* case, C-13/05.

HouseD aims at regulating the subsidies that can be accorded to married couples, families with more children and other persons in need. The subsidy can take the form of state contribution to the price of the house (flat), contribution to the interest payable, beneficial methods of payments etc. Only those can qualify who belong to the personal scope of ‘*supported person*’. Prior to 1 February 2008, pursuant to Article 1 paragraph (4) point 7 of the HouseD ‘supported persons’ were Hungarian nationals and Community workers in terms of Reg. 1612/68/EEC who possess a valid residence permit during their employment relationship. Government Decree No. 391 of 2007, 23 December amended HouseD in the spirit of FreeA. Following from this, as from 1 February 2008 Union citizens and their family members and family members of Hungarian nationals can qualify as supported persons in terms of the Government decree if their residence is lawful and they are registered in the permanent address register.

The new Act IV of 2009 on collateral assurance by the state concerning house loans also provides equal treatment. Art 1(10) entitles Union citizens and family members living in Hungary and having address card are entitled to obtain guaranteed credit or loan for house purchase or lintel credit as in the personal scope of the FreeA.

As regards advantages in public passenger transport TransD grants benefits for certain groups of persons using the inland public transport facilities. The decree gives the following listing for the circles of beneficiaries of advantages in public transport:

- persons given advantage on the basis of age,
- persons given advantage on the basis of being students,
- persons being pensioners,
- job-seekers,
- refugees,
- workers,
- disabled or
- persons travelling in groups.

There are travel fare exemptions or reductions for long-distance and local travel facilities. Transport exemptions or reductions are as a main rule attached to the status of the person not to his/her nationality. For instance, students or job-seekers are entitled to the advantages irrespective of whether they are Hungarian or EEA nationals. TransD contains two exceptions to this rule:³⁵

- In case of persons exceeding 65 years of age. In accordance with FreeA EEA nationals and their family members, family members of Hungarian nationals and persons possessing permanent residence in Hungary being above 65 years of age are horizontally free to travel. Elderly persons not having these nationalities are required to pay. Here, albeit TransD mentions nationality condition, Union citizens and their family members are put on an equal basis with Hungarian nationals.
- It embodies rather a positive discrimination in content. Pursuant to Art. 3 (1) point h) students who qualify as ‘entitled person’ in terms of FreeA – consequently having the nationality of an EEA state (including Hungarian), being family members of those or of Hungarian nationals – *and* who study full time in an EEA state or in Switzerland can avail themselves of the same benefits as students studying in Hungary. This means that if a German student of the Humboldt university comes to Hungary as a tourist she is to en-

³⁵ Both introduced by Government Decree No. 115 of 24 May 2007.

joy the benefits. Equally, if a Hungarian national studies in Paris, when she is at home, she can refer to these benefits as well.

Pursuant to the CardD Hungarian student card is automatically accorded to persons who are students of a public schools or high school that is accredited or recognised in Hungary irrespective of their nationality. According to the CardD the Hungarian Student Card must be applied for, and entitles the holder for travelling only together with the seasonal ticket. These students may travel on unlimited occasions too. PriceA gives a complementary element to the system, it regulates how the state subsidises the service providers for the loss of income resulting from the above-mentioned benefits where no discrimination occurs between Hungarian and EEA nationals.

Scold regulates scholarship possibilities for students and their tutors who are qualified as being severely disadvantaged or lives in a child protection institution. There are scholarships for primary schools, secondary schools and also high-level educational establishments. Pursuant to Article 3 (1) the personal scope of the Decree encompasses both Hungarian and foreign nationals including third-country nationals as well. There is no discrimination based on nationality in accordance with Directive 2004/38/EC. Albeit Scold has been amended during 2008 the equal treatment segment has not been touched upon.

MusD has been amended by Government Decree 281 of 2007, 25 October with effect from 1 January 2008 by which the nationals of the EEA have been put on equal footing with Hungarian nationals. Article 2 (2) lays down the cases of free of charge entries and 50 percent reductions into museums for the nationals of the EEA including Hungarian nationals. It is worth noting that family members are not mentioned in the personal scope of the Government decree.

As regards social advantages a substantial body of law (in form of self-governmental decrees) is created by the local self-governments, for instance on the base of entitlement given in the SocialA. Thereby the personal scope of these rules is of utmost importance hence local entitlements are laid down in these regulations. There are 3200 self-governments in Hungary and therefore a general compliance of these rules can only be presumed but not fully asserted. Moreover, the set of all local self-governments' decrees does not exist, thus a regular survey is not possible.

Summing up, the browsing of Hungarian law shows that Hungarian law clearly provides for the most important benefits attached to the concept of social advantages, namely social assistance, disability benefits, access to state subsidies, transport benefits. It is beyond doubt that the Hungarian legislator is fully aware of the existence of the concept and applies it. The reporter does not exclude the possibility of hidden restrictions that might come to light later.

Accession to non-agricultural land (housing)

LandA contains provisions for the acquisition of ownership title of non-arable lands (housing). Prior to the EU accession EEA nationals were equated with other foreigners in terms of having been subjected to authorisation for the acquisition of non-agricultural lands.³⁶ Act

³⁶ Art. 88 states that foreign legal entities or private individuals may acquire title of ownership to real property not qualifying as arable land, other than through inheritance and with the exception of what is contained in Section 88/A, by authorization from the head of the Budapest or county administration office of competence, in accordance with the location of the property.

XXXVI of 2004 amended the LandA as a result of which the new regime, as from 1 May 2004, provides free access to EU nationals to housing.³⁷ According to the LandA EU nationals, legal persons and unincorporated entities established in any Member State of the EEA or Switzerland may acquire title of ownership of non-agricultural land under the same conditions as Hungarian nationals (without special permission). This free acquisition refers to the permanent, principal place of residence. EEA national is entitled to acquire without permission the non-permanent place of residence (secondary home) estate if s/he has resided continuously and lawfully at least 4 years in Hungary. Otherwise five years from the accession should be awaited (the prohibition expires 1 May 2009). This period shall be proved by the OIN certificate.

There are some procedural requirements which should be met during the transitional period.³⁸ EU nationals shall be able to obtain title of ownership of a property only if they provide guarantees fixed in a private document of full probative force or in a public document that the property is intended to serve as a principal place of residence. EU nationals shall be entitled to acquire only one property under the title of principal place of residence during the 2004-2009 transitional period. The head of office shall be vested with powers to monitor compliance with the provisions contained in LandA in conjunction with the notary of the local self-government and the building authority.³⁹

Impacts of free movement on real estate market are visible due to liberal accession to first or second home. For instance, in the Slovak-Hungarian border zone more and more commuting workers and Slovak nationals have purchased property that upgrades price level of houses in a depressive border zone in Hungary. This comparative attraction of low price level in Hungarian side means awake of aged population in almost inhabited villages by Slovakian people,⁴⁰ especially after the introduction of euro in Slovakia.

However, the practice in co-operative for house handling and keeping proves that there is difference in membership rights between nationals and non-nationals. For instance, in Siófoki Lakásszövetkezet (Co-operative for House Handling) entitles for membership Hungarian nationals. Other natural persons can join to the Co-operative if 's/he is the owner of the flat/apartment that belongs to the building under keeping and handling by the co-operative'.⁴¹ Of course, similar non-equal practice can remain in other context, too.

3. OTHER OBSTACLES FOR FREE MOVEMENT OF WORKERS

There is a provision in the Labour Code that might pose questions that is related to the provision of manpower (munkaerő kölcsönzés). Pursuant to Art. 193/D. of the Labour Code – led by the intention to combat abusing the rules of manpower and referring on Austrian and German experiences⁴² – (1) A placement agency must be a limited liability business association or a non-profit company that is domiciled in Hungary, or a cooperative in respect of employees other than its members; (2) it must satisfy the requirements prescribed in this Act

37 Art. 88/A – 88/D deal with these issues.

38 Hence there are restrictions for the acquisition of secondary homes, a clear distinction must be set in law and in practice between principal and secondary homes.

39 LandA was modified by the Act CIX of 2006 affecting the authority competences.

40 Szlovákiai vevők kalandoznak a határ mentén, MTI, 31 October 2008.

41 Lakásszövetkezeti Közgyűlés 2008/2.sz.határozata, Siófok

42 Explanation made to the Bill by the Government, www.mkogy.hu.

and in other legal regulations and must be registered by the employment centre responsible for the place where the placement agency is established (hereinafter referred to as ‘employment centre’). ManD defines the conditions of registration in a way that it makes necessary a complete new establishment of the company in Hungary (Section 4-5).

The *Webb* case⁴³ of the ECJ states that

‘Article 59 does not preclude a Member State which requires agencies for the provision of manpower to hold a license from requiring a provider of services established in another Member State and pursuing activities on the territory of the first Member State to comply with that condition even if he holds a licence issued by the state in which he is established, provided, however, that in the first place when considering applications for licence and in granting them the Member State in which the service is provided makes no distinction based on the nationality of the provider of his place of establishment, and in the second place that it takes into account the evidence and guarantees already produced by that provider of the services for the pursuit of his activities in the Member State in which he is established’.

Based on the provision of the Labour Code and that of the ManD *a manpower agency (employer) located in another Member State seems to be barred from the possibility to send workers to Hungary without having legally established there*, which might be an obstacle to free movement of workers. However, this question is extremely complicated because of its relationship to the free movement of services topic. Implementation of the new Directive 2008/104/EC on manpower would clarify this relationship.

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

4.1. Frontier workers

In absence of specific regulation the movement of registered EU8 labourers to Hungary is mentioned in Chapter VIII. Furthermore, Hungarian labourers can use the quotas of trainee’s, seasonal and frontier work as defined in bilateral agreements concluded even before accession with Germany (since 1990) and Austria (since 1999). For instance, this quota to Germany in 2008 was 2,000 persons who can be employed in tourism, agriculture and mobile circus or domestic nursing. The yearly quota to Austria was 1,800 persons fully applied. In 2008 the trainee agreement concerned 1,800 persons and the cross-border agreement 1,900 persons.

It is worth mentioning that the word ‘*frontier worker*’ construed in terms of free movement of persons appears only in social law, in effect in FamA. Article 2 d) expressly lays down that the residence condition is waived for frontier workers. If a Union citizen works in Hungary – irrespective of the duration of the work – in a legal employment relationship, s/he will fall within the ambit of Reg. 1408/71/EEC and if s/he resides in another Member State will be exempt from evidencing his/her Hungarian residence. The person will be entitled to claim family benefits as a Community worker for himself and for his family. In this regard, Hungarian law is not as much sophisticated as it would be allowed by the ECJ (*Hartmann* and *Geven*, C-212/05 and C-213/05) because it grants benefits for the workers even if they

43 *Webb* case, 279/80 (1981) ECR 3305).

have no real and sufficiently close links to Hungary. Talks to officials revealed that the cases involving frontier workers are not problematic. The volume of frontier workers claiming family benefits is rather marginal. There are around 35.000 family benefit cases related to EEA nationals among which 1000 affect frontier workers (almost exclusively Romanian and Slovak nationals mirroring the general employment trends).⁴⁴ Compared to the yearly 1.2 million family benefit beneficiaries this means approximately 0.1%. However, it was also mentioned that the concept of entitlements for frontier workers is not acknowledged in every Member States causing inequalities and unjust situations.

Other reflections can be seen in Appendix 1.

4.2. Sportsmen/sportswomen

In the sport sector free movement can be hindered by three main obstacles. The first is the non-acceptance certificates or diplomas. The Government Decree No. 157 of 18 May 2004⁴⁵ regulates the *equivalent qualification* (certificate or diploma) in the field of sport (e.g. qualified or master trainer, human-kineologist, PET) due to internal legal changes in higher education system. Until May 2005 in the internal sport rules of the sport federations had to define the affected sport positions in which these professionals should be employed in accordance with the qualification categories in the Appendix of the Decree. If an applicant is over 50 years old and has at least five year outstanding activity in the given sport branch, s/he can be exempted from obtaining the professional qualification temporarily upon request of the sport federation up to 31 December 2007 (Section 3). This exception is deleted since February 2008. This qualification of sport experts is relevant in the employment (Section 4): all professional sportsman or member of sport organisation have to meet this qualification Decree that shall be implemented 'in accordance with internal rules of the sport federations'. Because nationality requirement of applicant is not defined, this universal requirement of qualification shall be equally applied by EU and non-EU nationals. Until 31 December 2007 each sport federation shall define (Section 5(6)) in each sport field and branch what qualification is considered as sport expert and what position shall be fulfilled by qualified or master trainer. This requirement is relevant in labour authorisation for non-nationals (PermitD).

The second possible repercussion would be the rules of employment and change of employer including provisions on transfer.

Since 1 July 2007 employment of professional athlete and trainer is lawful without labour permit regardless nationality [PermitD Section 7(1)t)]. Legality of exception shall be proved by the employee, e.g. for a labour inspector's checking [Section 7(6)]. Professional athlete shall be *remunerated* exclusively on the base of the Labour Code regardless his nationality according to the SportA. In possession of a racing permit s/he has to conclude on fix-time (close-ended) written *employment contract* with a sport club or association as a labourer with certain specific exceptions as defined in the Act (Art. 8). This racing right is assigned from the athlete to the employer sport organisation that shall be registered by the sport federation on the base of internal rules. This transfer of racing right means a financial compensation for the athlete. Due to termination of employment this racing right returns free

44 Gellérné Lukács, Éva & Gyulavári, Tamás, *Szociálpolitika és foglalkoztatás 199-215. Európai Tükör, Magyarország 5 éve az Európai Unióban*, Különszám, March 2009, p. 202.

45 Amended by the Government Decree No.171 of 1 September 2005 and No. 19 of 5 February 2008.

of charge to the athlete (Art. 9). The sport organisation obtaining this racing right temporarily or permanently may transfer it to another sport club with consent of the athlete who is entitled to get *compensation* from the transferring sport organisation that can obtain a *fee* from the hosting sport organisation. Financial compensation and fee is *consensual* (Art 10) but shall be announced to the sport federation, moreover its 1 percent shall be paid to the sport federation and 4 percent to the fund supporting the training of supplies (Art. 11(3)). If this transfer is not temporarily, a new labour contract shall be concluded.

During validity of employment contract it includes the fixed-time transfer of right for racing to another sport club/association according to a contract. In this case athlete is considered as a posted worker. The SportA provides athletes' free movement as employees. Transfer of racing right can be prepared and managed by commercial agents as a lucrative activity (commission) if s/he is registered at the international at national sport federation. Any other share in transaction costs (beyond the athlete's compensation, commission, fee and sport federation) is invalid. (Art. 11(2))

The third objection would be the nationality quotas or other specific treatments of non-nationals in racing. According to the SportA the *national sport league (federation)* in each branch of sport is entitled

- to regulate the Racing Conditions (e.g. of national championship),
- to regulate the Code on Transferring,
- to register the racing rights of athletes and clubs,
- to issue or reject the racing licence, authorisation 'for *Hungarian [national] athletes* participating on race held abroad and for *foreign [national] athletes* participating on race held in Hungary' (Art. 22). However, *there are no quotas of non-national athletes defined in public legal rules.*

Consequently, we can give answer on obstacles if we survey all home rules adopted by each sport federation on racing and transfer of athletes. Three examples on internal regulations and racing preconditions determined by sport unions (leagues, alliances) how these (in)compatible with equal treatment:

- the Hungarian Football League published the racing requirements and conditions in the season of 2008-2009. Accordingly, 'participation of players as EU citizens and citizens from the party states of Cotonou Treaty enjoying the equal treatment at national championship is not limited. The maximal number of other foreign players is five who are playing in the same match on the ground. The list of states whose nationals shall be equally treated with Union nationals as well as the states in the ambit the Cotonou Treaty the League shall publish until 31 May 2008 taking into account the information sheet of the Ministry of Foreign Affairs.' Due to absence of announcement or publication an inquiry was address to the League. It confessed that it made decisions upon request of clubs whether non-national player belongs to the preferred circle or not.⁴⁶
- the Racing Statute of National Badminton League (2008) requires that foreign sportsman is entitled to race in a team championship, if s/he is furnished with a national league's allowance to race. Only Hungarian national is eligible for race in national select team. The maximal number of foreigners per team is two in a team championship.⁴⁷

⁴⁶ Information from EU-Direct and Balogh Lidia (27 April 2009).

⁴⁷ The Badminton League includes 50 sport clubs. All internal regulations (Statute, Racing Provisions, Disciplinary Rules, etc.) were adopted in 2006-2008. See further www.badminton.hu and information in a report made by Dr. Réka Józsa (14 May 2009).

- according to the Racing Statute of the Hungarian Athletic League (2005) only Hungarian national is eligible for race in national select team, and the maximal number of non-national per club in a race is one athlete. However ‘*there is differentiation between national and EEA citizens*’ - said the president.⁴⁸

Further information can be read in Appendix 2.

4.3. The Maritime sector

In brief, there was no change in this domain of legislation. According to qualification and requirements of obtaining certificate for captains, nationality and language knowledge means the unequal treatment. For instance, examination obtaining the certificate shall be taken in Hungarian with some exceptions.⁴⁹ The Act XLII of 2000 on trafficking rules on water was modified in 2006⁵⁰ deleting the precondition of Hungarian nationality for internal water or sea ship captain or first officer [Art. 34 (3)]. It means that EEA nationals in these positions enjoy equal treatment. The case law of ECJ⁵¹ appointed how nationality precondition can be lawfully preserved in accordance with public law. Taking into account the ECJ interpretation, nationality as precondition was deleted, and the executive provisions provide transposition of 2005/45/EC Directive and 2001/25/EC Directives. Accordingly the qualification of captains follows the requirements as determined by the STCW Code and EMSA. Since 1 January 2007 these amendments provides equal treatment for EEA nationals.⁵²

4.4. Researchers/artists

As a main rule *researchers* of EEA nationality and their family members are granted free access to the Hungarian labour market in accordance with the rules described in Chapter 8. Hence research activities are subject to a diploma and pursuant Government Decree TraD2 regulated professions are exempted from work permit, no authorisation is needed. Pursuant to the general administrative rules employers are obliged to report the competent labour centre the employment of EEA nationals and their family members.

The rules on non-EEA nationals remained unchanged. Non-EEA nationals can only avail themselves of the possibilities laid down in PermitD. Very importantly, the general provisions of PermitD explicitly deal with researchers. As a main rule, a foreigner does not need a work permit if the duration of the research activity (that is not defined in the Decree) does not exceed 5 working days (Art. 7 (1) m). Moreover, the work permit shall be issued without

48 The Hungarian Athletic Alliance includes 113 sport clubs. All internal regulations (Statute, Racing Provisions, Disciplinary Rules, etc.) were adopted in 2005-2007. See further in a report made by Dr. Réka Józsa (14 May 2009).

49 Applicant for certificate on Danube-lines shall take exam in specific terminology in Russian or German language (see the International Treaty on Danube) and for certificate on sea-lines in English.

50 Act CX of 2006 is entering into force on 22 December 2006.

51 C-47/02 and C-405/01 on the base of Art 39 (4) of the Treaty.

52 Act LXXIX of 2003, Ministerial Decree on nautical qualifications No. 15 of 27 April 2001 that was amended by Economic and Trafficking Ministerial Decrees No. 93 and 95 of 27 December 2006. In addition, the Seafarers' Training, Certification and Watchkeeping Code was published by the Economic and Trafficking Ministerial Decree No. 41 of 28 June 2006 as point of reference on qualification.

the assessment of the labour market if an internationally recognised foreigner wishes to perform research activity for a high-level educational establishment or a research institution. With effect from 1 January 2006 Hungarian law contains a special piece of legislation for most of the artists active in Hungary, the EkhoA amended by the Act CXXVI of 2007 from 1 January 2008 also as regards EEA nationals. The new provisions benefit EEA nationals paying their social insurance contributions in other EU Member States.

EkhoA exempt *artists* from the general rules on taxation and payment of social security contributions and gives them the opportunity to opt for the payment of a fixed-rate public contribution that is less and financially more beneficial than the general system. Implicitly, the reduced rate of public contributions results at the same time in reduced level of social security benefits.

The Act covers inter alia the following categories of persons: editor, journalist, writer, actor, artist in fine arts, handicrafts and circus, puppet artist, musician and folk-musician, director, cameraman, photographer, dancer, singer, choreographer, designer. They fall within the ambit of the Act if they realize an income reaching the yearly minimum wage but not exceeding HUF 25 million (ca. 83,000 €) from the enumerated artistic activities. A person meeting the requirements of the Act is entitled but not obliged to make a declaration and register as an ekho-payer. In 2008 the employer or mandator is to pay 20 percent of social security contributions while the artist is to pay 15 percent ekho. The ekho contains 9.5 percent tax and 3.9 percent of pension while 1.6 percent of health care social insurance contributions. The beneficial nature of the ekho is to be understood in light of the general tax and social security contributions rates, namely the obligation of the employer to pay social security contributions being 29 percent while the tax and social security contribution load of workers is 18-36 percent tax and 15.5 percent social security contributions. The payment of the ekho entitles the artist to obtain in kind health care and accidental health care services (excluding cash benefits like sick-pay or maternity benefits), accident annuity and pension. The ekho does not cover unemployment benefits. The basis of the pension amounts to 50 percent of the yearly income.

In 2008 the APEH in a circular clarified the scope of the Ekho. It made clear that the beneficial taxation cannot be coupled with other taxation benefits.⁵³ It also published a simplified registration form.⁵⁴

The nationals of the EEA are entitled to opt for the ekho on the same footing as Hungarian nationals if they work in Hungary. Prior to 1 January 2008 an EEA national who was insured in another EEA Member State and performed the artistic activity only temporarily in Hungary, was obliged to pay taxes and social security contributions in the country of origin. However, with the new provisions of the EkhoA entering into force 1 January 2008 EEA nationals became entitled to choose the payment of ekho also in those cases when their social insurance obligations arose in other EU Member States. It means that an EEA national can pay the beneficial 9.5 percent tax in Hungary even if s/he is not insured in Hungary in terms of social security.

It is worth mentioning that only EEA nationals are eligible to apply for the Ekho but their family members are excluded.

53 2008/4. Adózási kérdés (ekho választása mellett nem alkalmazható a START-kártyás kedvezmény) [Ekho and START Card cannot be applied for simultaneously], 14072/5/2007, AEÉ 2008/1.

54 APEH tájékoztató az egyszerűsített közteherviselési hozzájárulás választásához alkalmazandó nyilatkozat mintájáról. [Form for the notification of Ekho] 2008/3. Adó és Ellenőrzési Értesítő.

As from 1 January 2008 the rules on access to employment of EEA nationals and their family members became simple and transparent. As a main rule artists of EEA nationality and their family members are granted free access to the Hungarian labour market. Hence artistic occupations are subject to a diploma and pursuant TraD2 regulated professions are exempted from work permit, no authorisation is needed. Pursuant to the general administrative rules employers are obliged to report the competent labour centre the employment of EEA nationals and their family members.

The rules on non-EEA nationals remained unchanged. Non-EEA nationals can only avail themselves of the possibilities laid down in PermitD. Very importantly, the general provisions of PermitD explicitly deal with artists. As a main rule, a foreigner does not need a work permit if the duration of the artistic activity (that is not defined in the Decree) does not exceed five working days. Moreover, the work permit shall be issued without the assessment of the labour market if an internationally recognised foreigner wishes to perform artistic activity for a public community institution or a registered film-shooting company employs the foreigner.

Act XXIII of 1993 lays down the rules on tendering operation of the National Cultural Fund that is a completely state-financed fund. The Fund aims at preserving and generating universal and national cultural assets. Its tenders are regularly published and the Act does not contain any restrictions on nationality.

4.5. Access to study grants

The HighA entered into force on 1 March 2006. It re-structured the prior law. However the rights of migrants were regulated in the same non-discriminative spirit as before. The HighA has been amended once in 2008 but this amendment did not touch upon the provisions related to the rights of migrants.

High-level education encompasses universities and colleges founded or recognised by the state in the territory of the Republic of Hungary the list of which can be found in the Annex 1 of the HighA. Hungarian high-level education institutions shall be registered and approved by the Registration Authority and recognised by the Hungarian Parliament (Art. 12), while foreign high-level education establishments can be operational in Hungary if they are registered (Art. 116). Only recognised/registered high-level educational institutions are entitled to normative financing from the state – among others – on the basis of the number of students who are qualified as ‘*students taking part in education financed by the state*’. Private Hungarian institutions enter into an agreement with the state on the number of their ‘students taking part in education financed by the state’ (Art. 129). Foreign institutions can be entitled to normative financing only on the basis of international agreement.

Full time students are entitled to several benefits. They can use the services of the institution (library, laboratory etc.) apply for scholarships, college-accommodation, social maintenance payments, contribution to the costs of their books, to their accommodation and further benefits enumerated in the Statutes of the institutions, for instance, student card (Art. 46). Students, as a main rule, pay attendance fees and other costs (Art. 49).

There are special provisions for non-Hungarian national students (Art. 39 and Art. 119). Pursuant to the HighA EEA nationals and their family members are entitled to enter into Hungarian high-level education under the same conditions as Hungarian nationals [Art. 39 (1) a)]. As a main rule, all the provisions of the HighA shall be applicable, EEA nationals

and their family members can be entitled to social maintenance payments and other study grants, contribution to their books and accommodation (Art. 119 (2) b). This rule is in full compliance with Art. 24 (2) of Directive 2004/38/EC which confirms that Member States are not obliged to provide for social maintenance payments for student before they obtain long-term resident status. It means that for a certain period of time the Member State is exempted. However, after obtaining the long-term resident status this obligation comes into force. Hungarian law benefits in general EEA nationals and their family members irrespective of the duration of their stay. Hungarian law also takes account of the *Grzelczyk* case,⁵⁵ according to which in certain cases a Member State is obliged to endure that a legally resident student faces financial difficulties.

The HighA [Art. 119 (3)] expressly delegates the power to the Government to regulate the issue of foreign students that is laid down by StudD. Article 7 enumerates the benefits which are generally available for students. Articles 26-28 regulate the system of supports payable to foreign nationals who study in Hungary. Section 28 (2) of the StudD stipulates that persons falling within the scope of the FreeA (EEA nationals and their family members included) shall be treated on an equal footing with Hungarian nationals as regards rights and obligations in terms of fees and benefits.

LoanD aims at providing for long-term and subsidized study loan construction for students in high-level education. The Study Loan Centre is responsible for granting the loan to the student who meets the requirements laid down in the Decree. The following categories form the personal scope: Hungarian nationals, refugees, persons with permanent residence permits, and in turn, pursuant to Article 3 (1) (b) ba) EEA nationals who exercise an economic activity are entitled to apply for the study loan, moreover, pursuant to Article 3 (1) (b) bb) family members of EEA nationals who exercise an economic activity can also apply. Finally, persons who are entitled to permanent residence in terms of the FreeA can apply (Art. 3 (1) (b) bd).

The Hungarian rule is in compliance with Article 24 (2) of Directive 2004/38/EC according to which Member States shall not be obliged, prior to the acquisition of the right of permanent residence, to grant students loans to persons other than workers, self employed persons, persons who retain such status and members of their families. The Hungarian rule meets the provisions of the Directive as regards workers and self-employed and with respect to family members. Moreover, the Decree refers to persons with permanent residence permit in terms of EC law.

Summing up, EEA nationals and their family members are placed on equal footing with Hungarian nationals as regards access to vocational training and to the benefits available under Hungarian law. The enjoyment of rights is not dependent upon the worker or self-employed status, moreover, not only long-term resident but every persons studying in a high-level educational establishment can qualify. Hungarian law is more beneficial than EC law. The system of study loans is in full compliance with EC law as well. Both EEA national workers and self-employed and their family members, and persons having the right of permanent residence can apply for the study loan. There are no residence conditions either.

55 C-184/99 *Rudy Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain-la Neuve* (2001) ECR I-6193.

Administrative practice

The Office for Equal Treatment is responsible for claims in which persons avail themselves of the breach of equal treatment laid down both in the Constitution and in the EqualA. During 2008 the Office did not publish any decision connected to a breach of the nationality condition.⁵⁶ A personal interview with the President of the Office revealed that there were no cases based on nationality between the unpublished cases either, the year of 2008 was dominated by a majority of ethnic discrimination cases.

The issue of beneficial parking (free of charge or for a reduced fee) in the districts of Budapest and bigger cities is still on the agenda. Several complaints were made also in 2008 the essence of which was that only cars possessing a Hungarian licence plate number could obtain the stickers entitling the owner to the free of charge or reduced costs parking. Usually the self-governmental decrees regulating beneficial parking in the distinct areas of the self-governments' competence lay down that the owner has to fulfil the payment of motor vehicle tax or has to be exempted from this obligation in order to become entitled to claim beneficial parking. In Hungary the administration of motor vehicle tax is the task of the self-governments and the tax partially belongs to the self-government. According to Act LXXXII of 1991 on motor vehicle tax [Article 1 (1)] only motor vehicles having an inland licence plate fall within the ambit of the Act except if these are lorries or trucks. Lorries registered in one of the Member States of the EU are also exempt. It means that automobiles for private or official use registered in other Member States (hence these are not subject to motor vehicle tax in Hungary) are not qualified for beneficial parking but only lorries used by a business organisation having the seat or branch office in Hungary (but these rarely need to park in the city).

The saga of the German national *Michael Graeme* (beginning in 2005 and continued in 2006/2007) ended. To recall the facts of the case: Mr Graeme worked 7 years in Hungary, lived (and still lives) continuously in Harkány (one of the most well-known spas of Hungary is situated there) and wanted to use the benefits provided for the local inhabitants of Harkány when accessing the spa. According to the rules of admittance at the spa Hungarian nationals living officially and permanently in Harkány are entitled to a reduction of 50 percent on the basis of a special card. Michael Graeme's application for the card embodying the reduction was refused by the Harkány self-government, consequently he was forced to pay full price when using the services of the spa.⁵⁷ He submitted an appeal to the Equal Treatment Authority claiming that his rights to equal treatment were breached.

The Equal Treatment Authority passed its decision on the 15th of May 2006 stating that the admittance rules of the spa and related practice are contrary to the principle of equal

56 www.egyenlobanasmodhatosag.hu. During 2007 the Office published a decision in which the breach of equal treatment was embodied by a nationality condition. In fact a Romanian national who possessed a permanent residence permit, worked in Hungary since 2004 and owned a flat in Budapest, wished to buy a TV on 22.11.2006 and to pay in instalments. The Accord Hungary company refused to let him buy the TV in instalments referring to its code of conduct in which it stated that only Hungarian nationals are eligible for instalments. The Office declared that the defendant breached the principle of equal treatment by allowing only Hungarian nationals to buy certain goods in instalments; hence, it could not put forward a reasonable and objective justification for its practice. The company was fined 1 million HUF (4,000 EUR). It is worth noting that the code of conduct excluded not only third country nationals (Romania has not yet joined the EU at the time of the breach) but EEA nationals as well, favouring only Hungarian nationals. Case: EBH/56/13/2007. Available only in Hungarian (1 May 2008).

57 <http://index.hu/politika/belfold/harkany0612/?print>.

treatment and obliged the Harkány self-government to make an end to this conduct. However, the self-government appealed against the decision with the Capital Court of Budapest.

The Capital Court⁵⁸ laid down in its final decision that the Harkány self-government did not breach Hungarian law and set aside the decision of the Equal Treatment Authority. We conducted a personal interview with the notary of Harkány and received the judgement as well. The Capital Court analysed the legal situation and stated that the application of Mr Graeme was rejected not because he was a German national but because he was not permanently living in Harkány. Albeit Mr Graeme possessed a residence permit for 5 year validity and was registered in Harkány pursuant to the Act LXVI of 1992 on registration of personal data and address, the Capital Court did not equalise his situation with a Hungarian national living for long in Harkány. The Capital Court emphasised that Mr Graeme was permanently living in Leipzig (Germany) and it is impossible to have two permanent addresses at the same time. The Capital Court concluded that the principle of equal treatment was not breached thereby repealed the decision of the Equal Treatment Authority. Based on legal grounds the regular appeal against this decision is excluded. However, this case draws the attention to weak implementation of EqualA and ECJ references by the court. Moreover, there is a disturbance in applicability of residence card/registration certificate of a Union citizen/family member because these terms are absent in numerous laws, such as in the Act LXVI of 1992 on registration of personal data and address.

The rate of awareness on what to do in case of discrimination, violation of equal treatment or harassment by employer is growing in Hungary. While the ratio of respondents on knowing rights and forum of remedy was 31 in 2006, it was 39 in 2008.⁵⁹

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58 Fővárosi Bíróság, 8 K 33.297/2006/5.

59 Eurobarometer survey www.egyenlobanasmod.hu and www.hvg.hu (July 2008).

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Chapter IV

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

Texts in force

- 1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek támogatásáról [Act IV of 1991 on job assistance and unemployment benefit] (UnemplA)
- 1993. évi III. törvény a szociális igazgatásról és a szociális ellátásokról [Act III of 1993 on social administration and social benefits] (SocialA)
- 1997. évi XXXI. törvény a gyermekek védelméről és a gyámságról [Act XXXI of 1997 on the protection of children and guardianship] (ChildA)
- 1997. évi LXXXIII. törvény a kötelező egészségbiztosítási ellátásairól [Act LXXXIII of 1997 on the benefits of compulsory health insurance] (HealthA)
- 1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségéről [Act XXVI of 1998 on the rights and safeguarding of equal opportunities of Disabled Persons] (DisabledA)
- 1998. évi LXXXVI törvény a családok támogatásáról [Act LXXXIV of 1998 on the support of families] (FamA)

Relationship

The interconnection between Reg. 1408/71/EEC and Reg. 1612/68/EEC has always been clear-cut in Hungarian law. Upon accession and prior to 1 January 2008 benefits deriving from the free movement of persons were due mostly only to Community workers and their family members, while benefits arising specifically from social security coordination gave rights for persons falling within the ambit of Reg. 1408/71/EEC. Based on this distinction social insurance and universal benefits were to be enjoyed by insured workers (also civil/public servants), self-employed, students and their family members while social assistance benefits and other social and tax advantages (in due terms of Article 7 of Reg. 1612/68/EEC) could have been claimed by workers only. The articles of Reg. 1612/68/EEC and Reg. 1408/71/EEC together with the related case law have been implemented in the level of secondary law resulting in a structured legal approach. The regulations explicitly appeared in the texts of the relevant laws.

The concept of special, non-contributory benefits – which are on the borderline of social assistance, but at the same time connected to the insurance-based or to the universal benefits – has also been implemented.⁶⁰ Article 20 of the Act of Accession, Annex II, point 2 on the free movement of persons contains the necessary changes in the annexes of Reg. 1408/71/EEC due to EU accession. Pursuant to this three Hungarian benefits belong to the category of special non-contributory benefits: invalidity annuity, non-contributory old-age allowance and transport allowance for the disabled persons.

By 1 July 2007 a rather remarkable change has taken place. FreeA entered into force – serving the transposition of Dir. 2004/38/EC – and laid down clearly that the beneficiaries of

⁶⁰ It is noteworthy that Hungarian law did not know this term before and, during the accession preparations, the benefits suitable to this category should have been defined.

free movement rights are from now on Union citizens and not only Community workers. During 2007 and most importantly upon 1 January 2008 this change was followed by numerous legal amendments in the social field (see also other Chapters of this Report). Most importantly, the references to Reg. 1612/68/EEC have been deleted and the wording has been changed to ‘*persons being entitled to exercise the right to free movement*’.⁶¹ This encompasses workers, self-employed, students and also economically inactive persons if they are residing in Hungary with the aim of permanent living. It means the extension of rights to every Union citizen in the social sphere. This change influenced the interrelationship between Reg. 1612/68/EC and Reg. 1408/71/EEC.

Reference to Reg. 1408/71/EEC can be found in Hungarian law but no reference has been kept for Reg. 1612/68/EEC. Union citizens and their family members in terms of FreeA are entitled to all family benefits which encompass birth grant, family allowance, child home care allowance, child raising support, regular and irregular child protection support. This category of persons is entitled to social benefits, including protection of disabled. Only insured persons – in terms of Reg. 1408/71/EEC – can claim the sickness and maternity benefits and disability benefits. Finally, Union citizens and their family members can qualify as unemployed and are entitled to unemployment benefits. Last but not least, old-age and invalidity benefits are also due.

Now, Union citizenship suffices to be eligible for social benefits if requirements are met and the aim of permanent living is shown properly. If – in addition to being a Union citizen – somebody also qualifies as insured, s/he can claim the benefits related to the insured status in accordance with Reg. 1408/71/EEC. The application of Union citizenship in the sense put forward above has a territorial limit – persons can enjoy rights while they are resided in Hungary – as well as the application of Reg. 1408/71/EEC follows the principle of exportability. That is why the reference to this regulation is a striking necessity and will not be deleted, and that is why this is though important which benefit belongs to its field of application.

Cases which would tackle the interrelationship between Reg. 1408/71/EEC and Dir. 2004/38/EC has not yet been revealed.

It shall be emphasized that Hungary belongs to the group of a few Member States that already implemented the *Kohll and Decker* case law⁶² – including Vanbraekel and Watts – giving the right to insured persons to go to another EEA Member State without prior approval and to get non-hospital treatment subject to reimbursement according to Hungarian tariffs (that is much below those states).

There has been some public debate on certain ECJ cases in Hungary – e.g. *Röckler* that was cited by women who worked for organs of the EU but after that were not economically active in Hungary – however, no legislative steps have been undertaken in this regard. The new regulation (883/2004/EC) that will enter into force soon will largely solve these kinds of problems.

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

62 Article 27 of HealthA.

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Chapter V

Employment in the Public Sector

Texts in force

- 1997. évi LXVII. törvény a bírák jogállásáról és javadalmazásáról [Act LXVII of 1997 on legal standing of judges and their earnings]
- 1994. évi LXXX. törvény az ügyészségi szolgálati viszonyról és az ügyészségi adatkezelésről [Act LXXX of 1994 on services of public prosecutor office and data storage] amended by the Act I of 2007
- 2001. évi LVIII. törvény a Magyar Nemzeti Bankról [Act LVIII of 2001 on the National Bank of Hungary] in a consolidated version
- 1997. évi LXVIII. törvény az igazságügyi alkalmazottak szolgálati viszonyáról [Act LXVIII of 1997 on service of members in administration of justice] modified by the Act XXIX of 2004 and Act I of 2007
- 1996. évi I. törvény a rádiózásról és a televíziózásról [Act I of 1996 on Radio and Television Broadcasting]
- 1992. évi XXXIII. törvény a közalkalmazottak jogállásáról [Act XXXIII of 1992 on legal standing of public servants] (PubsA)
- 1992. évi XXIII. törvény a köztisztviselők jogállásáról [Act XXIII of 1992 on legal standing of public officials] amended by the Act I of 2007 (PuboA)
- 1996. évi XLIII. törvény a fegyveres szervek hivatásos állományú tagjainak szolgálati viszonyáról [Act XLIII of 1996 on working position of officers in law enforcement]

1. ACCESS TO THE PUBLIC SECTOR

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

The public sector can be divided into the following categories in accordance with laws:

a. Elected positions defined by public law

Certain positions shall be fulfilled by exclusively by Hungarian national. For instance, member of the *Constitutional Court*,⁶³ mayor or chair of county municipal.⁶⁴ Each of them is regulated in separate acts requiring directly or indirectly (for instance, in case of the member of National Auditor Office the Parliament is entitled to elect the proper, qualified person regardless even his nationality). According to the Act on National Bank of Hungary, the member of the *Monetary Council and Inspectoral Board* shall be a Hungarian national.⁶⁵ The public sector covers on the independent body controlling the publicly financed radio and television broadcasting. The Act on Radio and Television Broadcasting regulates the tasks, responsibilities of programming services if the broadcaster has its corporate domicile in Hungary. Although before accession the Act was amended taking into account harmonisa-

63 Act XXXII of 1989 on the Constitutional Court, Art. 5.

64 Act XX of 1949, Art. 71.

65 Act LVIII of 2001 on Hungarian National Bank, Art. 49, 52/A(5).

tion, the task and component of the *National Radio and Television Board* has not changed. It shall protect and promote the freedom of speech by helping broadcasters to appear on the market, by breaking down any information monopolies and preventing the creation of new ones, by protecting the independence of broadcasters, too. It pays attention to the enforcement of the constitutional principles of the freedom of the press and shall inform Parliament thereof. The Board and its members are only subject to the law, and cannot be instructed relating to their decision or activity (Art. 31). This approach may explain why the Board's office consists of civil servants. Moreover, the membership in the Board requires Hungarian citizenship beyond proper qualification, clean criminal record and at least five years' professional experience.⁶⁶ The Parliament elects the Board members upon party group proposals (Art. 34). The executive manager of the *National Press Corporation* and representatives of the owner and founder (the Parliament) shall be appointed by the President of the Republic only a national with clean criminal record, proper decree and at least five years practice.⁶⁷ There is no reason to maintain these market-positions for nationals although the Act intends to define some public services provided by the Corporation (MTI).

b. Administration of justice (court, public prosecutor office) has its own regulation on employment

Accession to employment in administration of justice (judge, administrator, expert in judicial/forensic sciences, protocol writer, typist, physical worker) the basis requirement is to be a national in possession of voting right, clean criminal record and defined qualification. Certain exceptions are regulated in the Act in favour of EEA nationals and their family members defined in the Section 11 of 1612/1968/EC Regulation.

1. An EEA national and his/her family members belonging to the personal scope of the FreeA is employable as typist or physical worker at the Public Prosecutor Office, if s/he has basic qualification, has *Hungarian language knowledge* which is necessary to work in the given position, has a clean criminal record. This exception cannot be implemented for a leading and confidential position.⁶⁸ Moreover, only a Hungarian national may be appointed as judge at court,⁶⁹ public prosecutor, drafter, secretary and investigator at the prosecutor's office.⁷⁰
2. Furthermore, an EEA nationals and his/her family members belonging to the personal scope of the FreeA is employable as typist, physical worker, expert of justice and candidate for expert – with exception of protocol writer and editor at company court – at court administration, if s/he is in possession of a proper Hungarian language knowledge that is necessary to the given position.⁷¹

66 The following activities shall be regarded in particular as professional experience: information service, programme editing and making, broadcasting, telecommunications, frequency management, as well as the technical, legal, administrative, economic, cultural, scientific and public opinion survey activities related thereto. Art 34 (1) of Act I of 1996.

67 Act CXXVII of 1996, Art. 6, 18.

68 Act LXXX of 1994 on public prosecutors' legal status and data protection in Public Prosecutor Office, Art. 82 (2) as amended by the FreeA in Art. 82.

69 Act LXVII of 1997 on legal standing and remuneration of judges, Art. 3.

70 Act LXXX of 1994 on public prosecutors' legal status and data protection in Public Prosecutor Office, Art. 14, 79.

71 Act LXVIII of 1997 on legal standing of workers in administration of justice, Art. 11 (3) amended by the FreeA.

Thus the key position means implementation on power of justice (such as judge, member of tribunal, public prosecutor) shall belong to nationals together with their assistance in a wide circle. The amendment entering into force on 1st July 2007 only changed rather the terminology (EEA nationals and family members was replaced by persons ambit the FreeA).

c. Public servants

It means a collective term providing workers for all kinds of publicly financed institutions (e.g. at public schools, hospitals, universities) on the base of PubsA and decrees on ministerial branches. *There is no nationality requirement* in general preconditions of employment.

However, the Act on legal standing of public servants provides a wide manoeuvring room for supervising ministers of the given sector of the public services. The Art. 20 (2) entitles the minister to define further pre-conditions to conclude a public servant contract beyond the requirements of the Act. In this way the minister (in a decision, circular letter or in decree) may determine *working positions* in which applicant is to be a Hungarian national with clean criminal record in full age. Without definition of specific task or protected public interest this entitlement is problematic, and seems to violate the constitutional rule-of-law. The consequence of appointment in absent of pre-conditions (such as Hungarian citizenship) means invalidity of contract on employment (Art.10 (1) of the Act). According to the recent modification public servant's position shall be fulfilled by a competition procedure. The minister is also entitled to define specific requirements in application and in contract making beyond the general conditions by law (e.g. working practice to the given position and exemption from the probationary period). (Art 20/B and 20/A(5)) The purpose of the last modification of PubsA was to make the public service sector more competitive and transparent through the public tenders of jobs.⁷² Moreover, all public servants determined by law shall take regularly declaration on assets since 2007.

Numerous ministerial decrees were issued that were amended maintaining the requirement of *Hungarian nationality*, as follows:

- High-level leaders (e.g. director of public financed institutions under the supervision of minister, director of an institution appointed by the local municipal) and heading position of public servants *in the field of industry, commerce and tourism* shall be Hungarian nationals.⁷³ This precondition was deleted in May 2008.⁷⁴
- High-level leaders and heading position of public servants (e.g. director, deputy-director of National Institute of Sport Supplies, Olympic Centre, institute director appointed by the municipal) in the field of *physical education and sport* shall be Hungarian nationals.⁷⁵ This was also deleted in December 2008.⁷⁶
- Public servant in position of security or asset-guard of *archives and public collections* (museum) must be a Hungarian national unless the minister of culture and public education exempts him/her.⁷⁷ This acceptance is totally discretionary, there are no substantial preconditions.

72 Government Decree No. 388 of 23 December 2007 on details how to publish the public servants' jobs and put those to the homepage of the Government Personnel Directorate.

73 Government Decree No. 44 of 12 March 1997 on executive rules of the Act XXXIII of 1992 in the organisations in industry, trade and tourism, Section 2 (1)-(3).

74 Government Decree No.118 of 8 May 2008, entered into force on 16 May 2008.

75 Government Decree No. 89 of 8 June 1994, Section 3(1).

76 Government Decree No. 325 of 29 December 2008, entered into force on 1 January 2009.

77 Government Decree No. 150 of 20 November 1992, Section 2 (2).

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- Contract of public servant employment in all public institutions, organs under the *supervision of the minister of the interior (law enforcement)* requires proving the proper Hungarian language knowledge depending on the given task, unless the minister upon request of local leader of the unit may issue an acceptance. Further on, the minister determines the institutions/organs in an appendix of the decree in which only Hungarian nationals shall be employed if ‘public order, investigation of crime, border control, catastrophe-management, protection of data and migration interests requires it.’⁷⁸ This technique on legislation is tricky: the concrete position or task is not clearly defined but time to time, upon initiative of the unit leader the minister evaluates the required interest and type of the organ during exclusion process. However, in Section 2 the Decree determines only Hungarian nationals can be employed as administrators, security-technician, night watchman, captain and member in security guard with gun, receptionist, gatekeeper, preparation in duty, communication and telephone-technician at *National Catastrophe-Management Directorate* and its all units including the Training Centre.
- Unless the minister of Justice allows exception, public servant employment in *penological institutions* (prison-guard, service-man in prison system) shall be a Hungarian national. As in other cases, the grounds of acceptance or rejection by the minister are not regulated in a wide discretion power given to the minister.⁷⁹
- Top leaders in public financed *institutions belong to the minister of national heritage* shall be Hungarian nationals, such as director in National Administration on Ancient Monuments.⁸⁰ Its precondition was ceased in December 2008.⁸¹
- Hungarian citizenship is required for public servants employed at Headquarters of Customs Police and units under its supervision, and at Information Service Centre of the Ministry of Finance – if the position is out of a physical job.⁸² Nationality requirement was deleted in December 2008.⁸³
- Public servants employed in *each unit of National Defence* shall be Hungarian nationals. Upon request of the commander of the given unit (director, admiral, air-raid) the minister or the hierarchical high leader of defence may give acceptance.⁸⁴ The grounds of decision and types of position are not defined at all. However, the recent amendment maintains nationality precondition in all jobs that shall be fulfilled after national security checking with exception in jobs at Defence Security Service, and in other positions the Hungarian language (without determination its level or fluency) is required as alternative precondition.⁸⁵

78 Ministerial Decree of the Interior No. 62 of 7 November 1997, Appendix 5 (Headquarters of Police and Units of Police, Police Academy, high-school of police education, Protection Service of Law Enforcement, Office of Immigration and Nationality Affairs and its reception centres, National Catastrophe-Management Directorate and its training centre).

79 Ministerial Decree of the Justice No.7 of 9 March 1993 on executive rules of the Act XXXIII of 1993 on public servants’ legal standing in penology institutions, Section 2.

80 Ministerial Decree of Environment Protection and Regional Development No. 5 of 7 February 1993, Section 2.

81 Ministerial Decree of Public Education and Culture No. 37 of 31 December 2008, entered into force on 1 January 2009.

82 Ministerial Decree of Finance No. 17 of 18 June 1993 on executive rules of the Act XXXIII of 1992 in organisations under the supervision of the MF, Section 2 (2).

83 Ministerial Decree of Finance No. 50 of 31 December 2008, entered into force on 1 January 2009.

84 Ministerial Decree of Defence No. 25 of 25 November 1992 on certain issues of public servants’ legal standing employed in Defence, Section 3.

85 Ministerial Decree of Defence No. 27 of 31 December 2008, entered into force on 1 January 2009.

d. Public officials

It is also a collective term of employees working at various authorities implementing the *public power at local (municipal) and national level*. According to the recent amendment the public official shall be a national with clean criminal record, at least medium level education (clerk) or a diploma (in all decision-making position) and applicant has to take a successful entry exam.⁸⁶ Moreover, for a stronger transparency and anti-corruption efforts, in certain confidential and leading positions a declaration on assets and a security checking on the whole family of the applicant is necessary.⁸⁷

While the nationality is a general requirement, persons under the personal scope of FreeA and ‘nationals of party states of the European Social Charter’⁸⁸ can be employed as clerks (e.g. file manager) out of leading or confidential position, if the applicant has – beyond the upper defined, usual requirements – Hungarian language knowledge which is necessary to work in the given position. (Art. 7 (8)) This amendment as an exception means a more liberal regulation using another terminology (instead of EEA nationals and family members it refers back to persons with right to free movement) entering into force on 15 July 2007.⁸⁹

PuboA outlines⁹⁰ and the government decree determines time to time the precise circle of the scope of state organs in which the implementation is in full or in absence of specific provisions is obligatory.

e. Officers

This general term covers on members of *police, national security services, professionals of defence, border-guard, catastrophe-management, emergency-management, customs, fire brigades and officers in penology institutes*. This is a wide and gradually extending group being entitled to use coercive measures. In general applicant for employment in officer position has to be full age but below 35, and he/she shall have a standard residence in Hungary, clean criminal record, qualification as defined in the given position by law, Hungarian citizenship and confirmation by the security checking. (Art.37) This rationale appears in regulation on students and lecturers of military and law enforcement high education. For instance, director of National Defence University shall be a national.⁹¹ Similarly, professional and contractual worker in defence – with clean criminal record, determined qualification and health conditions and permanent residence in Hungary – shall be a national. For this reason,

86 Art. 7(1) of PuboA, and its Annex 6.

87 Its circle is regulated in ministerial decrees, such as 3 of 17 February 2004 by the Defence Minister, 5 of 13 February 2007 by the Defence Minister, 19 of 9 April 2003 by the Minister of Economy and Transport, 2 of 14 March 2006 by the Minister of Foreign Affairs. The ‘sensitive working positions’ for making regular declaration of assets of the public servants will determined by the Government (Art 79 of PuboA).

88 The revised Charter (1996) is published by the Act VI of 2009.

89 Act LXXXIII of 2007.

90 PuboA shall be implemented at Prime Minister’s Office, ministries, national authorities and their regional, territorial units, National Investigation Office, County Public Administration Offices, mayor offices, public inspector offices. Moreover, if not regulated otherwise in specific rules, it shall be implemented at officials in the office of the State President, Parliament, Ombudsman, Constitutional Court, Audit Office, Council of Public Procurement, National Agency of Arable Land Management, Body of Radio and Television Broadcasting, Economic Competition Authority, Secretariat of Hungarian Academy of Sciences and National Telecommunication Authority (Art 1).

91 Act XLV of 1996 on legal standing of students, lecturers and leaders of defence and law enforcement high education institutions, Art. 11(1).

the legal relation is terminated in case of ceasing nationality or acquisition of another nationality.⁹²

Further requirement is determined of applicants joining the police and civil security services.

- In possession of multiple nationality employment at any police unit may be allowed only by the minister of the interior/law enforcement. (Art 258 (6))
- The minister supervising the civil security services is entitled to allow exceptionally for applicant to be employed if he/she has multiple nationality. (Art.284 (2))

1.2. Language requirement

As regards public servants, the knowledge of Hungarian language is not expressly required. However, in case of public servants belonging to law enforcement sector the ‘*proper level of Hungarian language knowledge that is needed to his/her working task*’ is required for employment. Furthermore, upon request of the responsible unit leader the minister of justice is entitled to exempt the applicant the Hungarian language knowledge.⁹³

Public officials shall be Hungarian national which inherently presumes the knowledge of Hungarian language. It is indirectly evidenced by Art. 7 (2) of PuboA which says that career starters must possess foreign language skills – English, German or French – which also presumes that Hungarian language skills are present. As an exception, Art. 7 (8) declares that a public official might be a persons in personal scope of FreeA, but only if the (clerk’s) work at issue is not confidential and the person possesses *the Hungarian language* skills necessary to perform the tasks. In case of public officials the knowledge of Hungarian language is not expressly required, either. However, Art. 74 declares that the public official is entitled to wage-supplement if he regularly uses a foreign language besides Hungarian. This means that the knowledge of Hungarian language is evident.

Despite of the ongoing preparatory works on reform in public administration and management have neglected to determine the level of (Hungarian) language skills to which task or to regulate how to make an objective test of ‘necessary knowledge’ to the given task. (The main emphases are on capacity and efficiency, e-government and interoperability of public service management.)

The recent modification in PuboA introduced the public administration competition exam (Art. 10/C) since 2010. In 2008-2009 a preparatory is going on how to develop curricula, examination and procedure for all applicants.⁹⁴ The successful examination will be the precondition of accession to public authority staff and to be appointed as leader (e.g. head of unit). This examination taken in Hungarian inherently contains a linguistic barrier for non-native applicants although a clerk and other technical staff member can be an EEA national. It is not clear how language knowledge that is necessary to the given job and entry competition exam relates to each other, what will be the required level and how it would be tested.

92 Act XCV of 2001 on legal standing of professional and contractual soldiers in defence, Art 41(1), 62(1).

93 Internal Ministerial Decree 62 of 1997, 7 November on executive rules to the PubsA in the field of law enforcement.

94 www.kszk.hu.

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

Recruitment, recognition of diplomas and professional experience

Essentially the issue in the *Burbaud* case is that, according to French law, only those persons can acquire a *stage* (post-secondary probation time in the public service) who successfully pass the entrance exam for and in the aftermath go through the training of the ÉNSP. Those who pass the final examination (for which there is no any formal document) obtain a permanent appointment as civil servant to the hospital public service. Apparently, those who pass the entrance exam to the ÉNSP are already civil servants (this is a form of recruitment), and they get a permanent status at the end of the training. (These posts are not necessarily qualified as an exemption in terms of Art. 39 (4) of the Treaty of Rome.) The first problematic issue in the main proceeding was whether this final examination can be regarded as a diploma within a meaning of Dir. 89/48/EEC. The ECJ declared that this final exam confirms that the person has successfully completed a post-secondary course that is why it can be regarded as a diploma (Section 1(a) of Dir. 89/48/EC). In effect the judgement declares that persons (French or EEA nationals) holding diplomas acquired in other EEA Member States can require to have their diplomas mutually recognised. However, a second problem arises, namely how to channel persons holding an equivalent diploma from another Member State into this system. According to France, these persons have to pass the entrance exam, because that is the selection (competition) part, and after that they are exempted (in full or in part) from the training by an opinion of a committee. The ECJ acknowledged the importance of the entrance examination by selecting the candidates, however pointed out, that this exam checks skills of graduated students and not the acquired qualifications of professionals as in a usual recruitment process. Taking this special feature into account, the ECJ stated that the method proposed by France is liable to detract nationals of other Member States who already pursuing a profession and is therefore liable to be an obstacle to free movement of persons.⁹⁵ The ECJ also pointed out that a kind of selection process might be worked out for such situations, similar to what is called the *du tour extérieur*, but that shall be proportional and appropriate.

It is apparent that the ruling is important only for those Member State that have similar systems or training methods. It shall be emphasised at the outset, that *Hungary will introduce a similar entry exam for applicants of public officials only in 2010*. Accordingly, Hungarian law does not envisage any such kind of recruitment or selection process in the course of which a post-graduate candidate is in a preliminary civil servant status. It seems that Hungary belongs to the majority of the Member States in this regard⁹⁶ but in the near future it can change in a segment that has been rather exceptionally open for EEA nationals and family members.

It has to be added, however, that there is a scholarship construction in Hungary for students studying in high-level education, on the basis of which the administrative body wishing to employ the selected students enters into a contract with the student with a view of at least one year long employment after the completion of the studies. However, these students are not qualified as civil servants but trainees and their status is determined only in the course of the actual employment.

⁹⁵ Paras 100-101.

⁹⁶ Network on the Free Movement of Workers in the EU in 2002-2003, p. 17.

Transparency of recruitment in the public sector is improved due to more advertisement of vacancies in home pages of the given authority and the central portal of the Prime Minister's Office.

There are neither specific provisions on recognition of diplomas and certificates beyond the general rules (QualA), nor on recognition of professional experience in recruitment and professional advantages procedure in public sector. The existing provisions only determine the minimal qualification to the given task, working or leading positions.⁹⁷ We can conclude from these provisions the following:

- The required certificate or qualification shall be provided, exception is not allowed.⁹⁸ If there is an extraordinary case (e.g. a totally new qualification is introduced, thus a period of toleration is regulated).
- Nomination of qualifications or certificates is based on the nomenclature and structure of Hungarian vocational training and high degrees.⁹⁹ There is no reference on 'equivalent' qualification obtained out of Hungary. Naturally, the recognition rules are applicable (in particular for public servants).
- There are no provisions how to evaluate or accept working experiences abroad.¹⁰⁰

However, a case¹⁰¹ proves how the courts interpret the professional experience in public sector. A plaintiff's action in law was submitted for rejection of a job due to absence of two years minimal professional experience in public administration although he had experiences spending long years as police officer. The non-accepting judgement refers on specific legal commitments of police officers, regardless the general character of police that belongs to the public administration system. The judgement rendered the professional experience requirement in a really tight way, literally as Act on Public Officials defined.

During the launched reform of the public sector and administration in 2006, in the first phase a more competition oriented assessment system has been introduced for all increments of civil servants. Until 2009 a new system for access to the public sector will be introduced. The newly defined rules will aim at honouring the applicants' different abilities (professional, language, communication skills) including former employment relationships.

2. WORKING CONDITIONS

Recognition of professional experience for the purpose of determining the working conditions (e.g. salary; grade) have not been developed. A case by case recognition is the most probable, in particular for public servants fulfilling burning vacancies in public health, tourism or social care. Reform of public administration is delays by the crisis and preservation of jobs are the focus of the trade unions. For this reason a more receptive rules on (foreign) workers are not possible in near future.

97 For instance, Government Decree No. 9 of 3 February 1995 on qualification of public officials. It covers local self-governments, public administrative offices at country level and central administration.

98 Section 6 of Government Decree No. 9 of 1995, 3 February clearly bans exceptions.

99 For instance, Interior Ministerial Decree 25 of 6 May 2005 on nomination of working tasks

100 If there are specific rules on a given task (e.g. Architect in Chief employed in the Metropolitan Municipal), they define the minimal working and heading experience, without any reference to the Hungarian settlement management and administration (Section 2-4).

101 *Bírósági Határozatok* [periodical of published cases of the Supreme Court] 1488/2006.

Recent legal literature

Gajduschek, György, *Közzszolgálat. A magyar közigazgatás személyi állománya és személyzeti rendszere az empirikus adatok tükrében*, Kormányzati Személyügyi Szolgáltató és Közigazgatási Képzési Központ Regionális Operatív Program 3.1.1, Budapest 2008.

Horváth, István, Actual questions of public service labour law. Legislative recommendations in Hungary, *Pécsi Munkajogi Közlemények*, 2008, Vol. 1, No. 2, p. 7-27.

Horváth, István, Merre tovább?! Javaslatok egy új magyar közzszolgálati szabályozás megalapozásához, *Közzzjogi Szemle*, 2008/2, p. 33-41.

Horváth, István, Public service labour law. Questions of today and legislative recommendations, *Annales*, Budapest 2008/49, p. 259-283.

Chapter VI

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

Texts in force

- 2007. évi I. törvény a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról [Act I of 2007 on entry and residence rights of persons being entitled to free movement and right to residence] amended by the Act LXXXII of 2007 (FreeA)
- 113/2007. (V. 24.) Korm. rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény végrehajtásáról [Government Decree No. 113 of 2007, 24 May implementing the Act I of 2007] amended by Government Decree 327 of 2007, 11 November, No. 341 of 2008, 30 December (FreeD)
- 32/2007. (VI. 27.) EüM rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek és a harmadik országbeli állampolgárok magyarországi tartózkodásával összefüggő közegészséget veszélyeztető betegségekről [Ministerial Decree of Health Care No. 32 of 2007, 27 June on diseases of third-country nationals and persons being entitled to free movement and right to residence endangering public health] modified with Government Decree No. 118 of 2008, 8 May that entered into force on 18 May 2008 (SanitD)
- 25/2007. (V. 31.) IRM rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény, valamint a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény végrehajtásáról [Ministerial Decree of Justice and Law Enforcement No. 25 of 2007, 31 May on executive rules of Act I of 2007 and Act II of 2007] amended by the Government Decree No.118 of 2008. 8 May entering into force on 16 May 2008 (FreeMD)
- 28/2007. (V. 31.) IRM rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek, valamint a harmadik országbeli állampolgárok beutazásával és tartózkodásával kapcsolatos eljárások díjáról [Ministerial Decree of Justice and Law Enforcement No.28 of 2007, 31 May on fees paid by persons being entitled for free movement and residence relating to entry and residence authorisation] (FeeD)
- 2005. évi CXXXIX. törvény a felsőoktatásról [Act CXXXIX of 2005 on high-level education] (HighA)
- 2005. évi CXX. törvény az egyszerűsített közteherviselési hozzájárulásról [Act CXX of 2005 on simplified public contributions] (EkhoA) amended by Act CXXXVI of 2007 on the amendment of tax acts (54-58. §) entering into force on 1 January 2008.
- 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról [Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities] (EqualA)
- 2003.évi XCII. törvény az adózás rendjéről [Act XCII of 2003 on taxation procedural rules] (TaxPA)
- 1995. évi CXVII törvény a személyi jövedelemadóról [Act CXVII of 1995 on personal income tax] (TaxA)

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- 1994. évi LV. törvény a termőföldről [Act LV of 1994 on Arable Land, amended by Act XXXVI of 2004] as amended by Act XXXVI. of 2008. (LandA)
- 1992. évi XXII. törvény a Munka Törvénykönyvéről [Act XXII of 1992 on Labour Code]
- 1991. évi LXXXII. törvény a gépjárműadóról [Act LXXXII of 1991 on motor vehicle tax] (CarA)
- 1992. évi XXIII. törvény a köztisztviselők jogállásáról [Act XXIII. of 1992 on the Legal Standing of Public Officials] (PuboA)
- 1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról [Act IV of 1991 on Job Assistance and Unemployment Benefits] (UnemplA)
- 8/1999. (XI.10.) SZCSM rendelet a külföldiek magyarországi foglalkoztatásának engedélyezéséről [Ministerial Decree on foreign labourers' authorisation on employment] (all amendments included) (PermitD)
- 51/2007. (III. 26.) Korm. rendelet a felsőoktatásban részt vevő hallgatók juttatásairól és az általuk fizetendő egyes térítésekről [Government Decree No. 51 of 2007, 26 March on benefits and fees of students in high-level education] (StudD)
- 194/2000. (XI. 24.) Korm. rendelet a muzeális intézmények látogatóit megillető kedvezményekről [Government Decree on benefits at museum admission] (MusD) amended by the Government Decree 281 of 2007, 25 October with effect from 1 January 2008.
- 7/1996. (I. 18.) Korm. rendelet a külföldiek ingatlanszerzéséről [Government Decree No.7 of 1996, 18 January on Acquisition of Real Estate by Foreign Residents] amended by Government Decree 118 of 2008, 8 May (LandD)
- 1993. évi III. törvény a szociális igazgatásról és a szociális ellátásokról [Act on Social Administration and Social Benefits] as amended by Act CXXI of 2007, the consolidated text entered into force 1 January 2008 (SocialA)
- 1998.évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról [Act XXVI of 1998 on the Rights and Safeguarding of Equal Opportunities of Disabled Persons] as amended by Act CXXI of 2007, the consolidated text entered into force 1 January 2008 (DisabledA),
- 2003.évi LXXXVII. törvény a fogyasztói árkiegészítésről [Act LXXXVII on consumer price-supplement] in a consolidated text (PriceA),
- 12/2001. (I. 31.) Korm. rendelet a lakáscélú állami támogatásokról [Government decree on the housing-related state subsidies] HouseD as amended by the Government Decree No. 391 of 2007, 23 December entering into force 1 February 2008; and Government Decree 165 of 2008, June 27 entering into force 1 July 2008.

Equal treatment

It is necessary to recall that the implementation of Directive 2004/38/EC and its main transposing legislative instrument, FreeA improved considerably the rights of migrants' family members in 2008. The Act clearly regulates (Article 1 (1) b) point) that the Republic of Hungary guarantees the right to free movement and the right of residence to family members of EEA nationals (also of Swiss nationals) and pursuant to Article 1 (1) c) point) this right is also provided for the family members of Hungarian nationals (irrespective of their nationality). Family members are included in the term '*persons being entitled to free movement and right to residence*' (Article 1(1) involved). FreeA changed the personal scope of several very

important acts upon its entry into force (1 July 2007). Usually these acts refer to ‘*persons being entitled to free movement and right to residence*’ in their personal scope meaning that family members are covered by this term. In 2008 some new areas of law lifted family members into the category of migrant workers (family, social and disability benefits). These legislative steps generally contributed to the enhanced rights of family members.

In this Chapter only those cases are shown where the situation of family members differs from that of the Union citizen.

1. RESIDENCE RIGHTS

FreeA and the legal practice of the OIN differentiate the following categories of family members:

- spouse of EEA national or Hungarian national;
- dependent descendant below 21 of EEA national or Hungarian national or of his/her spouse;
- dependant ancestor of EEA national or his/her spouse;
- ancestor of Hungarian national or his/her spouse;
- person entitled for parental supervisory right on a minor Hungarian national;
- person whose entry and residence is allowed by the OIN.

Entry and residence not exceeding 3 months (Art. 3-5, 34(4) of FreeA)

- a) A family member with the nationality of a third country accompanying an EEA or Hungarian national or joining an EEA or Hungarian national living in the territory of Hungary shall be entitled to enter the territory of the country with a *valid travel document* and, unless otherwise provided for in directly applicable European Community law¹⁰² or by international agreement, a valid (multi-entry) *visa*. It covers on dependant of a Hungarian/EEA national, or s/he has lived in the same household as a Hungarian/EEA national for at least one year, or is cared for in person by a Hungarian national upon serious health grounds. They can enter without visa, if they have a document proving the right of residence under this Act, or a residence card issued to them as a family member of an EEA national, having the nationality of a third country, by a signatory state to the Agreement on the European Economic Area.
- b) The Schengen Borders Code shall also apply to entry and visa issuing. The right to entry by visa shall cease if the conditions in the Code cease to exist. If entry is denied because the entry conditions have not been fulfilled, the border traffic authority shall, upon request of the (very probable) EEA national or family member the opportunity to obtain the necessary documents, or otherwise prove that the entry conditions have been fulfilled, within 72 hours of return being decreed.
- c) A family member having the nationality of a third country and entering legally, shall have the right of residence for up to 3 months from the date of entry as long as his residence becomes an unreasonable burden on the social assistance system of Hungary.

102 Reg. 539/2001/EC.

The modified FreeD provides further opportunity for adjacent state nationals¹⁰³ as family member of EEA/Hungarian national obtaining a small border traffic permit at consular office (Section 18/B-C). Applicant living permanently in the border zone may claim this permit completing a format and showing a valid passport to which the permit is inserted.

Residence exceeding 3 months (Art 6-8, 10-15(1) of FreeA)

- a) Due to *derivative residence right* of family member, the FreeA requires that EEA national shall be met the requirements: paid employment, sufficient resources for him/herself and family members during become an unreasonable burden on the social assistance system, or s/he has been admitted to study at an educational institution (accredited training programme, public education, vocational training, high-level education) if at the time of entry, sufficient resources for him/herself and family members (only the spouse or dependent child) are provided not to become an unreasonable burden on the social assistance system during their period of residence, and s/he has adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law.
- b) A family member of a Hungarian national in paid employment shall be entitled to residence for more than three months, if s/he or the Hungarian national has sufficient resources for said family member not to become an unreasonable burden on the social assistance system, and has adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law.
- c) Residence *may be authorised* in absence of self-subsistence conditions for the parent or guardian of a Hungarian national below the full age (minor). Authorisation also may be allowed for dependant of a Hungarian national, or s/he has lived in the same household as a Hungarian national for at least one year, or is cared for in person by a Hungarian national upon serious health grounds; or the said person was a dependant of an EEA national, or lived in the same household as an EEA national for at least one year, in the country from which they arrive, or who is cared for in person by an EEA national upon serious health grounds, where the EEA national was in a paid employment, had sources for subsistence or admitted to study. It is conditional, the authorisation shall cease: if those concerned no longer live together, the Hungarian national died, his/her Hungarian nationality terminated, EEA national died, lost or gave up the right of residence.
- d) The family member obtains *own right to residence*
 1. despite the death or giving up the right of the residence of EEA national, if s/he can meet the requirement of self-subsistence, or is in paid employment, and has adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law,
 2. the family member's right to residence of a Hungarian national shall retain after the death of the national, if s/he can meet the requirement of self-subsistence, or is in paid employment, and has adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law.

103 Reg. 1931/2006/EC and bilateral treaties.

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3. the right to residence of spouse of the EEA/Hungarian national shall retain despite of marriage is dissolved or annulated by the court, if s/he can meet the requirement of self-subsistence, or is in paid employment, and has adequate insurance cover for taking advantage of health services as defined under separate legislation, or shall see to covering these themselves as provided for in law. Moreover, the right of residence depends on length of valid marriage and prior residence: if the marriage lasted for at least two years prior to its dissolution or annulment, and the ex-spouse resided in the territory of the Republic of Hungary for at least one year of the marriage as a family member of the EEA or Hungarian national; if the ex-spouse is also accorded by the courts the right of parent or guardian over the child of the EEA national residing in the territory of the Republic of Hungary, or is responsible for the supervision of the child by agreement; or if so justified by exceptional circumstances, particularly if their spouse, being an EEA or Hungarian national, carried out an intentional offence against them during the marriage, or if they had the legal status of settler prior to the marriage; or if the ex-spouse has visiting rights in respect of the child by agreement or by court judgment, assuming that such visiting take place in the territory of Hungary under the terms of the agreement or court judgment;
 4. the spouse of a Hungarian national having the nationality of a third country shall retain unconditionally the right of residence if the spouse also exercises the right of parental supervision over a child born of the marriage;
 5. if the EEA national dies, or loses or surrenders his/her right of residence, the right of residence of his/her children shall be retained, regardless of age, until they have completed their education, if they have already commenced their education and continue it without interruption;
 6. the other parent with the right of parental supervision over the children shall retain the right of residence until the children have completed their education.
- e) Leaving territory of Hungary for more than 6 months within one year before obtaining the right of permanent residence means *a waiver the right to residence*. It shall not apply if the reason for absence is compulsory military service; or an important reason, of a maximum of twelve months, particularly pregnancy, childbirth, serious illness, study, vocational training or an overseas posting.
- f) The *right of residence of family members shall cease* if they no longer fulfil the conditions for the right of residence; or they are prohibited from entry and residence. Family members with the nationality of a third country shall also lose their right of residence if the family stops living together within six months of the right of residence having been obtained, assuming that this only happened in order to obtain the right of residence, or the right of parental supervision shall lose and s/he is not entitled to continued residence on other grounds. The authority has to take a decision on recognition of these legal facts.

Right to permanent residence (Art. 16-19 of FreeA)

It shall be provided for:

- a) Family members who have resided legally in the territory of Hungary for five years without interruption;
- b) persons who have the right of residence in respect of an EEA or Hungarian national and who have resided legally in Hungary for five years without interruption;

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- c) children born in Hungary to a parent with the right of permanent residence;
- d) a family member of a Hungarian national, with the exception of the spouse, if he/she has lived together with a Hungarian national for at least one year without interruption;
- e) the spouse of a Hungarian national, assuming that the marriage took place at least two years prior to the submission of the application and that they have been living together continuously ever since;
- f) a person with the right of residence as a family member, if the EEA national obtained the right of permanent residence (in paid employment and become inactive);
- g) a person with the right of residence as a family member, if an EEA national in paid employment in Hungary dies before obtaining the right of permanent residence, and the EEA national resided in the territory of Hungary for two years without interruption prior to death; or the death was the result of an industrial accident or occupational illness.

If the family member surrenders the right of residence in the territory of Hungary and then returns for a period of more than three months, the period of time required for obtaining the right of permanent residence shall start again. The following shall not constitute interruptions to residence: residence outside the country of no more than six months per year; absence for compulsory military service; one absence, for an important reason, of a maximum of twelve months, particularly pregnancy, childbirth, serious illness, study, vocational training or an overseas posting. It shall be an interruption of residence if the family member stops exercising the right of residence in Hungary (leaving, disappearing).

The right of permanent residence shall cease in the event of continuous absence of 2 years or a declaration of a ban on entry and residence.

Documentation proving the right to residence (Art. 20-26(1) of FreeA)

- a) Visa is valid for six months from the date of issue but not exceed that of the travel document. It shall be issued free of charge, within 15 days, if the purpose of travel is certified (FreeD Section 9(4), 11). A visa must be invalidated if a third country national family member does not fulfil the conditions defined in the Schengen Border Code at the time of entry. There shall be no right of appeal against visa refusal or invalidation of a visa.
- b) Residence card: The right of residence of more than 3 months for a third country family member shall be attested to by this document issued by the OIN regional unit, and which must be applied for at the latest by the 93rd day after entry. Documents verify that the conditions for residence are fulfilled, as defined under separate legislation, those must be shown or enclosed at the time the application is submitted. Fee for the residence card is 6 € by the FeeD (as fee for ID of nationals). (The paid employment as purpose of residence shall be certified with labour contract, property document in a company, entrepreneurship card or other proper way. The minimal monthly income must exceed the lawful minimal pension per month per capita – about 130 € – in the family, or proving assets, real estate or other sources of income taking into account the size of the family not to become unreasonable burden. The family ties shall be proved by birth/marriage/adaptation certificate. The sponsorship declaration undertakes to provide subsistence for family member on a format. FreeD, Section 20-25). At the same time as the application is submitted, the authority shall issue a *certificate* attesting to the right of residence of a family member with the nationality of a third country until the application has been decided

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- upon (3 months). The residence card shall certify that the conditions for residence are fulfilled for as long as it is valid (up to 5 years). The card shall be invalid if its holder stops exercising the right of residence in the territory of Hungary, or if the right of residence ceases.
- c) Permanent residence card: it attests to the right of permanent residence of the family members. Third country family member shall submit an application for a permanent residence card before the expiry of the residence card. If s/he submits with delay and cannot give a valid excuse, it must be proved whether the conditions for the right of permanent residence have been fulfilled. At the same time as the application is submitted, the OIN regional unit shall issue a *certificate* attesting to the right of residence until a permanent residence card is issued (3 months). The permanent residence card shall be invalid if the right of permanent residence ceases. Fee is the same as for residence card (6 €) by FeeD.
 - d) The family member shall report his/her first home (address) in Hungary during the procedure for issuing a residence card. The residence card holder is obliged to request address card and personal identification number from the local registry office as nationals (e.g. valid, existing address can be controlled by the list of existing addresses, legality of living also has to prove by a rental contract or property certificate concerning the apartment/house).

We have to add that FeeD was modified by the Government Decree No. 118 of 8 May 2008, however the relevant fees are stable. For instance, fee of visa for short visit by the family member of a Hungarian national was 60 €. The Government Decree amended the FreeMD in limited extent.

Departure of family member refers to the following issues (Art. 15(2)-(4), 33-34, 38-48, 64 of FreeA):¹⁰⁴

- a) If the right of residence ceases, the family member must *leave the territory* of the country unless they are granted a residence permit under separate legislation. The obligation to leave the country must be fulfilled within 3 months of the decision taking legal effect.
- b) The right of entry and residence can be restricted in accordance with the principle of proportionality and exclusively on the basis of the personal conduct of the individual concerned which represents a genuine, direct and serious danger to any of the fundamental interests of society, particularly public order, public security or public health. Return and expulsion shall respect for non-refoulement (protection against torture, death penalty, persecution).
- c) *Entry and residence is prohibited*, if in respect of him/her Hungary has undertaken an international legal obligation to enforce a prohibition of entry and residence; or anyone in respect of whom the Council of the European Union has decided to enforce a prohibition of entry and residence. The authority shall determine the duration of a prohibition of entry and residence up to 3 years in the first instance, which may be extended by a maximum of 3 years on each occasion, if the conditions for it still exist upon the expiry of the prohibition. It must be repealed if the grounds for prohibition no longer exist.
- d) The competent authority may *expel an EEA national or family member* (1-5 years) who:

¹⁰⁴ Ministerial Decree of Justice and Law Enforcement No. 27 of 31 May 2007 on alien police detention was modified by the Ministerial Decree No. 51 of 11 December 2007, that entered into force on 1 January 2008. It contains procedural provisions, e.g. claim for compensation of unlawful detention. The Government Decree No. 118 of 8 May 2008 amended the Ministerial Decree of Justice and Law Enforcement No. 26 of 31 May 2007 on deportation provisions since 16 May 2008.

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1. has not fulfilled the obligation to leave the territory of the country by the deadline stipulated;
 2. does not have the right of entry or residence but who has nevertheless referred the competent authority to false information or untrue facts in order to verify a right of entry or residence. The authority in both upper cases must evaluate the nature and severity of the crime committed; the age and state of health of the individual concerned; the family situation of the individual concerned, and the duration of family relations; the number and age of any children of the individual concerned, and the means and frequency of his/her contact with them; whether there is another state where there is no legal obstacle to the family continuing to live together, taking into account any difficulties the family members might encounter if they were forced to settle in the territory of that state; the financial situation of the individual concerned; the duration of the individual's residence in Hungary; the social and cultural integration of the individual concerned, and the closeness of his links to the country of origin.
 3. at the instigation of the public health authority, on public health grounds if s/he suffers from, could infect with, or is carrying a disease dangerous to public health as defined in separate rule, and does not undergo compulsory treatment for these, unless he contracts, could infect with, or carries the disease after three months have passed from the date of entry;
 4. has legally in the country for less than 10 years and not minor (unless expulsion takes place in the interest of the minor), or
 5. has committed an offence and the court imposed the expulsion.
- e) Against the expulsion and prohibition of residence there is a court review with suspensive effect on enforcement. The court shall rule on the application within 8 days of its arrival. The EEA national or family member must also be heard in person at the proceedings if a request for this is made. A hearing in person may be dispensed with if the EEA national or family member cannot be summoned at the given address, or has moved to unknown whereabouts. The court may amend the decision. There shall be no further right of appeal against the decision of the court.
- f) Family member prohibited from entry and residence at the same time as his/her expulsion as an alien may, after one year has passed since the date of expulsion, request that the prohibition of entry and residence be repealed with reference to a change in his state of health or family situation that justifies his residence in the territory of Hungary. The competent authority shall decide on the application within 3 months. If the competent authority ends the prohibition of entry and residence, it shall see to its repeal.
- g) A family member may not leave the territory of Hungary if he/she is under arrest pending criminal proceedings, under house arrest, forbidden from leaving his/her place of residence, in custody, in extradition custody, under arrest pending extradition, under arrest pending handover, under arrest pending temporary handover, or undergoing temporary, compulsory medical treatment. The competent authority shall decide to withhold the travel documents in mentioned cases. There is no right of appeal against the decision.

The *unreasonable burden* as regularly returning exclusive preconditions means that EEA national or family member has not at least the minimal lawful old age pension per month per capita in the family – as the general threshold for social benefit – or has obtained for at least 3 months (continuously or in parts within a calendar year)

- regular social allowance,
- regular age benefit, or
- nursing benefit on the grounds of SocialA.

However, the authority shall evaluate the prior length of residence in the country, length of provided social benefits and reasons for material shortage of the family or the persons in concern (e.g. timely shortage or standard need) (Section 21 and 35 of FreeD). Its amount is really solid but we have to add that all non-nationals (EEA nationals, family members and third country nationals) entering the territory of the country have to prove as minimal source 1000 HUF (4 €) for residence *per entry*¹⁰⁵ and not per capita per day. It is obviously anachronistic but today is in not in harmony with the ‘social burden rule’ which is applicable per capita. Due to kin-minorities living across the (EU) borders this amount has not been lifted up for years.

Residence of family member shall meet *public health conditions* that are proved by a declaration of the visa/card applicant. However, the OIN may contact with epidemiologic authority in favour of controlling or defining certain behaviour for family member.

According to the SanitD *public health is endangered by the following diseases*, or in being of the pathogen condition of

- Tuberculosis,
- HIV-infection,¹⁰⁶
- Lues,
- Typhoid or paratyphoid in pathogen condition, or
- Hepatitis B.

If the sanitary authority recognized one of these, this fact is notified officially to the OIN regional office as a general alien policing rule.

1.2. Application of Metock judgment

Application of *Metock judgment* means that previous lawful residence in another Member States is not required from family member of the Union citizen. The OIN confirmed that residence card is issued without previous lawful residence. However, family unification (visa) is not an automatic opportunity. The marriage of convenience (Art. 35 of Directive 2004/38/EC) is a joint task of the OIN and consular office but share of responsibility in practice has not been defined clearly.¹⁰⁷ Issuance of visa for TCN family member is discretional decision of the OIN upon proposal of the consular officer. Art. 3 (6) and 4 (1) requires consultation upon request between Schengen national visa authorities before issuance of visa for short term (not exceeding 3 months) and applicant has to meet the requirements as defined in the Schengen Border Code (Art.5 (1) a, c-e. points).

For instance, the Ombudsman receives a complaint from a Hungarian national whose spouse living in Egypt (as local national) cannot obtain visa although there is a valid marriage (in Cairo they managed and lived a shorter period and the wife had to return to Hun-

¹⁰⁵ Section 25 of FreeMD.

¹⁰⁶ Since mid-90s human rights organisations have criticized the HIV-infection and AIDS for being treated as usual, traditional epidemiological appearance in public law in Hungary, www.tasz.hu.

¹⁰⁷ Dr. Réka Imre-Sebők, head of unit, Regional Directorate of OIN, Szeged (15 May 2009).

gary to keep own job up), life standard and the husband has never left own state, so there is no signal in SIS. According to the complaint the visa refusal was explained by ‘*supposed false marriage*’ but without personal scrutiny and reasoning.¹⁰⁸

2. ACCESS TO WORK

Family members (spouse and children) of Union citizens irrespective of their nationality are entitled to work with *temporary work book* under the same conditions as Union citizens (Art. 1 (2) point c). Moreover, the spouse of a Hungarian national is also eligible (Art. 1 (2) point d).

PuboA deals with the family members of EEA nationals. Art. 7 (1) states that civil servant shall be only Hungarian nationals. As an exception, Art. 7 (8), however, declares that civil servant might be an EEA national or the family member of a Community worker as defined in Article 11 of Reg. 1612/68/EEC, if the work at issue is not confidential and the person possesses the language skills necessary to perform the tasks.

Article 59 (5) of the UnemplA expressly states that any Union citizen and his/her family member in terms of FreeA can register as a job-seeker and apply for supports that are open for job-seekers. In this regard Union citizens’ family member is put on the same footing as Hungarian nationals. The modified (6) refers to the FreeA personal scope (family members of EU citizens together with EEA nationals), thus job seekers’ registry covers on these persons regardless their lawful employment with labour permit. Family member in job seeking means couple and dependant child under 21. If UnemplA requires job seeker’s status to a kind of labour benefits (e.g. support to re/training or self-employment) it includes family members of Union (EEA) citizens, too.

Further on, Article 58 (9) of the UnemplA provides equal treatment for any legal employment relationship that is valid and effective according to the national law of *another* Member State must be equally treated in terms of supports as a Hungarian employment relationship (active labour market measures). This kind of support targets on employers in favour of wider, lawful employment. However, discretion is exercised by labour offices but the evaluation must focus on the merit of the application and can not reject it just because the planned work place is outside Hungary.¹⁰⁹

3. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES AND OTHER AREAS OF LAW)

Most importantly, Union citizens and their family members can be entitled to all benefits enshrining in the SocialA. The Act contains both cash and in kind benefits, the most of which are means tested and awarded by the self-governments. Prior to January 2008 the benefits regulated in the SocialA were only granted to Hungarian nationals, refugees, persons with permanent residence permits and Community workers and their family members

¹⁰⁸ Dr. Katalin Haraszti, head of unit, Ombudsman Office (31 March 2009) pending case.

¹⁰⁹ Discretionary power is essential for the labour authority in a budget cutting period and in bottleneck situations in active labour market supports. It was confirmed by the Labour Office representative in Szeged (10 May 2009).

falling within the ambit of Reg. 1612/68/EEC.¹¹⁰ With effect from 1 January 2008 the reference to Reg. 1612/68/EEC has been deleted from the SocialA and the wording of the personal scope of FreeA is cited.¹¹¹ According to FreeA every Union citizens (irrespective of economic activity) and their family members qualify as ‘*entitled persons*’ which is a departure from the concept concentrating on workers only. It means that from 1 January 2008 the personal scope has been extended, from this date not only Community workers and their family member but every Union citizen residing lawfully in Hungary for more than 3 months and being registered in the permanent address register is eligible to apply for social and family benefits. The personal scope has been extended to the family members of Hungarian nationals as well meaning that reverse discrimination in this regard was terminated.

Access to housing on the same footing as Hungarian nationals is restricted in Hungary to EEA nationals. It means that the EEA national family members are entitled to fall within the personal scope of the law, however, non-EEA national family members qualify as ‘foreigners’. In compliance with the LandA and the LandD these persons need permission for non-agricultural land (housing) acquisition.

MusD has been amended by Government Decree 281 of 25 October 2007 with effect from 1 January 2008 by which the nationals of the EEA have been put on equal footing with Hungarian nationals. Article 2 (2) of MusD lays down the cases of free of charge entries and 50% reductions of fees into museums that are ensured for the nationals of the EEA including Hungarian nationals. It is worth noting that family members are not mentioned in the personal scope of the MusD.

The right to social advantages is also granted to family members. The SocialA and the HouseD make express reference to the personal scope of the FreeA in terms of defining the beneficiaries, which means that the family members – irrespective of their nationality – are entitled to avail themselves of the rights contained in these provisions. There is, however, the condition of residence: if the person is not living in Hungary, social benefits can not be awarded.

At least 15,000 foreign students attend in average in tertiary education in Hungary. According to statistics only their citizenship can be defined but not their family status. Students in foreign speaking courses are supposed foreigners while family members of EEA citizens are attending foreign speaking elementary and secondary schools. There are 22 tertiary education institutes in which there are full courses (whole curricula) in English and German. For instance, University of Szeged receives thousands of students (to Faculty of Medicine, Dentist, Pharmacology, Hungaryology, Law, Arts) from the EEA states on equal footing as nationals (they are coming from Germany, Greece, Romania, Norway, Ireland, UK, Austria, France, Denmark, Sweden and Slovakia).¹¹² Bilingual secondary schools established in the 1980s receive also non-native pupils also on the same conditions as nationals.

Integration courses, language training for TCN are not managed, and properly prepared text books for non-native students or handbook for teachers how to teach non-native pupils in classrooms are missing while stable or decrease migration trend is observed in 2008-2009. Although the EU support from three funds (Integration, Refugee, Return) means 5.5 million € for Hungary, there is neither strategy on integration, nor projects on comprehensive

110 It means that not all persons can avail themselves of Reg. 1408/71/EEEC, but only workers can enjoy social assistance.

111 Art 100 of FreeA.

112 Kőrkep idegen nyelvű képzéseinkről. *Szegedi Egyetem*, 9 March 2009.

integration services.¹¹³ The personal scope of the Bill on Integration will not cover on EEA nationals and family members. However, the Ministry of Justice endorses programmes on integration of migrants in general just for the labour market needs.¹¹⁴

EEA nationals and their family members are placed on equal footing with Hungarian nationals as regards access to vocational training and to the benefits available under Hungarian law. The enjoyment of rights is not dependent upon the worker or self-employed status, moreover, not only long-term residents but every person studying in a high-level educational establishment can qualify. Hungarian law is more beneficial than EC law. Both EEA national workers and self-employed and their family members and persons having the right of permanent residence can apply for the study loan. There is no discrimination whatsoever in Hungarian law.

Administrative practice

As in other years, the ombudsman responsible for protection of fundamental rights receives complaints from foreigners including family member of Union citizen. Due to scrutiny the cases are finished and published not in the year of submission. A case of a mixed couple living in Sopron (Hungarian national with a wife from Cuba) related to equal treatment.¹¹⁵ After birth of their dual-citizenship baby their request for maternity aid and locally paid benefit for life start was refused in May 2007. According to explanation the Treasury cannot pay maternity aid because the mother is neither a national, nor settled migrant but only a residence permit holder. The local self-government (in Sopron Town) refused the claim for young couple's benefit because she is not born in Sopron or from Sopron dwellers as precondition in local decree for eligible for this benefit.¹¹⁶ The FamA (Art. 2 a.) personal scope covers on Hungarian nationals living in the country. In this case the couple and their child is also living in Sopron, consequently the FamA has to be implemented for them. Moreover, the purpose of maternity aid is to provide support in case of birth by the state '*respecting for importance of family and undertaking child giving assistance for bringing up child*' [Art. 3(3)]. Maternity aid is given for mother giving life and caring for the baby – for this reason mother of adopted child or guardian is eligible for this aid – '*contributing to protection of family and contributing to costs of family*' (Constitution, Art. 15). Thus ombudsman recognised violation of equal treatment of the Treasury implementing the FamA in a narrow (textual) meaning, and ordered to apply FamA in accordance with the Constitution and to revise all pending cases back to one calendar year of refusal for non-eligibility. (In parallel, the FreeA modified the personal scope of the FamA covering on *persons being entitled to free movement and right to residence*.) As regard the locally paid benefit for new couples' joint life, it is based on a self-government decree clearly required previous residence in Sopron. Thus the ombudsman could not state violation of equal treatment, however precondition of longer residence, being locally born or born from local dwellers cannot be met by Union citizens (and family members).

This may illustrate how many covert or latent discriminative regulations exist in 3200 municipals.

113 Kék kártya és zöld folyosó: a munkaerőpiac megnyitását javasolják. *Népszabadság*, 19 November 2008.

114 Judit Fazekas, state secretary (*HVG* 19 November 2008).

115 OBH 4416/2008, számú ügy.

116 Sopron Megyei Jogú Város Önkormányzata 23/2006. (VI. 29.) rendelete 1. § (1) bekezdése.

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Chapter VII

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

1. *The case of Renneberg (C-527/06)*

The TaxA (Act CXVII of 1995 on personal income tax) lays down moneywise taxation logic: only real incomes and costs are to be taken into account, so-called hypothetical incomes (like ‘advantage following from occupying his own dwelling’) are not handled. In this sense the cases Laekebring and also Renneberg (C-527/06) – that focus on a specific issue between Germany and Luxemburg and the agreement on avoidance of double taxation – are not relevant for Hungary. The priority and binding force of bilateral tax agreements in general is fully recognised in Hungarian law. In 2007 the Ministry of Finance and the APEH issued a circular¹¹⁷ in which it has been clearly stated that according to Article 5 (4) of the TaxPA taxation Hungarian rules are to be overwritten and adjusted by international law. Consequently, if a bilateral agreement so prescribes, a tax title emerging in another Member State has to be taken into account in the Member State liable for tax assessment. Based on this principle, e.g. if a Hungarian resident company has a branch in another Member State and the bilateral agreement foresees the taxation of the revenue of the branch in that Member State no additional taxes shall be payable in Hungary.¹¹⁸

2. *The case of Raccanelli (C-94/07)*

In essence the ECJ stated in *Raccanelli* that research institutions need to exercise their freedom to enter into contractual relationships in accordance with the EC Treaty. It means that if a legal relationship fulfils the criteria of ‘*Community work*’ (work performed under instruction, for remuneration being genuine and effective) equal treatment has to be accorded to Union citizens.

In Hungary research activity can be performed for an institution in basically three ways:

- in a legal employment relationship (Labour Code applies),
- as a civil servant (PubsA applies),
- with a contract for assignment (Civil Code applies).

The legal employment relationship and the civil servant relationship mean permanent occupation and close ties with the institution. The contract for assignment is used for temporary, occasional work. The parties are entitled to conclude the legal form best suitable for them. There are no nationality conditions or any similar obstacles in Hungarian law for Union citizen researchers.

The granting of scholarships for young researchers falls within the competence of high-level educational and/or research institutions. Usually these scholarships must be applied for, and funded full time research can only be conducted if the student has no other occupation (income from any other legal relationship). A full time Ph.D. researcher has determined teaching and studying obligations, must obey the instructions of the appointed professor and

117 PM-APEH Közlemény 12816/2007.

118 www.apch.hu (29 April 2008).

gets remuneration as well. In this sense it would be ‘Community work’ and would fall under the EC Treaty. Browsing the eligibility conditions of the ELTE University, Law Faculty (Budapest) we found that the Ph.D. candidate must have obtained his/her diploma in a Hungarian university in order to be eligible to apply.¹¹⁹ It means that students who obtained their diploma in another Member States are excluded from the possibility to apply and to become funded full time Ph.D. researchers.

3. *The case of Hartmann (C-212/05) and Geven (C-213/05)*

Albeit the facts of the two cases are different, they can be treated together hence the core issue is the same and Hungarian law gives the same answer in the two cases. In the *Hartmann* case the wife of a German national who worked full-time in Germany and lived in Austria claimed child-raising allowance that was refused on the basis that the mother did not reside in Germany and there were no sufficient (real) links with German society. In the *Geven* case a Netherlands national who lived in the Netherlands but also worked in Germany applied for the child-raising allowance and was refused on the basis that she did not reside in Germany and her employment was not more than minor (not more than 15 hours weekly). The ECJ ruled that the child-raising allowance constituted social advantage in terms of Reg. 1612/68/EEC and frontier workers are allowed to receive it except if it is proven by the Member State that the refusal is objectively justified and proportionate. The ECJ adjudicated the two cases differently. In the *Hartmann* case it declared that a full-time employment is a valid factor of integration into the society of Germany and thereby Mr Hartmann’s children are entitled to be granted child-raising allowance. However, in the *Geven* case the ECJ accepted the reasoning of Germany that a minor employment does not constitute a sufficiently close link with Germany, the refusal is proportionate and thereby justified. Consequently, Ms Geven’s children could not receive the benefits.

The above-mentioned cases acknowledged that in certain cases Member States are allowed to exercise discretion and require a sufficiently close link to be existing between the person claiming the benefit and the country. Additionally, the legal nature of Reg. 1612/68/EEC shall be taken into account which does not regulate accumulation. Consequently a social advantage granted to a person will not rule out that s/he receives a similar benefit on a different legal title from another Member State.

Hungarian law approaches this question horizontally. Pursuant to Article 2 c)–d) the provisions of the FamA (Act LXXXIV of 1998 on Support of Families) shall be applied to persons exercising the right to free movement and to persons falling within the ambit of Reg. 1408/71/EEC. The persons shall evidence that they are in legal employment and that they reside in Hungary. Hungarian labour law does not dispose of minor employment: every person who is in legal employment qualifies as worker in terms of labour law. Every EEA national who exercises economic activity on the basis of a legal employment relationship will fall within the ambit of Reg. 1408/71/EEC. In addition, Article 2 d) FamA expressly lays down that the residence condition is waived for frontier workers. In sum, if a Union citizen works in Hungary – irrespective of the duration of the work – in a legal employment relationship, s/he will fall within the ambit of Reg. 1408/71/EEC and if s/he resides in another

119 <http://www.ajk.elte.hu/DoktoriIskola/AJK/index.html>.

Member State will be exempt from evidencing his/her Hungarian residence. The person will be entitled to claim family benefits as a Community worker for himself and for his family.

In this regard, Hungarian law is not as much sophisticated as it would be allowed by the ECJ because it grants benefits for the workers even if they have no real and sufficiently close links to Hungary.

4. The case of *Hendrix* (C-287/05)

The *Hendrix* case contains two important findings. First, the ECJ decided that a Union citizen who has only worked in the Member State of his nationality but during the interruption between two legal employment relationships resided in a different Member State, qualifies as a worker in terms of Article 39 of the Treaty of Rome. Secondly, the ECJ stated that the change in residence without any economic purpose is capable of activating Article 39 and it is not necessary to refer to Article 18 (Union citizenship). Having held that the ECJ overruled the *Werner* case (C-112/91) and in our view it went far beyond the *Surinder Singh* (C-370/90) and the *Akrich* cases too. In the first case the mere fact that a person resided in a Member State without economically establishing himself there did not embody any foreign element thereby it was not capable of invoking EC law. In the latter two cases the return of the Community worker into the country of origin and continuing employment was capable of invoking EC law meaning that the activation of EC law was based on a change in the *place of work*. In the *Hendrix* case the change in residence sufficed and entitled Mr. Hendrix to avail himself of EC law in order to claim a benefit falling within the ambit of Reg. 1408/71/EEC and Reg. 1612/68/EEC. The conclusion thereby was drawn that Mr. Hendrix could claim social security benefits and social advantages in accordance with the rules enshrining in the Treaty and in the relevant secondary legislation (Reg. 1408/71/EEC or Reg. 1612/68/EEC respectively) just because he changed his residence. In the concrete case the ECJ accepted that eligibility for a special non-contributory benefit can objectively require residence, however, it is evident that the proportionality of withdrawing the benefit based on the lack of residence was questioned. This case basically might give a chance to everyone to claim to fall within the ambit of EC law by a simple change in residence.

Hungarian social law contains three types of special non-contributory benefits in terms of Reg. 1408/71/EEC and the Act of Accession:

- non-contributory old-age allowance,
- invalidity annuity, and
- benefit for motor-disabled persons.

These benefits are found in three pieces of legislation, the personal scope of which are, however, commonly regulated in the main Act, the SocialA (Act III of 1993 on Social Administration and Social Benefits). Pursuant to the Act persons being entitled to exercise the right to free movement (EEA nationals, Swiss nationals and their family members) can claim these benefits if they possess a Hungarian residence that is evidenced by an address card issued by the local authority. The address card is usually issued for indefinite period in case of Hungarian nationals and for one year in case of EEA nationals. Both Hungarian and EEA nationals are obliged to notify the authorities of their change in residence and they are legally liable for the damage caused by the omission of the notification. Reading these provisions together it must be stressed that Hungarian law sets the objective criteria of Hungarian resi-

dence for these special non-contributory benefits that must be evidenced by a valid address card. The lack of lawful residence results in the withdrawal of the benefit – just in the way as the law of the Netherlands provided for in the *Hendrix* case. Hence the objective requirement of residence is set by the SocialA, the authorities are not allowed to exercise discretion in cases of persons who leave Hungary. The Act does not contain any general clause for persons in possible hardship who maintain their economic and social links to Hungary. It is presupposed that a person changing residence is entitled to establish legal links with the host country. EC law obliges authorities and courts to interpret national law in light of the cases of the ECJ. This, however, is probably not well-defined yet in EC law either.

5. Other cases

There were some public discussions as regards case of *ITC* (C-208/05) in 2008. An article described the essence of the *ITC* case and its possible Hungarian implications that is presented here in a nutshell.

It is well known that in the *ITC* case the ECJ passed three important findings:

- not only employers and employees but also intermediary institutions are allowed to avail themselves of the provisions of the EC Treaty;
- the German legislation according to which an active labour market measure is dependant upon having a German workplace is a breach of EC law; and
- several justifications of Germany – to modernise German unemployment law in order to decrease unemployment rate, to enhance the employment of skilled workers – have been rejected.

The concrete legal instrument (recruitment voucher) is unknown in Hungary. However, there are other active labour market measures that can be subjected to the filter set by the ECJ. First and foremost, the relevant UnemplA lays down that the Act targets the decrease of unemployment and the improvement of the general employment situation but it does mention neither the Republic of Hungary nor Hungarian nationals. It enumerates several means of promoting employment, the common feature of which is discretion meaning that the supports are need to be applied for and are evaluated and assessed on a case-by-case basis by the competent labour office. It is to be analysed whether the evaluation process discriminates against non-Hungarian nationals or non-Hungarian workplaces.

Active labour market supports can be divided into two groups:

- the addressee of the support is the job-seeker or the institution training the job-seeker;
- the addressee of the support is the employer.

The definition of job-seeker is the key in case of supports addressed to job-seekers and training institutions. Article 59 (5) of the UnemplA expressly states that any Union citizen and his/her family member in terms of FreeA can register as a job-seeker and apply for supports that are open for job-seekers. In this regard Union citizens are put on the same footing as Hungarian nationals.

The notion of employer is also open wide. According to Article 58 (9) of the UnemplA any legal employment relationship that is valid and effective according to the national law of *another* Member State must be equally treated in terms of supports as a Hungarian employment relationship. It results factually in the interpretation that employers who employ Hun-

garian unemployed persons according to another national law can require equal treatment. This broad terminology enables for instance, a Slovak employer who employs (wants to employ) a Hungarian unemployed in Slovakia to apply for active labour market supports from Hungary. Of course discretion is exercised by labour offices but the evaluation must focus on the merit of the application¹²⁰ and can not reject it just because the planned work place is outside Hungary.

The article concludes thereby that Hungarian law is fully in compliance with the spirit of EC law.

Recent legal literature

Gellérné Lukács, Éva, Határtalan támogatások – Magyar aktív munkaerő-piaci eszközök – európai szintű igénybevehetőség? [Cross-border supports – Hungarian active labour market measures – European-wide application?], *Humán Saldo* 2008/3, p. 118-124.

Gellérné Lukács, Éva, Munkavállalók szabad mozgása az Európai Unióban – Gondolatok egy 40 éves évfordulóra [Free movement of workers in the European Union– to the 40th anniversary] *Föld-rész*, 2009/1, p. 9-23.

Tóth, J., Munkavállalók szabad mozgása az Európai Unióban. Esetjog. Összeállította [Free movement of workers in the European Union – the ECJ case law], *Föld-rész*, 2009/1, p. 60-94.

120 See the Labour Ministerial Decree No. 6 of 16 July 1996 and No. 1 of 16 January 1998.

Chapter VIII

Application of Transitional Measures

Texts in force

- Act of Accession, Annex X.
- 1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról [Act on Job Assistance and Unemployment Benefits] (UnemplA)
- 355/2007. (XII. 23.) Korm. rendelet a Magyar Köztársaság által a szabad mozgás és tartózkodás jogával rendelkező személyek tekintetében alkalmazott, a munkaerő szabad áramlásával összefüggő átmeneti szabályokról [Government Decree No. 355 of 2007, 23 December on the transitory rules applicable to free movement of workers by the Republic of Hungary in respect of persons enjoying the right to free movement and the right of residence] (TraD2) repealing the Government Decree No. 354 of 2006, 23 December (TraD1) and RecipD. It entered into force on 1 January 2008
- 236/2008. (IX. 23.) Korm. rendelet a Magyar Köztársaság által a szabad mozgás és tartózkodás jogával rendelkező személyek tekintetében alkalmazott, a munkaerő szabad áramlásával összefüggő átmeneti szabályokról szóló 355/2007. (XII. 23.) Korm. rendelet módosításáról [Government Decree No. 236 of 2008, 23 September amending the Government Decree 355 of 2007, 23 December on the transitory rules applicable to free movement of workers by the Republic of Hungary in respect of persons enjoying the right to free movement and the right of residence] entered into force 28 September 2008 and it was repealed 5 days later. (TraD3)
- 322/2008. (XII. 29.) Korm. rendelet a Magyar Köztársaság által a szabad mozgás és tartózkodás jogával rendelkező személyek tekintetében alkalmazott, a munkaerő szabad áramlásával összefüggő átmeneti szabályokról szóló 355/2007. (XII. 23.) Korm. rendelet módosításáról [Government Decree No. 322 of 2008, 29 December amending Government Decree 355 of 2007, 23 December on the transitory rules applicable to free movement of workers by the Republic of Hungary in respect of persons enjoying the right to free movement and the right of residence] entered into force on 1 January 2009 (TraD4)
- 8/1999 (XI. 10.) SZCSM rendelet a külföldiek magyarországi foglalkoztatásának engedélyezéséről [Decree of the Social and Family Affairs Minister on Work Permits Issued to Foreign Nationals in Hungary] (PermitD) amended by Decree of Social and Employment Minister No. 39 of 2007, 29 December with effect from 1 January 2008.

1. AMENDMENTS IN LAW AND TRENDS

First and foremost it shall be settled that upon 1 January 2008 a new regulation entered into force as regards provisions on the transitory rules applicable to free movement of workers by the Republic of Hungary in respect of persons enjoying the right to free movement and the right of residence. The new regulation (TraD2) completely repealed the formerly effective rules. Prior to 1 January 2008 two government decrees were in force and regulated differently the legal status of workers from the ‘old’ Member States and A8 states, on the one

hand the legal status of workers from Romania and Bulgaria.¹²¹ The two sets of rules were different in spirit and gave rise to intense discussion on whether the restrictions and the distinct systems were necessary.¹²² The TraD2 eliminates the unnecessary differences and takes the charge to be a unified piece of legislation on the transition regime. Following from the diverse approach as regards certain nationalities there are still differing rules. However, the formerly existing severe gap between the rights of certain Union citizen migrant workers has been immensely tightened. Thereby the new rules were unanimously welcome by employers and scholars as well.¹²³

What are the major trends since the previous report? The law has only been slightly amended as regards EU8 countries, however the actual labour market situation has changed a lot with respect to these nationals. It is worth mentioning that Malta and Cyprus are treated legally to belong to this group as well. It is a common sense that Member States joining to the EU 1 May 2004 were not allowed to apply transitional periods towards each other based on the Act of Accession. Consequently the nationals of these Member States and their family members are allowed to enter the Hungarian labour market without the need to possess a work permit (UnemplA, Art. 7). Until 31 December 2007 the law – in accordance with the Act of Accession – prescribed the condition for the employer to *register* workers of these nationalities with the competent local employment office.¹²⁴ The obligation of registration was widespread. It encompassed personal data, salary, economic branch besides the nature of employment (contract details, beginning/end of legal relationship etc.). The data collection was based on a prescribed form and was therefore highly personalised. Upon the entry into force of TraD2 – namely 1 January 2008 – this obligation has ceased. Firstly, in accordance with Article 9 (7) personal data collected before 31 December 2007 had to be eliminated. Secondly, Article 6 (2) lays down the new structure of data collection. Most importantly the employer shall only notify the competent local employment office of the number and nationality of EU8 workers, the form of the legal employment relationship (for definite/indefinite period, full/part time, temporary work book etc.) and the termination of it. Albeit no personal data shall be indicated A8 nationals are still not put on an equal footing with Hungarian nationals as regards notification. The employer still has to make a special record, submit it to the authorities and keep the record for 3 years. Obviously it embodies an additional obligation requiring time, energy and thereby also bears financial consequences.

The new regulation contains the possibility and procedure for safeguard measures. So far the safeguard regime has not been amended and safeguard measures have not been initiated. The volume of registered workers with EU8 nationalities was relatively standard (18,000–20,000) in the year of 2006–2007, but declined in 2008, and thereby did not endanger the position of Hungarian labourers. No governmental actions were necessitated.

121 Government Decree No. 93 of 27 April 2004 on the rules of labour market reciprocity and the safeguard measure to be applied following the accession of the Republic of Hungary to the European Union (RecipD) and Government Decree No. 354 of 23 December 2006 on the transitory rules applicable to free movement of workers by the Republic of Hungary after the accession of the Republic of Bulgaria and Romania to the European Union. Both repealed.

122 Éva Gellénné Lukács, Munkaerősüzítés a minőségért [How to select the best in the labour market], *OFA – KSH NKI Kutatási Jelentések*, Budapest 2007 (in press), p. 1-40. Egon Dienes-Oehm, Az Európai Unió egységes belső piaca [Single Market of the EU], *Európai Tükör* 2008/1, p. 8-18.

123 Dr. Györgyi Bánsági, Engedjétek hozzánk – A külföldiek magyarországi foglalkoztatásának gyakorlati kérdései [Practical issues of employment of foreign labour in Hungary], *Humán Saldo*, 2008/4, p. 166-169.

124 Repealed RecipD, Article 7.

The most dominant group of EU8 nationals in Hungary is that of Slovak nationals (93% of all EU8 workers). The two countries have common border and there are tense employment relationships due to historical and geographical reasons. Although in certain regions and sectors labour market tensions were mentioned in press in 2006-2007, the reality was that the region where mostly Slovak EU8 nationals are employed (North-West Hungary) suffered constantly from labour shortage. Thereby the public debate was dominated by the issue of how Slovak workforce contributes to the Hungarian labour market and whether this employment endangers the status of Hungarians or not.¹²⁵

Already in 2007 a slight change was to be perceived. An article based on interviews with the relevant stakeholders (employers, trade unions, labour centres, placement agencies) carried out in the area of Szombathely, Székesfehérvár, Győr and Komárom (the biggest cities around) in 2007 examined the effects of the accession on the Hungarian labour market.¹²⁶ The report has drawn important conclusions namely Slovak workers are very much welcome and appreciated by Hungarian employers and that Slovak workers were motivated to work in Hungary by higher salaries and because they are not put to the danger of loss of employment. The report also stressed that without the contribution of these workers labour shortages can occur. In 2007 another research was undertaken supported by the OFA in the following topic: employment of Slovak nationals in Hungary, motivations and characteristics in the border region.¹²⁷ The results of the research that was made in co-operation with Slovak colleagues were published in 2008. The analysis resulted in the following statements:

- Labour force migration in the Slovak-Hungarian border region is an *economic issue*, the dynamics of which is influenced predominantly by regional inequalities;
- The *decrease in the number of Slovak nationals is awaited* in the future due to the gradual equalization of regional disparities and of present salary differences. Hence Slovak nationals are employed by multinational companies mostly in unskilled jobs in Hungary. The settlement of multinational companies in Slovakia will fundamentally change the employment structures. It can give a push to the return of Slovak workers to Slovak work places.

Forecasts became true hence labour market trends mirror the statements of the researches. In 2008 there has been a dramatic decline in the number of Slovak nationals working in Hungary parallel with the economic changes that has taken place (first and foremost the introduction of the € in Slovakia). It is generally backed-up by the statistics on foreign labour according to which in the first 9 months of 2008 3,363 less Slovak workers were present in Hungary than in the same period of 2007.¹²⁸ This statistics does not even contain the consequences of the global financial crisis. There is no nationality filter in collective redundancies, probably the decline affected Slovak workers too. 93 percent of EU8 nationals were Slovak

125 For more information on Slovak workers see: Krisztina Estélyi, Béla Keszezh, Péter Kovács & Ilona Mikóczy, Munkaerőmozgás a szlovák-magyar határ mentén [Labour force migration along the Slovak-Hungarian border], *Fórum Társadalomtudományi Szemle* 2006/1, p. 26-48.o, www.kft.sk.

126 Éva Gellérné Lukács, Munkaerőszűrés a minőségért. [How to select the best in the labour market], *OFA – KSH NKI Kutatási Jelentések*, Budapest 2007, p. 1-40.

127 Bleha Branislav, Tamás Domokos, Balázs Mahler, Dr. László Kulcsár, Tamás Ruff & Dr. Gabriella Vukovich, *Szlovák állampolgárok magyarországi munkavállalása, ennek okai és jellemzői a magyar-szlovák határmenti régiókban* [Employment of Slovak nationals in Hungary, motivations and characteristic in the border region], Kutatási összefoglaló, Székesfehérvár 31 October 2007. Published in 2008. http://www.ofa.hu/index.php?WG_NODE=WebPageReader&WG_OID=PAGfa9959790d415b838.

128 http://www.afsz.hu/engine.aspx?page=stat_kulf_munkavall_mo-on.

nationals in 2008 just as in 2006-2007. However, on 31 December 2008 the number of Slovak nationals working in Hungary declined to 6,358. This means a 36 percent decline. Decreasing number of Slovak workers was to be perceived continuously during 2008. It is probably due to the global economic crisis, gradual equalization of regional disparities in salary and the worsening labour market situation in Hungary.

Albeit the law on EU8 nationals has become simpler (the registration obligation was loosened) the full equal treatment with Hungarian nationals has not been achieved. The employer has still make and keep a separate record on A8 nationals workers that endorses additional expenses.

2. THE SECOND PHASE

What are the changes in position with regard to the second phase of the transitional arrangements? The major changes introduced by the TraD2 – as from 1 January 2008 – was affecting the non-EU8 nationals. (EU8 nationals are only dealt with in terms of registration.) In general, access to employment of EEA nationals and their family members became really simple and transparent. A new approach has been founded, *in concreto*:

- a) the nationals of 11+1 Member States (UK, IRL, SE, FIN, GR, ISL, PT, ES, IT, NL, LUX and FR) from 23 September 2008 were granted free access to the labour market of Hungary and they were only subjected to the general registration requirement (see below);
- b) as regards others (non-EU, and not 11+1) nationals:
 1. occupations that are subject to a diploma (being regulated professions) are exempted from the necessity of a work permit, no authorisation whatsoever is needed for such persons irrespective of their nationality;
 2. occupations that are *not* subject to a diploma (unskilled work) are generally subjected to a work permit. However,
 - it was granted always without the assessment of the labour market for AT, DE, DK, BE, FR, NO, LIE, CH nationals and their family members;
 - it was granted always without the assessment of the labour market for RO, BG nationals *if* the employment was effectuated seasonally in the agricultural sector or in the economic activity laid down in the annex of the Government Decree;
 - if the RO, BG nationals are not employed in the agricultural or other given sector, the work permit is issued in the normal authorisation process, with the assessment of the labour market.

The specified sectors – in which work permit is issued without the assessment of the labour market for RO, BG nationals – are e.g. the following: housekeeping, road-builder, trimmer, train-master, machine-man, well-driller, washerwomen, finery-ironer, trolley-driver, porter. It means that RO and BG nationals subject to transitory regime need a work permit only if they arrive in the sector most probably hit by unemployment in Hungary, in the sphere of distinctly specified unskilled work.¹²⁹

129 Dr. Györgyi Bánsági, *Mint vendég – a külföldiek magyarországi foglalkoztatásának aktualitásai (munkaerőkölcsönzés)*[Actual issues of the employment of foreign labour in Hungary – posting], *Humán Saldo* 2008/5, p. 217-219.

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The following table shows the changes between 1 May 2004 and 31 December 2008.

Categories	1 May 2004	31 December 2007	Changes in 2008
<i>No restrictions</i>	UK, IRL, SE	UK, IRL, SE, FIN, GR, ISL, PT, ES, IT, NL	As from 1 January 2008 LUX, as from 23 September 2008 FR has been added to this category. ¹³⁰
<i>Occupations subject to a diploma, no restrictions</i>	-	-	AT, DE, DK, BE, FR, NO, LIE, CH, RO, BG
<i>Occupations not subject to a diploma</i> 1. <i>Work permit without assessment of the labour market</i> 2. <i>Work permit with assessment of the labour market</i>			AT, DE, DK, BE, FR, NO, LIE, CH in general RO, BG in the agricultural and given sectors RO, BG in sectors different from agriculture and other given sectors

If the 12-months rule (nationals of Member States involved in the transitional measures, legally working in the other Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State) applies, no work permit is required. If family members enjoy more beneficial treatment in accordance with other provisions of law that applies.

What are the actual trends in particular with Romanian and Bulgarian workers? In reality the actual trend of employment by Romanian – and to a very limited extent Bulgarian – nationals showed a dramatic decline in 2008. The number of Romanian nationals declined by 41% in 2008, numerically to 15,136 upon 31 December 2008. Two-third of the Romanian nationals (9,853 persons) were employed in sectors where the work permit was issued without the assessment of the labour market. It means that the majority of Romanian nationals performed unskilled work in Hungary (hence for work-permit related jobs no diploma is necessary).

During the year of 2006 and 2007 the necessity of the transitory measures towards the two newcomers has been severely criticised.¹³¹ Two extensive research projects took place both of which The Ministry of Foreign Affairs, together with the Hungarian Academy of Sciences and the Centre for EU Enlargement Studies carried out a research project on the future directions of Hungarian foreign policy.¹³² The interrelations between the Hungarian labour market and labour migration has also been scrutinised. The study dealing with this issue concluded that the system of illiberal transitory measures towards Romania and Bulgaria shall be supervised and abolished. Moreover, four institutes of the Hungarian Academy of Sciences entered into an agreement to collaborate in order to analyse in an interdisciplinary and multidisciplinary pattern the most important social science topics.¹³³ Labour migra-

¹³⁰ TraD3.

¹³¹ Papers and lectures by Judit Tóth, Klára Fóti and Éva Gellénné Lukács within the framework of the project on European strategy and foreign affairs of HAS–CEU (Budapest 2006).

¹³² <http://web.ceu.hu/cens/magyarkulstrat.html>, Magyar Küllapcsolati Stratégia (Hungarian Foreign Policy Strategy).

¹³³ Web page of the book in Hungarian <http://www.mtapti.hu/eumo/>.

tion was one of the selected areas to examine and the colloquium agreed that the conduct of Hungary was based on political considerations instead of an economically rational back-up. Not only the scientific and independent sector but also the central administration took active steps to disclose more closely the real tendencies of the Hungarian labour market. The Hungarian Chamber of Commerce and Industry (HCCI) together with the Ministry of Social and Family Affairs carried out a labour market forecast for the year of 2008.¹³⁴ The report as regards foreigners' employment in Hungary forecasted no changes.

Albeit complete liberalisation has not been achieved in 2008, an immense step forward has been taken. The legal changes that have been presented before enhanced severely the employment of Union citizens, in particular that of Romanian and Bulgarian nationals. For this group of persons the liberalisation meant effective changes hence these persons really look for employment in Hungary (contrary to the EU15 nationals whose number is stable in the past years it amounts only about 2000). Talks to officials revealed that there have not been inquiries or claims from Romanian nationals complaining about the new rules or their application. In this sense the reform of the regulation can be deemed successful.

The simplification of the system, however, did not give rise to an increase in labour immigration. Probably the changes took place too late and were unable to exert any influence. Quite the contrary, an evident decline is to be perceived. On the one hand the regime is still not simple enough on the other hand countries offering less complicated rules and higher wages will always have considerable competitive advantages. In spite of the decline, however, Romanian nationals are still the major group of foreigners employed in Hungary followed by Ukraine and Slovak nationals.

Although there have been considerable changes in the legal position of Union citizens, the labour authorisation procedure itself has not been changed (PermitD).¹³⁵ Art. 7 (1) of the UnemplA foreigners may pursue gainful employment in Hungary only in possession of a work permit except for specified cases. According to the Art. 7 (2) (b) of UnemplA no work permit is required for the employment of persons entitled to exercise the right of free movement in Hungary.¹³⁶ Accordingly, the Hungarian law gives permission to EEA nationals to enjoy full access to the labour market of Hungary as a main rule. However, pursuant to Art. 7 (2) (b) differing provisions may be enacted by a Government Decree (see upper with reference on TraD). According to Art.7 (6) of the UnemplA the minister responsible for employment – in agreement with other ministers concerned – may create a Decree to specify the highest number of foreigners not including Union citizens – to be employed in individual occupations in any county, the capital city, and in Hungary as a whole at any one time, the occupations in which no foreigner may be employed due to the then current trends and structure of unemployment. Since 2008 the number of foreigners employed in Hungary can not exceed 87000.¹³⁷

The rules of issuance of work permits is laid down in the PermitD. Section 7 (1) of the PermitD defines the cases in which no work permit is required.

- For instance, for the director of a branch office or representative office of a foreign-registered business association, for the staff of diplomatic or consular missions, or the

134 SZMM, *Magyar Kereskedelmi és Iparkamara, Munkaerőpiaci előrejelzés 2008-ra* [Labour force forecast for 2008] http://www.afsz.hu/engine.aspx?page=full_afsz_rovidtavu_prognozisok_oldal.

135 Amendment to PermitD (Ministerial Decree 39 of 2007, 29 December) was not relevant to Union citizens.

136 This is the wording of FreeA.

137 Munkaügyi Közlöny 2008/6, SZMM közleménye.

- branches or offices of such, for work performed by foreign nationals at international organizations or at joint organizations established under international convention.
- No work permit is needed for carrying out work that involves commissioning, warranty repair, maintenance or guarantee service activities performed on the basis of a private contract with a foreign-registered company, if such does not exceed fifteen consecutive days at any given time. The Supreme Court in a judgement interpreted the meaning of ‘*installation work on the basis of a private contract*’ not exceeding 15 days. Accordingly, labour permit is not required if installation necessarily includes constructing and assembling work and its length no longer than 15 consecutive working days. Thus a fine (1.5 million HUF) implied by the Labour Inspection Office for unlawful employment of Romanian labourers was annulled.¹³⁸
 - Some education related cases are also acknowledged: for a foreign national winning a tender for post-doctorate related employment, or a public-financed Research Scholarship for work performed as part of the tender or the scholarship program, for the employment of a foreign national studying at a foreign institution of higher education as part of an apprentice training program arranged by an international student organization, for foreign nationals pursuing full-time studies at vocational schools, secondary school, basic art schools or institutions of higher education, for foreign nationals to be employed in basic, intermediate and higher education institutions for lecturing in a foreign language, if such employment is part of an international school program signed by the relevant ministers of the countries involved, as verified by the Ministry of Education.

An individual work permit can be issued if, first, the employer duly indicated its request for a worker (*workforce request*), prior to filing the workforce request no Hungarian worker was available for the position in question, nor, as second, any national of the EEA or a relative of such national who is registered as a job-seeker (*Community preference* in the Hungarian law means that a third-country nationals can only be employed in Hungary if there is no available Hungarian or EEA national applicant.) However, in certain cases the second element, namely the *assessment of the labour market situation* can be set aside. These are, for example, for employment of a foreign national in a key position, for employment in a business association under foreign majority ownership if the number of foreign nationals employed does not exceed two per cent of the labour force registered on 31 December of the previous calendar year, for the employment of an internationally recognized foreign national in the field of education, science or art.

Summing up, the fully liberalised access rules to the Hungarian labour market were adopted on the last days of 2008 before rules entered into force on 1 January 2009. While in 2008 RecipD and TransD was applicable in a modified version, this whole rather complicated system was finally annulled¹³⁹ and all persons under the scope of FreeA (Union citizens and EEA nationals) can enjoy free access to the Hungarian labour market including their family members regardless their nationality.

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¹³⁸ Legfelsőbb Bíróság határozata munkajogi perben 2008/23. II.10.259/2007/3, BH 31 May 2008.

¹³⁹ Government Decree No. 322 of 29 December 2008.

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Chapter IX

Miscellaneous

1. Short analysis of existing labour and migration policies

A short analysis of existing labour and migration policies including legislation and practice can be found in the book publishing the main findings of an IOM-EU-ILO supported research on irregular and illegal employment of migrants including Hungary, Germany, Ireland, Poland and Spain. It offers a complex limitation of irregular economy through a more transparent and fair authorisation (visa, labour permit), coherent taxation and economic-driven measures (e.g. rationalized transaction costs), reforming the control system in labour inspection (e.g. the annual inspection rate of all enterprises is below the offered ten percent¹⁴⁰ and efficiency of the controlling procedures is also low) and easy shift of legal status of migrants would enforce together a lawful labour migration for Union and non-Union workers. Naturally, the social acceptability of shadow economy in parallel has to be limited in different measures.¹⁴¹ Moreover, irregularity of employment in general is supported by the high rate of 'lost workers' among the inactive labour force (14 percent of them, about 330 000 persons are living out of schooling, child care, handicapped or retirement allowances): they are vegetating from certain social transfers or/and ad hoc, informal labour. They form a massive stock of (irregular) labour force much more than migrants. A survey¹⁴² proves the major factors of their dropping out from labour market, taxation and regular economy in longer term:

- their geographical location (in segregated zones of the country without employers and public transport facilities to reach working place in farer regions);
- low level of education (44 percent of inactive persons in active age are unskilled);
- absence of motivation for formal work (63 percent of responded persons do not project to be employed as hopeless, while 33-40 percent of inactive persons in active age have never been employed).

2. Counter-irregularity

We have to add that counter-irregularity requires a complex knowledge on migration and employment process. The labour and migration statistics have not been harmonized and available. Although the first year of reference was 2008 in the Reg.862/2007/EC on migration statistics, its data in grouping of the Regulation has not been prepared by the Statistical Office. The available data¹⁴³ are neither up-to-date nor detailed on purpose of residence or employment. For this reason only surveys and research based on critical analysis of statistics can ensure proper information on migration and employment process. Two efforts may be mentioned: an ongoing survey on who is and how is employed in Austria moving from Hun-

140 COM (2007) 249 final.

141 Marek Kupiszewski, Addressing the irregular employment of migrants – Concluding remarks and recommendations, in: Kupiszewski – Mattila (eds), *Addressing the Irregular Employment of Immigrants in the European Union. Between Sanctions and Rights*, IOM, July 2008, p. 318-328.

142 GKI research led by Judit Ádler (2008) financed by the OFA.

143 Central Statistical Office, *Demographic Yearbook 2007*, Budapest 2008.

gary¹⁴⁴ and an international comparative research on patterns of migration, policy and labour progress in the Mediterranean and CEE regions, conclusions from the past and present.¹⁴⁵

3. Ombudsman and Equal Treatment Agency

Ombudsman and Equal Treatment Agency have remained the non-judicial bodies that are entitled for scrutiny in violated rights. However, the EqualA contains no reference on discrimination on the ground of citizenship, so ETA can scrutiny for complain of an EU citizen or worker on the ground of labour or ‘other social condition’ of applicant. Ombudsman responsible for fundamental rights receives complaints for non-equal treatment of anybody, while ombudsman responsible for minority rights can launch an investigation for maladministration on the ground of race or ethnic origin of applicants. While ETA can impose severe fine, the Ombudsman can offer amendments in regulation, providing publicity of the case and mediate in conflict without sanction. In other term, there is a forum shopping seeking the most effective organisation from the point of prevention and sanctions (such as from public prosecutor, authority of labour inspection, sanity authority, customers’ rights protection authority, health care inspection and the judicial organs). This embarrassing diversity of authorities is criticised from two sides: (a) there is no perfect rationale in division of competences among the authorities;¹⁴⁶ (b) in absence of a clear notion of disadvantage caused by unlawful action (discrimination) the fact finding process and ETA proceeding rules have to be re-structured.¹⁴⁷

4. The FMOW network

The FMOW network organises a regional seminar on legal experiences of equal treatment and legal status of Union citizen’s workers and family members. Legal practitioners, representatives of local self-governments, OIN, labour, taxation, labour inspection and social insurance authorities, taxation advisers and academics would discuss on Hungarian and Romanian transposition of rules, ECJ case law¹⁴⁸ and legal practice.¹⁴⁹ This was the first time for law practitioners since enlargement EU10 and EU2 providing deeper and critical analysis of how the Hungarian and Romanian legislation, administration has faced equal treatment requirements. The pending cases of pension recognition by the Hungarian and Romanian pension scheme for Romanian nationals retiring and living in Hungary were also discussed.

144 Kopint -TÁRKI research led by Ágnes Hárs (2008/2009) financed by the OFA.

145 IDEA project led by Marek Okolski (Poland) and supported by the EU. The Hungarian team is delegated from the Hungarian Academy of Sciences.

146 András Kádár, A bőség zavara? A magyar antidiszkriminációs fórumrendszer vázlata; Katalin Szajbély, A diszkrimináció tilalma a kisebbségi biztos tevékenységében, in: Balázs Majtényi (ed.), *Lejtős playa*, Budapest: L’Harmattan 2008, p. 29-49 and p. 50-66.

147 Mónika Ambrus, Vizsgálati modell az egyenlő bánásmódmegsértésével kapcsolatos ügyekben; András Magicz, A megtorlással szembeni védelem gyakorlati kérdései és a jogi szabályozás továbbfejlesztésének irányai, in: Balázs Majtényi (ed.), *Lejtős playa*, Budapest: L’Harmattan 2008, p. 135-164 and p. 165-178.

148 The most relevant cases are translated into Hungarian but reference is given to handbooks, such as Jean-Yves Carlier & Elspeth Guild (eds), *L’avenir de la libre circulation des personnes dans l’UE – The Future of Free Movement of Persons in the EU*, Brussels: Bruylant 2006.

149 University of Szeged – EU Direct, 14/15 May 2009. The seminar material is published by the L’Harmattan Publishing House (legal periodical *Föld-Rész*, 2009/1).

5. Regional cooperation

I add two other evidences on regional co-operation. The Romanian Lawyers' Association held a conference on which free movement and temporary provisions of labour market were discussed in a section. Presentation on Hungary was published in Romania in 2008.¹⁵⁰ The French presidency initiated a regional exchange of views on migration inviting experts in public administration, trade unions from Romania, Bulgaria, Slovakia, Hungary, and some academics, NGO representatives from France and Hungary. The Hungarian labour migration experiences and equal treatment were presented and distributed among participants in Kosice.¹⁵¹

6. Social coordination

Although the FMOW is hardly attached to the Reg. 1408/71/EEC and 574/72/EEC defining the social coordination, the thousands of Romanian nationals living in Hungary would cause certain tension. The number of applicants in 2007-2008 was over 9000 claiming for pension decision belonging to the state pension scheme (first pillar) at the Hungarian Pension Authority reaching the old pension age in Hungary and in Romania. Their applications have been pending. The European Commission communication (10 September 2008) explained that in absence of Romanian authority's answers and completed formats beyond '*the reasonable time*' the Hungarian counter-partner neglected to request for support and intervention of CASSTM with reference on its Resolution No.192. Vladimir Spidla's announcement warned the authorities in concern that despite of pending cases applicants cannot be without temporary pension (advancement). The Hungarian Pension Authority has provided these advancements but the Romanian has omitted effective actions as well as procedural steps. Due to long procedure a civil association was formed by claimants in Hungary sending complaints to the European Parliament, to the Ombudsman and other organisations.

7. Workshops

After five years of accession the academic workshops have evaluated the first experiences of enlargement and its impacts on social, economic and employment progress in Hungary. Accordingly the most visible changes are indicated in legislation but internalisation of rules in economic actors would require a longer period.¹⁵² The implications of EU membership on immigration and integration policy, for instance, Bulgaria is urging effective luring measures for emigrants to return due to shortage of labour force. Or in the Romanian-Hungarian labour migration would enforce in both states a more expansive salary policy in order to improve

150 Judit Tóth, Munkaerőmozgás és az Európai Unió bővítése az átmeneti rendelkezések tükrében [Movement of workers and transitional provisions in the enlarged EU] *Romániai Magyar Jogtudományi Közlöny*, 2008/12, p. 5-10.

151 Regional Conference organised by the French Embassy – Slovakia, *Les droits des travailleurs immigrés* (23 October 2008, Kosice) paper on Hungarian experiences and legal practice by Judit Tóth (University of Szeged, Hungary).

152 Review on Imre Kovách, Éva Nagy, Tímea Tibori, Ágnes Tóth (eds), *Európai Magyarország 2007 – Társadalomtudományi áttekintés* [Social scientists on Hungary after enlargement], MTA Politikatudományi Intézet, Budapest 2007, *Európai Tükör* 2008/7-8, p. 188-189.

the migration balance.¹⁵³ The social benefits and allowances and employment was also analysed from the perspective of EU accession, in particular the success of social coordination and transposition of 2004/38/EC Directive providing the social rights for residing Union citizen regardless his/her active or inactive status in Hungary.¹⁵⁴ It is included into the most popular periodical on the European integration devoting a special issue on evaluation of Hungarian experiences of membership in 2004-2009. Another ongoing research evaluates the similarities and differences of regional migration patterns in CEE and the Mediterranean regions from the perspective of labour forces supported by the European Commission.¹⁵⁵

Some other relevant thematic articles can be mentioned, as follows:

- Inflow of highly skilled foreign managers to the Hungarian labour market as another economy in transition has been observed. A survey within the framework of the EU Brain Drain Project in 2000 and repeated in 2005¹⁵⁶ was gathering information on how flux of brain improved management level. Majority of delegated migrants from stable (EU15) economies and relocation of staff inside the multinational companies were directly related to direct investment. On the other side, there are not so much good practice on how to attract knowledge centre based on the regular co-operation of academics, multinational companies and regional R+D actors maintaining highly skilled and innovative brains in this region.¹⁵⁷
- What are the strategic components of employment, how economic activity and its rate can be improved in parallel with cleaning the shadow economy. Taking the Lisbon strategy seriously, the frequency of not registered employment (illegal work) or registered jobs for lawful salary shall be diminished but curtailment of budget deficit and reduction of contribution rate to public charges is forced at one sitting in Hungary.¹⁵⁸
- The reform of public administration is a key factor to competitiveness. Although only 7 percent of state budget is paid to administrative costs in Hungary, without its capacity building and selective development in further reform, neither stronger economic competitiveness nor right to good administration (Charter of Fundamental Rights) can be reached.¹⁵⁹
- The labour office system is playing a limited role in Hungary. First, the vacancy is low (for instance, in 2006 its rate was 1.2%, about 30,000 jobs) and its significant part belongs to the public sector (health care, social allowances). It means that for profit sector is reluctant to register or/and extend employment. Secondly, unemployed persons are

153 *The Implication of EU Membership on Immigration Trends and Immigrant Integration Policies for the Bulgarian Labour Market*, Sofia: Economic Policy Institute 2008. It contains 12 articles of the joint research led by the Work Economic Institute, Hungarian Academy of Sciences.

154 Éva Gellénné Lukács & Tamás Gyulavári, *Szociálpolitika és foglalkoztatás [Social security and employment – 5 years in the EU]*, *Európai Tükör*, Magyarország öt éve az Európai Unióban 2004-2009, Különszám, March 2009, p. 199-214.

155 *IDEA: Mediterranean and Eastern European countries as new targets for immigration in the European Union Immigration countries in Central and Eastern Europe – The Case of Hungary* (National Report Prepared by Ágnes Hárs in collaboration with Anna Balogi, Anikó Bernát, Margit Feischmidt, András Kovács, Pál Nyíri, György Péteri, Ildikó Zakariás), Budapest, December 2008.

156 Annamária Inzelt, *Közvetlen tőkebefektetések és a vezetői tudás áramlása az átmenet idején [Direct investment and influx of leaders' knowledge in transition period]*, *Európai Tükör* 2008/1, p. 46-72.

157 Gábor Hoványi, *A tudás és a nemzetközi tudásháló szerepe egy régió iparának fejlődésében [Knowledge and role of networks in the industrial development of our region]*, *Európai Tükör* 2008/5, p. 47-57.

158 For instance, Kristóf Lehmann, *A lisszaboni stratégia megvalósítása az új tagállamokban és Magyarországon [Implementation of the Lisbon strategy in new Member States]*, *Európai Tükör* 2008/1, p. 121-131.

159 Imre Forgács, *Közigazgatás és versenyképesség. Miért nem kicsi és olcsó az állam az Európai Közigazgatási Térben?*, *Európai Tükör* 2008/6, p. 10-17.

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seeking jobs reading advertisements (84%), requesting assistance from friends, relatives (81%), directly entering into contact with companies (70%) or advertising agency (41%). The state labour service is requested (72%) more frequently than private labour service (1-2%) but it is not a dominant position. Survey proves how interpersonal relations in job seeking have been outstanding in Hungary¹⁶⁰. We can suppose that this trend is similar to job/work seeking abroad.

160 Central Statistical Office www.ksh.hu and www.afsz.hu.

Appendix 1. Frontier workers

In point 4.1. I have already referred to frontier workers.

There is no specific schemes for frontier workers, as this group is rather marginal in the Hungarian labour market.

There are no incentives to enhance frontier mobility.

There is no debate on the issue of frontier workers at present in Hungary.

I add that provisions on job-seekers are really wide. Access to the job-seeker services is guaranteed to all persons who are legally entitled to enter the Hungarian labour market (Hungarian nationals, foreign persons possessing an immigration/settlement permit, refugees, EEA and Swiss nationals and their family members). EEA and Swiss nationals are placed on an equal footing with Hungarian nationals hence they are qualified as 'job-seeker' and enjoy this status. The principle of Community preference is also applied hence EU citizens are entitled to use job-seeker assistance services by the employment agencies regardless of the fact whether they are required to hold a work permit or not. Moreover, employers are entitled to take into account these workers when applying for certain benefits as if they were Hungarian nationals.

Further, due to deleted transitional restrictions in last December and economic crisis, today the avoidance of economic abusive operation and growth of shadow economy (e.g. by TWB) and modification of public revenues (contribution to social insurance and VAT) are in the middle of parliamentary debates and governmental efforts.

Appendix 2. Free movement of athletes (Hungary)

1. Regulation on sport activities

Sport activities relate to wellbeing and healthy life of persons, thus Constitution provides right for all to the regular physical education (Art.70/D) while the State has to protect everybody from harmful, dangerous actions. This complex task of state and fundamental right to healthy life is executed through the special regulation on sport in the following structure:

- a) International public law obligations (e.g. anti-doping convention in the Council of Europe);
- b) SportA defining the most relevant institutions, financial support and administrative system on amateur and professional sport. It contains numerous specific rules differing from the universal provisions in Code Civil, Act on Right to Association (1989) and Labour Code.
- c) Code Civil and Act on Companies (2004) is applicable in business life (e.g. concluding contract with sponsors with sport club) including entrepreneurship and undertaking in sport sector;
- d) Act on Right to Association is relevant for all non-profit organisations (sport associations, sport federations, leagues, sport schools and clubs for handicapped persons). It provides subsidiary rules to the SportA.
- e) Act on Public Interest Organisations (1997) is also relevant for non-profit organisations in sport sector because it contains requirements on transparency in all entities that by law upon request obtain this public interest organisation status at country/capital court. These organisations (e.g. sport federations, leagues, sport associations, National Olympic Committee, Para-Olympic Committee) have to meet more conditions than simple sport clubs or companies.
- f) Labour Code is relevant for professional sportsman and sport experts because their employment is subjected to labour law as subsidiary rules to SportA.
- g) Government Decrees shall regulate the next topics according to the SportA:
 - a. Anti-doping procedure and control;
 - b. Disciplinary procedure and liability in sport;
 - c. Security in sport events;
 - d. Olympic centres (preparatory to the games and those operation);
 - e. Benefit for outstanding sportsmen (Olympic winners and their trainers);
 - f. Employment of sport experts, recognition of certificates;
 - g. Medical control in sport sector and its system;
 - h. Sport information system and administrative tasks of state.
- h) Ministerial Decrees shall regulate the next topics according to the SportA:
 - a. Implementation of sport assets and property (e.g. by local self-government);
 - b. How to apply and distribute the budget support to the sport sector including support to participation and organising outstanding sport events;
 - c. Physical education as part of public education, how to support it by state and budget (e.g. pupils' sport at school).
- i) Local municipal decrees may define how to support the local sport events, amateur or students' sport life.

- j) Sport federations, Leagues regulation and by-law shall be implemented as obligatory rules on the given branch of sport activities that are applicable by all represented clubs, regional federations.
- k) International private law taking into account the regulations of continental, international sport federations, leagues and Olympic Movement (e.g. WADA Codex, FIFA, UEFA, FINA, LEN statutes).

2. Organisation of professional sport activities

Sport activities are managed in the following organisations:

- a) sport associations (civil organisation rather for amateurs and handicapped persons);
- b) sport schools, circles (for students, frequently inside the public schools, universities);
- c) sport entrepreneurship (share-holdings, limited companies in private property). It is the most relevant for professionals whose make money from sport activities and are employed by sport firms.

However, the SportA covers all kinds of mentioned entities defining general rules for all and separate additional provisions on professionals, handicapped persons, students' sport, hobby sports and other amateurs.

The SportA delegates the legislative power in certain issues to the branch sport federations at national and regional level. According to the SportA the *national sport league (federation)* representing interests of members from the given fields of sport is entitled

- to regulate the Racing Conditions (e.g. of national championship) and Code on Transferring,
- to register racing rights,
- to issue or reject the racing licence, authorisation 'for *Hungarian [national] athletes* participating on race held abroad and for *foreign [national] athletes* participating on race held in Hungary' (Art. 22). However, *there are no quotas of non-national athletes defined in public legal rules.*

National sport federations have members: regional leagues/alliances/ federations and sport clubs (associations, entrepreneurship). Members have to respect for SportA and federation by-laws at least. In many cases federation by-laws transpose the international federations' regulation. It means that applicable rules issued by the national sport federations are different in football, basketball, volleyball, handball, rugby, ice-hockey, etc.

The upper indicated multi-level regulation in sport has been accepted in practice and there is no intention to amend it. On the other hand, sport managers and leaders of clubs are not necessary familiar with changing substance of public (domestic or EC) law in sport, so sport authorities' directing role has not been fully successful.

3. Organisation and functioning of sport authorities

Sport authorities' structure is as follows:

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- a) Minister responsible for sport¹⁶¹ (Ministry of Municipal Affairs) and the National Sport Office under the subordination of the state secretary is responsible for preparatory of regulation (legislation), registry of state supports, sport organisations and sport policy.¹⁶² It belongs to the state administration.
- b) National Sport Council as adviser to the Government represent the sport federations, responsible ministries, public funds, sponsors and other stakeholders making consent on long-term sport policy.
- c) Local municipals' department at country and capital level providing sport facilities, supports for local population, schools and segregated persons. Numerous sport tracks, stadiums are owned by the local municipals and cities may contribute to various sport events.¹⁶³ Their task is subsidised by the state budget including contribution to modernisation of sport facilities.¹⁶⁴
- d) Public institution as a legal status is provided by law for
 - i. National Sport Alliance¹⁶⁵ as umbrella organisation of all sport federations. It maintains the Standard Sport Arbitrage making final decision in disputes in licence giving, transfer, racing rights or employment of sportsmen.
 - ii. Hungarian Olympic Committee¹⁶⁶ as main organiser of Olympic movement and national team/participants on games supported by the state budget. Leading position in state administration is not compatible with membership in presidency of HOC.
 - iii. Para-Olympic Committee¹⁶⁷ managing participation of handicapped sportsmen on games;
 - iv. National Para-Sport Alliance.These organisations enjoy a special entitlement for regulation, distribution of state benefits among members and represent the country at international level.
- e) Sport leagues/federations/alliances in each main fields of sport (Olympic, amusement, hobby, innovative) – as it is mentioned – is responsible for lawful racing, anti-doping enforcement, registry of sportsmen, registry of racing right and regulation (by-law) making. Its legal status is a 'public utility' organisation¹⁶⁸ by law.
- f) Public funds for sport provide additional social security for old sportsmen, sport experts and those distribute scholarships, benefits for students' and youth sport education contributed by the state budget.

Summing up, authorities are partly decentralised in branches, and partly centralised and hierarchical (clubs, federation at county and at national level; local municipal and Sport Office at national level in state administration) co-operating all inside the National Sport Alliance. Authorities only in part belongs to public administration, the own civil autonomy of all kinds of federations and Olympic movement is also ensured.

161 Competence and division of work inside the government is changeable: there was an independent ministry for youth and sports for some years, which belonged to the Ministry of the Interior, Prime Minister Office and recently it was ticked to the municipal affairs.

162 Upon proposal of the Government the Parliament adopted the long-term sport policy 'Sport in 21st century – National strategy' (Parliamentary Resolution, No. 65 of 27 June 2007).

163 For instance, see the Capital Municipal Decree on contribution to international sport events, No. 57 of 16 September 2005.

164 For instance, Ministerial Decree of the Local Municipal Affairs No. 15 of 17 March 2009.

165 <http://www.nssz.hu/index.php>.

166 <http://www.mob.hu/Engine.aspx>.

167 <http://www.hparalimpia.hu/>.

168 SportA refers back to the Act CLVI of 1997 on public utility/non profit making organisations.

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How are the members of the managing bodies of the sporting authorities appointed? Is the State involved in their nomination? Beyond the state administration recruitment (in Sport Office and ministerial positions, as well as in municipal departments¹⁶⁹) we mention the main civil or para-autonomous organisations in which the nomination is influenced by the state:

- a) National Sport Council: its chairman is appointed by the President of the State upon nomination of the Prime Minister. Before his/her appointment a hearing at the parliamentary committee is required. Its co-chairman is the minister responsible for sport affairs and the secretary is the deputy-leader of the National Sport Office. Other competent ministers delegate members to the Council (3 persons) and curators of the public funds, too. The parliamentary committee and the alliance of municipals also delegate members.
- b) Public funds for sport: two curators are appointed by the Prime Minister upon proposal of the minister responsible for sport affairs for five years. However, leading position in state administration is not compatible with curatorship.
Moreover, leader of public administration in sport and president of National Sport Council is entitled to participate without voting right on general assembly of the HOC.

How are the sporting authorities that are in charge in Hungary of the organisation of professional competitions financed? Does the State participate directly or indirectly in their financing? Does the State exercise any financial control? The following Table summarises these overlapping questions according to SportA and FinancD.

Source	Purpose	Control
Subvention to sport in yearly budget	Its 3% to communication tasks (e.g. popularization of sport) Its 5% to application and control management Its 92% to normative support concerning (a) international sport events (b) professional sport, sport racing (c) education of young talents (d) support for handicapped persons' sport (e) support for students' sport (f) premium for outstanding results (g) sport study and research	(a) Report on implemented contract in details and invoices (FinancD, Section 7) (b) Itself the Ministry/Sport Office and its auditor (c) Regular data supply to national sport information system (NSIS) ¹⁷⁰ : since January 2005 sport organisation is not eligible for state subvention in absence of supply of required data (Section 8) (d) state subvention to sport club is not available if it has arrears to taxation office (FinancD, Section 6) (e) state subvention to sport club is not available if it has expired arrears within 90 days to sport organisation supported by the state budget
State budget from the Ministry	Individual applications for (a) scholarships (b) premium for sport results (c) benefit to Olympic winners (d) social benefit to old sportsmen	

¹⁶⁹ Act XXIII of 1992 on Legal Standing of Public Officials.

¹⁷⁰ Government Decree No. 166 of 21 May 2004 on national sport information system. Its recent modification entered into force on 15 May 2008.

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		(f) state subvention is not available for sport club if it is under sanction for violation of (sport) employment provisions (g) state support/subventions may be withdrawn or suspended for violation of supporting contract (e.g. a renovated sport building is used for not sport purposes) and extra charge shall be paid
Purposes explained in FinancD	For instance support to competitive sport (a) in preparatory to Olympic games and expenditures concerning participation of national teams/athletes (b) contribution to costs of operation and tasks in sport federations (c) in preparatory to AGFIS games and costs relating to participation of national teams/athletes (d) in strategic development of training, education of sport experts and management in sport (e) to public order and security in sport events (f) management cost concerning international sport events (g) capacity building in local sport facilities and fields operated by the local municipals	(h) Contribution shall be supported by the sport federations (consensus) or Olympic Committee (i) items of support are determined (e.g. preparatory cost means expenditures on sport health, anti-doping control, modern protective cloth and equipments, additional nutrition) and its rate (e.g. support up to 50% of organisation and management cost concerning international sport event) (j) support shall be separately accounted and kept in books
National Civil Fund	Additional benefits to non-profit sport organisations	Report on implemented contract in details and invoices ¹⁷¹

We have to add to the control mechanism:

- a) the Audit Office is entitled to control state subventions and supports in all clubs, federations;
- b) lawful operation including fair implementation of SportA and FinancD is checked by the public prosecutor office in sport associations and federations (control of legality in civil sector);
- c) Court of Registry also is entitled to control lawful operation (documentation, data supply) in sport entrepreneurs/sport firms;
- d) State support to competitive sport that is applied to economic activity of benefited organisation shall be considered as rule of *de minimis* (Art. 87-88 of the Treaty, 1998/2006/EC Reg. (Local municipals' state support belongs to public service compensation, see the Art 86 (2) of the Treaty, it can limit the economic competition only in the necessary size to the effective service supply). Thus applicants have to declare the substance and used supported in the first 3 years.

¹⁷¹ Act L of 2003 on National Civil Fund.

In brief, mechanism in state support to the sport sector has been developed and regulated. Its efficiency requires a survey. Through interviews diversity of clubs in financial position is obvious in which publicity and commercialized rate of the branch of sport is decisive but state support is depending neither the subjects of sport (professionals or amateurs, mass, pupils, handicapped persons) nor commercialization (whether the sport organisation is a civil entity without sponsors or sport club is a company with numerous sponsors, advertisement and broadcasting chances).

Regulation governing professional athletes' competitions is adopted without state intervention but within the frame of the SportA. Independence is really broad while there are no proper experts in codification in sport federations. On the other side, public administration in sport has not effective controlling system on by-law in sport in particular comparing to international sport federations that enforcement power on members is obvious. Consequently, harmony with EC law and constitutional requirements is hardly ensured.

4. *Equal treatment*

Although the professional athletes are subjected to labour law, there are no collective bargaining agreements governing sports. Due to construction of public institution in sport and sport federations, those operate as 'quasi trade unions' representing the interest of athletes without formal right to collective bargaining.

What are the practice of equal treatment of sport experts and athletes moving inside the EU? Before description of possible discriminative provisions in by-laws, we have to outline the general rules on sport employment.

- a) Professional athlete shall be *remunerated* exclusively on the base of the Labour Code regardless his nationality according to the SportA. In possession of a racing permit s/he has to conclude on fix-time (close-ended) written *employment contract* with a sport club or association as a labourer with certain specific exceptions as defined in the Act (Art.8). This racing right is assigned from the athlete to the employer sport organisation that shall be registered by the sport federation on the base of internal rules. This transfer of racing right means a financial compensation for the athlete. Due to termination of employment this racing right returns free of charge to the athlete (Art. 9). The sport organisation obtaining this racing right temporarily or permanently may transfer it to another sport club with consent of the athlete who is entitled to get *compensation* from the transferring sport organisation that can obtain a *fee* from the hosting sport organisation. Financial compensation and fee is *consensual* (Art. 10) but shall be announced to the sport federation, moreover its 1 percent shall be paid to the sport federation and 4 percent to the fund supporting the training of supplies (Art. 11(3)). If this transfer is not temporarily, a new labour contract shall be concluded. During validity of employment contract it includes the fixed-time transfer of right for racing to another sport club/association according to a contract. In this case athlete is considered as a posted worker. The SportA provides athletes' free movement as employees. For this reason the SportA defines a maximal three year transitional period for modification of each existing civil contract of professional athletes' sporting activities (Art. 78(3)) that expired at the end of 2007.
- b) Transfer of racing right can be prepared and managed by commercial agents as a lucrative activity (commission) if s/he is registered at the international at national sport fed-

- eration. Any other share in transaction costs (beyond the athlete's compensation, commission, fee and sport federation) is invalid (Art. 11(2)).
- c) Beyond this basic condition, professional athlete shall be in possession of *labour permit* (PermitD Section 6(1)d) that may be issued without economic test if 'according to [internal rules of] competent national federation of the sport in concern his/her employment is acceptable' (PermitD Section 6(5)). It means that *professional athletes from the EEA* can be employed on the upper described rules (on *reciprocity* based facilitated authorisation or without labour permit). *Since 1st July 2007 employment of professional athlete and trainer is lawful without labour permit regardless nationality* (PermitD Section 7(1)t). Legality of exception shall be proved by the employee, e.g. for a labour inspector's checking (Section 7(6)).
- d) SportA regulates employment of athlete following the model of the labour law but in practice it is attached to *unlawful sponsorship, remuneration or other compensatory measures on the rational of civil contracts*. Labour law is not applicable in certain components of sportsman's contract (e.g. fixed salary, fixed and inclusive bonus, 'audition' of the athlete before lending, transfer of racing right by another/national sport club/association) in the analogy of labour law. For this reason 'illegal employment' or irregular employment is rather spread in professional sport. For instance, Sport documentation (e.g. Registry of sport associations, state subsidy for athletes, Art. 56) system contains no information on accession to employment, fees, transfer of rights on the base of internal sport rules.. The labour authority, labour inspectors cannot monitor on this sphere. Athletes from less developed region are delivered in a vulnerable situation. Sport Arbitration Court disputes cases on compensation paid to consignor club and league for transfer of racing rights and licence of the athlete in concern. However, this is the most regulated issue in Codes on Racing Conditions of national sport federations.
- e) The SportA is speaking shortly on procedure, agent of *recruitment*, intercession and transmission of sportsmen from one club to another (foreign) club. Whether these actions must follow the labour force intermediation in harmony with ILO conventions¹⁷² and national rules on registry (of private manpower offices) and on deposit (for foreign manpower transmission) or not or in part – it is unclear in this tight labour-law model. Recruitment agent shall be in possession a licence from the international/national sport federation but not from the labour office. Its fee and involved legal representative's role is not clear in SportA.

After enlargement and adoption of the SportA, the by-laws, internal codes on racing including transfer of racing right are inconsistent in personal scope. Majority of them¹⁷³ use the term of 'Hungarian', 'foreign' athlete or 'non-national athlete' (in possession of settlement/long term residence permit) who are received/transferred to Hungary or from Hungary to abroad.¹⁷⁴ It means that all non-Hungarian nationals including EU nationals, EEA citizens and other persons under the Community law preference shall be equally treated.¹⁷⁵

172 In particular with Conventions Nos. 81, 129, 143.

173 The Code on transferring and registration of athletes was analysed for this report: the National Sport Federation of Wrestling, Triathlon, Volleyball, Basketball, Table Tennis, Motor Sport, Field Hockey, Parachute, Kayak-canoe, Weight-lifter, Athletics, Football and Handball.

174 Some examples: Statute of *Hungarian Football Federation*, Rules on Licence and Transfer (Resolution of the HFL 36, 24 April 2003) covers 'Hungarian national' and 'non-Hungarian professional sportsmen', returning and leaving nationals. Resolution on rules of licence and transfer of athletes issued by the Presidency of *Hungarian Pentathlon Federation* (16 November 2005) shall be implemented on 'athlete in possession of

These internal codes defines the term of professional athlete,¹⁷⁶ and by-laws distinguish national and non-national in transfer procedure and international transfer. The non-national athlete's transfer has to be managed in harmony with the same home-grown rules on transfer adopted in the sending sport federation abroad. In practice it requires a binding declaration on respect for a foreign or international¹⁷⁷ sport federation's rules by the Hungarian receiving club. However, the transfer of non-national can be managed with the consent (permit) of the sending sport federation or meeting additional requirements of students and persons in military duty.¹⁷⁸ In contrast, the transfer of national to abroad is permitted if the athlete undertakes to participate in the racing and training program of the national assorted team, or permit can be based on the respect of 'the interest of the sending club and national assorted team'.¹⁷⁹ Although the request for international transfer can be submitted at any time, the transaction will be valid and final if consent of the national sport federation to the tracing right and transfer will be given.¹⁸⁰

The transferring fee is also determined by internal codes in different ways. In some cases it is openly intends to compensate the sport club educative and training efforts at least for three years before the age of 16 of the athlete, and it has to be maximised and paid by the hosting club.¹⁸¹ Or it is the price of training a new weigh-lifter, thus it is a service from the perspective of taxation.¹⁸² The most sophisticated rules can be found in football: expenses for reinforcement education shall be paid from the first professional athlete contract concluded with the athlete until his/her age of 23; transferring fee for termination of the club contract, and the cost for transmission of the playing right of the athlete shall be covered.¹⁸³

The labour-law model for regular workers is obviously out of sport practice, and sport managers, transmitting agent together with law firms manage the athletes' recruitment, movement between clubs across the borders, too. Law firm provides the legal background (how to make contracts but not necessary in accordance with labour law but rather in civil law on sponsorship, transfer and management abroad), while managers as head-hunters pro-

Hungarian nationality or settlement permit obtained in Hungary.' In Section 12 it adds 'athlete who is Hungarian national or who shall be treated as national may be transferred to another sport club (even abroad) only in possession of the consent of national federation'. This consent would be obtained tacitly if 'athlete acquired his/her Hungarian nationality at least one year before or has settlement permit and transfer is in harmony with international sport rules and interest of international sport association' (Section 13). Statute of *Hungarian Table Tennis Federation* (1 July 2005) defines: Racing licence may be issued for a non-Hungarian national if his national league rejected the consent but s/he obtained as a foreigner a settlement permit a year ago in Hungary and issuing the licence does not violate the rules of the international federation (Art. 8 (10.5)). The tacit consent to transfer inside Hungary shall be supposed if the athlete acquired Hungarian nationality more than 8 years ago or s/he is in possession of a settlement permit in Hungary (Section 17). The transfer can be managed by an agent in possession of a license issued by the national federation paying a bail (Section 20). This construction is far from strict rules on employment agency. The Code on Racing adopted by the *Hungarian Cycling Federation* (20 December 2005) defines that an athlete with dual citizenship in racing and registration shall be treated as an Hungarian national if s/he has Hungarian nationality. Dual nationals have to prove the absence of racing licence issued by any UCI member federation (Section 1.13).

175 The neutral regulation of personal scope on racing is exceptional. We mention the Statute of Hungarian Water Polo Federation (see modified and full text as adopted on 16 September 2004).

176 S/he is employed and is remunerated for sport activity by a sport organisation (club, association or sport company).

177 For instance, see the Code of Volleyball, Field Hockey and Basketball.

178 See the Code of Hungarian Wrestling Federation.

179 For instance, see the Code of Volleyball, Wrestling.

180 See the Code of the Football Federation.

181 See the Code of the Basketball Federation.

182 See the Code of the Weight-lifter Federation.

183 See the Code of the Football Federation.

vide the export of athletes entering into contact with clubs and they negotiate on conditions, expenses, price of leaving and entry. At least football players (from Hungary to UK, Germany, and from Ukraine, Russia to the EU) have been transferred for years ‘although the biggest challenge means for us that concluded contracts are not necessarily based on the Hungarian legal system, and rules of FIFA and National Football League are different from the Act on Sport [...] within some years a legal harmonisation is required in order to reach a legal security in each Member State of the EU in the domain of the football’ – said an experienced legal representative and a sport agent.¹⁸⁴ The Codes require involvement of sport manager or agent in possession of a licence from the European or the international sport federation, league, and in some case his signature in the transferring contract¹⁸⁵ or the agent shall be registered by the international sport federation whose efforts can be paid commission. However there only minimal example when contract is void by the Code if compensation for transferred racing right is distributed for third persons beyond the mentioned commission.¹⁸⁶ However, the SportA (Art 11(2)) makes the contract invalid if another person – beyond the registered agent, the sport federation, athlete and the receiving club – is benefited from the transaction. Who pays managers and lawyers?

In 2008-2009 in the sport sector free movement can be hindered by the following main obstacles.

- a) The first is the non-acceptance certificates or diplomas. The Government Decree No. 157 of 18 May 2004¹⁸⁷ regulates the *equivalent qualification* (certificate or diploma) in the field of sport (e.g. qualified or master trainer, human-kineologist, PET) due to internal legal changes in higher education system. Until May 2005 in the internal sport rules of the sport federations had to define the affected sport positions in which these professionals should be employed in accordance with the qualification categories in the Appendix of the Decree. If an applicant is over 50 years old and has at least five year outstanding activity in the given sport branch, s/he can be exempted from obtaining the professional qualification temporarily upon request of the sport federation up to 31 December 2007 (Section 3). This exception is deleted since February 2008. This qualification of sport experts is relevant in the employment (Section 4): all professional sportsman or member of sport organisation have to meet this qualification Decree that shall be implemented ‘in accordance with internal rules of the sport federations’. Because nationality requirement of applicant is not defined, this universal requirement of qualification shall be equally applied by EU and non-EU nationals. Until 31 December 2007 each sport federation shall define (Section 5(6)) in each sport field and branch what qualification is considered as sport expert and what position shall be fulfilled by qualified or master trainer. This requirement is relevant in labour authorisation for non-nationals (PermitD).
- b) The second possible repercussion would be the rules of employment and change of employer including provisions on transfer. Since 1 July 2007 employment of professional athlete and trainer is lawful without labour permit regardless nationality [PermitD Section 7(1)t)]. Legality of exception shall be proved by the employee, e.g. for a labour inspector’s checking [Section 7(6)]. Professional athlete shall be *remunerated* exclusively on the base of the Labour Code regardless his nationality according to the SportA. In

184 Ügyvéd és ügyfele. Dr. Körösi Tibor és Hrutka János a sport és a jog kapcsolatáról [Attorney at law and his clients. Relations of Sport to Law] *Ügyvédvilág* 2007/10, p. 27-28.

185 See the Code of National Football Federation.

186 See the Code of the Volleyball Federation.

187 Amended by the Government Decree No.171 of 2005, 1 September and No. 19 of 2008, 5 February

possession of a racing permit s/he has to conclude on fix-time (close-ended) written *employment contract* with a sport club or association as a labourer with certain specific exceptions as defined in the SportA (Art. 8). This racing right is assigned from the athlete to the employer sport organisation that shall be registered by the sport federation on the base of internal rules. This transfer of racing right means a financial compensation for the athlete. Due to termination of employment this racing right returns free of charge to the athlete (Art. 9). The sport organisation obtaining this racing right temporarily or permanently may transfer it to another sport club with consent of the athlete who is entitled to get *compensation* from the transferring sport organisation that can obtain a *fee* from the hosting sport organisation. Financial compensation and fee is *consensual* (Art. 10) but shall be announced to the sport federation, moreover its 1 percent shall be paid to the sport federation and 4 percent to the fund supporting the training of supplies (Art. 11(3)). If this transfer is not temporarily, a new labour contract shall be concluded.

During validity of employment contract it includes the fixed-time transfer of right for racing to another sport club/association according to a contract. In this case athlete is considered as a posted worker. The SportA provides athletes' free movement as employees. Transfer of racing right can be prepared and managed by commercial agents as a lucrative activity (commission) if s/he is registered at the international at national sport federation. Any other share in transaction costs (beyond the athlete's compensation, commission, fee and sport federation) is invalid (Art. 11(2)).

- c) The third objection would be the nationality quotas or other specific treatments of non-nationals in racing. According to the SportA the *national sport league (federation)* in each branch of sport is entitled to regulate the Racing Conditions (e.g. of national championship), the Code on Transferring, to register the racing rights of athletes and clubs, and to issue or reject the racing licence, authorisation 'for Hungarian [national] athletes participating on race held abroad and for foreign [national] athletes participating on race held in Hungary' (Art. 22). However, there are no quotas of non-national athletes defined in public legal rules at national level.

Consequently, we can give answer on obstacles if we survey all home rules adopted by each sport federation on racing and transfer of athletes. Three examples on internal regulations and racing preconditions determined by sport unions (leagues, alliances) how these (in)compatible with equal treatment:

- the Hungarian Football League published the racing requirements and conditions in the season of 2008-2009. Accordingly, 'participation of players as EU citizens and citizens from the party states of Cotonou Treaty enjoying the equal treatment at national championship is not limited. The maximal number of other foreign players is five who are playing in the same match on the ground. The list of states whose nationals shall be equally treated with Union nationals as well as the states in the ambit the Cotonou Treaty the League shall publish until 31 May 2008 taking into account the information sheet of the Ministry of Foreign Affairs.' Due to absence of announcement or publication an inquiry was address to the League. It confessed that it made decisions upon request of clubs whether non-national player belongs to the preferred circle or not.¹⁸⁸
- the Racing Statute of National Badminton League (2008) requires that foreign sportsman is entitled to race in a team championship, if s/he is furnished with a national league's al-

¹⁸⁸ Information from EU-Direct and Balogh Lidia (27 April 2009).

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- lowance to race. Only Hungarian national is eligible for race in national select team. The maximal number of foreigners per team is two in a team championship.¹⁸⁹
- according to the Racing Statute of the Hungarian Athletic League (2005) only Hungarian national is eligible for race in national select team, and the maximal number of non-national per club in a race is one athlete. However '*there is differentiation between national and EEA citizens*' - said the president.¹⁹⁰

We analysed some by-laws of sport federations from the perspective of equal treatment.

a) Hungarian Football Federation: Regulation on Racing in Football¹⁹¹ in harmony with UEFA and FIFA rules shall be implemented by all clubs, county and national federation members:

- Application for external remedy in disputes of right to race, licence and participation on a race shall be submitted to the Standard Arbitrage of Sport (setting up by the Act on Sport) within 30 days.
- 'Each member of the Federation (clubs, regional alliance of clubs) is entitled to make sportsmen play on official matches without limitation, if s/he is citizen of a Member State of the EU, or citizen of states concluding agreement on equal rights in employment. The list of these states shall be published on the homepage of the Federation. Players who are citizens of other states can participate on races according to calls for the given sport events.'
- The National Eleven shall only consist of Hungarian nationals. The Federation invites them to the assorted team.
- Upon request of the club the Federation (or its regional member federation) is entitled to give approval to an athlete of this club to participate on international match in a team of another club.
- Irregular participation of players on match including the case of participation an athlete coming abroad and without license issued by the Federation shall be sanctioned.
- Organizer of the sport event shall stop to race if racist or hate speech, spectators' violence or extraordinary death is happening. It is also obligatory to terminate the match if fans, sportsmen, players of the team or referees are disparaged on the ground of his/her ethnic, racial, religious or other origin.
- Discrimination of players or clubs is forbidden for non-native speaking, and translator shall be provided in a racing issue by the club or the non-native athlete.

Tariff of fees related to the Regulation on Racing in Football 2009-2010¹⁹²

- Nationality of athlete is irrelevant, e.g. fee for transferring right to race depends on the class in championship but not on nationality of sportsman.

189 The Badminton League includes 50 sport clubs. All internal regulations (Statute, Racing Provisions, Disciplinary Rules, etc.) were adopted in 2006-2008. See further www.badminton.hu and information in a report made by Dr. Réka Józsa (14 May 2009).

190 The Hungarian Athletic Alliance includes 113 sport clubs. All internal regulations (Statute, Racing Provisions, Disciplinary Rules, etc.) were adopted in 2005-2007. See further in a report made by Dr. Réka Józsa (14 May 2009)

191 Adopted by the presidency of the Federation, No. 55/2009 (16 April 2009) entering into force on 1 July 2009.

192 Adopted by the presidency of the Federation, No. 78/2009 (3 May 2009) entering into force on 1 July 2009.

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- Trainer shall obtain a license for operation by the Federation if fee is paid and s/he has to participate on a course (development of training method).¹⁹³ While the license is valid to 3 years 'it can be withdrawn by the Federation'.
- Non-national athlete in a club team is entitled to participate on the match of national championship or cup: (a) according to the regulation on racing of the given season in the first and second class male teams; (b) in male and junior team the maximal number of non-EU nationals is three and two in the futsal team.

Statute of the Hungarian Football Federation¹⁹⁴

- also sets up Registry and Transfer Committee and a Committee that is responsible to issue licence for agent dealing with transfer of players' contracts, rights and obligations in race. Accordingly, agent in sport can officially operate in transfer actions if s/he is registered by the FIFA and controlled by the Federation.
- Leading position (membership in presidency in the Federation, regional federation of clubs, Control Body) is eligible only for Hungarian national or foreigner in possession of open-ended residence permit (settlement permit) in full age and unlimited ability to perform.

b) The Hungarian Ice-Hockey Alliance: according to its Charter on registration, certification and transfer (valid since 7 November 2003)

- Right to race is the individual, asset valuable right of professional athlete relating to his/her sport activities. This right is transferred to a club for a given period by a contract (sport contract based on labour law).
- Upon request of the sport club and professional athlete the Alliance issues a certificate on the seasonal races certifying the personal right of sportsman within the club to participate on races organised by the Alliance.
- Upon common request of the sport club and professional athlete an approval given by the Alliance before expiration of his/her contract concluded with the club in order to continue to sport activities in another sport club (transfer). The Charter differentiates
 1. transfer between Hungarian clubs,
 2. international transfer: it shall be based on IIHF by-laws on transfer (e.g. in possession of transfer card issued by the International Federation) (a) from Hungary to abroad. Its fee is the same as inland. (b) from a foreign club to a Hungarian one. Their certificate on race shall be registered, and their number (quota) is unlimited regardless their nationality. However, this fee is yearly defined in Championship Regulation by the Alliance. For instance, a resolution of the Racing Jury¹⁹⁵ allows to race for 6 junior athletes with Romanian citizenship since 1 September 2008 in the Debrecen Club without limitation of participation in championship matches. It proves neither the relevance of accession of Romania, nor nationality of sportsman in transfer.
- Sportsman without contract or expired contract without delay can transfer own racing right to another club while in other cases the procedure of approval takes 15 days by the Alliance.

193 Determined by the presidency of the Federation No. 124/2002 (14 November 2002).

194 Adopted by the Assembly on 29 March 2001 and amended on 13 April 2007, entered into force on 1 May 2007.

195 080929/1.sz.Versenybírósági határozat.

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- Manpower (lending sportsmen) based on agreement between the bearer and recipient clubs inland is also possible for a concrete tournament. It means a temporary transfer of racing right of the club and athlete. Its fee is half of the normal transfer.
- Fees for issuing Certificate and a transfer of sportsman right shall be paid taking into account the minimal tariff determined by the Charter (Appendix) and further agreement between the bearer and the recipient club, and its 5% shall be provided to the Alliance. After expiration of the contract with the club the athlete's right to race returns to the owner free of charge.
- Alliance keeps up a registry on professional athletes contracted with member clubs regardless his nationality. The register has no information on citizenship. This registration is paid by the club.
- Maiden name of sportsman's mother in all formats may prove how Hungarian athletes have remained the basic object in spat law

c) The Hungarian Judo Federation: its Format on transfer: no reference on nationality of athlete (but maiden name of sportsman's mother may prove how Hungarian athletes have remained the basic object in spat law). According to Charter on registration, certification and transfer:¹⁹⁶

- The Transfer Committee makes the final decisions in disputes concerning licence giving and transfer the athlete's right to race and contractual obligations between bearer and recipient club.
- Price of transfer and licence on right to race is based on consent of bearer and receiving club taking into account the yearly defined tariff and its 5% belongs to the Federation.
- The non-national athlete cannot be a national assorted team member. Moreover, the participation of non-national athlete on championship and races the Presidency of the Federation can limit in the yearly Race Regulation.
- The individual right of sportsman to race is transferable to foreign club with approval of the captain of the Federation taking into account the rules in the recipient country's federation. If applicant is a member of the national assorted team, the captain of the Federation may determine further requirements or conditions to approval.

d) Hungarian Athletic Alliance: in Format on transfer, registration on race right there is no reference on nationality of athlete. Its Championship Regulation is the same.

e) Hungarian Handball Federation:

- Its by-laws refer back to IHF Regulation. Accordingly, national federation shall issue a certificate on race right for athlete, if s/he is a recognized refugee, a protection seeker with valid residence permit – so other aspects of legal status is irrelevant. However, membership in national champion team requires '*nationality of the state of assorted team; in exceeding three years before accession to national assorted team was no member in another country's national assorted team; at least in previous 12 months s/he has a right to race in the country*'.
- Moreover, the Sample Contract offered by the HHF for athletes and clubs contains that club (sport association) allows membership in the national assorted team including the

¹⁹⁶ MJSZ elnökségi határozat (5 April 2006).

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championship, preparatory and international matches according to prior agreement to the season

Statute of the Handball Federation, adopted on 22 April 2006

- Leading body of the Federation shall consist of members ‘with Hungarian nationals and migrants with open-ended residence (immigration) permit’.
- International transfer of contractual rights and obligations inside Europe is based on the Charter on Transfer adopted by the European Handball Federation (2001). Consequently, procedural and fee paid to the Federations are determined by the IHF and EHF rules.¹⁹⁷ For instance, international transfer requires not only contract concluded between the bearer and recipient club but also approval of the national federation is necessary within 30 days.
- Fee for transfer depends on whether the athlete was a member of the assorted national team or not, his/her age and

f) Hungarian Basketball Federation: its Championship Regulation on 2008/2009 issued by the Federation differentiates between nationals and foreign athletes: they are not national but persons in possession of residence or immigration obtained at alien police. The document confirms that dual nationals shall be considered as Hungarian upon his/her request. Otherwise, non-national athlete treatment shall be changed in possession of all documents on naturalisation and national ID card. For instance,

- declaration that s/he has no a parallel contract with other clubs abroad or in Hungary than the bearer and recipient club in the transfer procedure shall be made in English but as national in Hungarian;
- obtaining certificate on right to race s/he has to prove the lawful residence in the country by documents issued by the alien police;
- the maximal number of foreign athletes in the national assorted team would be 4 (e.g. in group A of males per match).
- a specific licence on racing in national championship (T licence) is eligible only for nationals,
- fees¹⁹⁸ for licence on participating in national championship are higher than for nationals: those are progressively increasing depending on how many foreign athletes want to obtain it inside a given club (200-400-600 000 HUF + VAT), while the fee for licence on participating in international championship matches is unified (200 000 HUF + VAT) per capita is almost the same as nationals; fee for licence of foreign trainer is also significantly higher than for nationals (120 000 HUF + VAT).

According to Appendix V to the Championship Regulation on 2008/2009 makes differences on trainers whether s/he obtained diploma in Hungary or abroad. In latter case diploma shall be recognized by the Hungarian Equivalence and Information Centre (Ministry of Culture and Education). Moreover, trainer can obtain operation licence from the Federation if diploma is recognised and some years of practice are also required as well as participation on development course regardless where it was made (here or abroad).

¹⁹⁷ It entered into force on 1 July 2006.

¹⁹⁸ MKOSZ elnökségi határozata (27 June 2008).

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Procedure on transfer of foreign athletes¹⁹⁹ and licence on race depends on whether s/he has ever played in a club under the ambit of FIBA or not (e.g. in USA or Canada) because the Letter of Clearance and its fee shall be managed by Federation or by the sportsman individually.

g) The Charter on Registry and Transfer adopted by the Hungarian Volleyball Federation entering into force on 1 July 2008:²⁰⁰

- also set up a special committee that is responsible its management including issuance of approval to transfer and remedy in disputes (as alternative forum to the justice). ‘Committee shall issue approval to transfer of athletes with Hungarian citizenship’.
- Compensation for transfer belongs to the consent of bearer and recipient club including the fee for business agent, if s/he has a licence from the FIVB, and 5 % to the Federation.
- Transfer of national athletes’ right to race abroad is subjected to FIVB rules (e.g. obtaining International Transfer Certificate), and application for approval shall be submitted to the Hungarian Volleyball Federation. It shall approve the transfer abroad, if national athlete not only meet requirements of procedure but ‘s/he is good moral character and s/he undertakes to participate on sport events of the national assorted team (e.g. preparatory to the European Cup, final cup, Grand Prix), and club undertakes to pay the fee (contribution to education fund, yearly 6 000 USD for three years) unless the presidency of the Federation reduces this fee’. Approval to transfer is valid for one year.
- Licence on race in Hungary shall be issue to non-national athlete shall be issued by the Federation if s/he meets the requirements of transfer determined by the FIVB, and approval number by the FIVB is given to the Federation. However, ‘it shall be refused if recipient club has not applied for licence of young sportsmen (reinforcement) whose minimal number is determined the yearly Championship Regulation of the Federation’.
- Fee of registry and licence issued by the Federation for non-national athlete is higher than for nationals. The registration and licence format has question on citizenship of the athlete.

h) Hungarian Water polo Federation: its Championship Regulation to 2008/2009²⁰¹

- The Federation sets up a Certification and Transferring Committee that is managing and making final decisions in disputes related to right to race and transfer this right between clubs.
- Athlete can race with licence only in one club during the season regardless his/her nationality, and ‘playing in ambit of a foreign club during the season – in absence of dual license – is excluded from the championship matches. Playing in foreign club is accepted with permit of LEN including racing in Europe and Israel.’
- The maximal number of foreign athletes will be three in a team of a club, in possession of the permit of LEN. The number of licence for racing issued for foreign players in a sport event otherwise is not limited. The non-nationals’ citizenship shall be indicated well on the licence of race.
- There are progressive sanctions for spectators’ hate speech and aggressive behaviour (fine, exclusion from the championship of the club).

199 MKOSZ döntés (14 August 2008) www.mkosz.hu.

200 Adopted by the presidency of the Federation (20 May 2008) www.hunvolley.hu.

201 Adopted by the presidency of the Federation (12 June 2008) www.mvlsz.hu.

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Summing up, the sport federations' home-grown rules on consensual fee and compensation, agent, transmission consent and undertakings can be considered as indirect repercussion of free movement but regardless the nationality of the athletes. Although there are no quotas for EU nationals the entitlement of sport federations – as influential civil organisations – on internal sport rules can hinder the free movement of non-national sport experts and athletes' movements. The actual texts – with exception of the football by-laws – differentiate nationals and non-nationals (settled migrants and others) without Community preferences, and contains certain limitation of players in matches, championship or assorted national teams in favour of nationals. It is very probable that these by-laws are not controlled by the government whether those are in harmony with EC law and ECJ case law.

Appendix 3

Internet sites of national legislation

www.irm.hu (legal provisions related to justice) in Hungarian

www.magyarorszag.hu (legal provisions related to public administration)

www.mhk.hu (the recent copies of the Magyar Közlöny – Official Gazette) in Hungarian

<http://www.magyarkozlony.hu/nkonline/index.php?menuindex> (other copies of the Magyar Közlöny – Official Gazette) in Hungarian

www.bevandorlas.hu (the most relevant rules on immigration are available)

Internet sites of judgments in Hungarian

www.mkab.hu (only the Constitutional Court's judgement are available in the net)

www.lb.hu (only the guiding judgements of the Supreme Court are available)

www.birosag.hu (only the statistics of cases and major rules on justice are available)