REPORT
on the Free Movement of Workers in Spain in 2007

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Introduction

The main issues in the 2007 report on Spain involve the administrative and legislative application of Royal Decree 240/2007 whereby Directive 2004/08 was transposed to Spanish legislation. The second issue involves a draft of a Royal Decree which transposes Directive 2005/36. This Royal Decree draft means that Spain has failed to comply with the period of adaptation stipulated in Directive 2005/36 which terminated in October 2007. It is expected that, at the end of 2008, the Spanish Government will have approved this Royal Decree draft and it will be possible to analyse whether the transposition was correct or not. The third issue involves the approval of the Statute on the Spanish Civil Service which clarifies and establishes the conditions and criteria required to be a civil servant in Spain, and which is the subject of analysis in this report. Another important legislative innovation in Spain which must be taken into account by any citizen of the EU or EEA and their families who wish to work as self-employed workers is Law 20/2007 of July 11, on the Statute of the Self-employed Worker. Finally, in 2007, the Spanish Government decided to maintain the transitory regime for Rumanian and Bulgarian employees for another year.

Chapter I
Entry, Residence, Departure

Regarding whether the transposition of Directive 2004/38 in Spain (Royal Decree 240/2007, in force 2nd April 2007) has retroactive effects for the EU or EEA citizens and their families, the Spanish legislator stipulates (first transitory provision of Royal Decree 240/2007) that the applications submitted previous to its entry into force (2nd April, 2007) will be processed and resolved in accordance with the stipulations of this Royal Decree unless the person concerned requests the application of the legislation in force at the time of the request (Royal Decree 178/2003) and on condition that this is compatible with the stipulations of Royal Decree 240/2007. Therefore, the norm on transposition does have retroactive effects.

Another issue deals with whether this leads to treatment which is less favourable than under the previous Community rules on free movement: In general, the 2007 regime is more favourable although the obligation to register implies an active conduct by the EEA citizen that was not required by Royal Decree 178/2003.

A. ENTRY

Transposition of Directive 2004/38 was made in Spain through "Royal Decree 240/2007, of February 16, on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states parties to the agreement of the European Economic Area", in force, since April 2, 2007.

Unlike article 3 of Directive 2004/38 which includes the beneficiaries of the Directive in a single law (principal and family members), the Spanish legislator has chosen to establish the citizens of the European Union and of the EEA as the main beneficiaries who could exercise the right to enter, exit, stay, have permanent residence and work in Spain, and dedicate a different article (article 2 of Royal Decree 240/2007) to family members of the EU or EEA citizens whose legal regime will be analysed in Chapter V.

As regards "entry" into Spain, Royal Decree 240/2007 establishes in article 4 (similar to article 5 of Directive 2004/38) that this will be done with a passport or valid ID Card in force, which records the nationality of the holder. It is also stipulated that, if EU or EEA citizens do not have the travel documents required to enter Spain, when they reach the border, the authorities responsible will provide them with all the facilities to obtain these documents or to accredit that they are beneficiaries of the right to enter by other means (in line with section 4 of article 5 of Directive 2005/38).

However, conditions required at Royal Decree 240/2007 regarding family members are stricter than conditions required in Directive 2005/38 as Royal Decree 240/2007 states*:*

> "in the cases in which a citizen of a member State of the European Union or of a State which is a party to the Agreement of the European Economic Area, or a family member does not have the travel documents required to enter Spanish territory or a visa, the Authorities responsible for border controls will give these persons, before their return, maximum facilities so that they can, in a reasonable period of time, obtain or receive the documents required, or so that they can confirm or prove by other means that they are beneficiaries of the scope of application of this Royal Decree, *on condition that the lack of a travel document is the only reason which prevents entry to Spanish territory*".

This final phrase in italics seems to show that the lack of a visa is not a reason for the refusal to enter through a Spanish exterior border. However, section 2, article 4 of Royal Decree 240/2007 expressly states that the family members of EU or EEA citizens included within Regulation 539/2001, *"are subject to the obligation of a visa in order to cross external borders..."*.

In the event that a family member of a EU or an EEA citizen without an entry visa, will not be allowed to enter Spain and will be returned, this will not comply with the stipulations of the ECJ in the MRAX case. As a guarantee in this possible situation, in section 3 of article 4 of Royal Decree 240/2007 the Spanish legislator establishes that "Any resolution rejecting an application for a visa or entry, made by a person included within the scope of application of this Royal Decree must have grounds. This rejection resolution will state the reasons on which it is based, either because the requirements demanded by the Royal Decree are not duly accredited, or due to reasons of public order, security or health. The person concerned will be advised of these reasons unless this is contrary to State security".

Having a passport or an ID Card in force are also the conditions required in article 6 of Royal Decree 240/2007 (similar to article 6 of Directive 2004/38) for the cases in which EU or EEA citizens remain in Spain (termed a stay) for a period less than three months regardless of the finality of this temporary stay. The difference with article 6 of Directive 2004/38 is that the Spanish legislator conditions the entry of family members of EU or EEA citizens for a stay which is less than three months to compliance with the requirements of article 4 of Royal Decree 240/2007. Such a remittal means that they must have an entry visa so that they might avail themselves of the three month stay as stated above.

Section 5 of article 5 of the Directive referred to the fact that

> "the Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions",

and this has not been transposed in article 4 of Royal Decree 240/2007.

Finally, in terms similar to those stipulated in article 4 of Directive 2004/38, article 5 of Royal Decree 240/2007 includes the right of exit of EU or EEA citizens and the members of their families in order to move to another Member State. However, unlike article 4 of the Directive, article 5 of Royal Decree 240/2007 adds that the exit will be made through the presentation of the passport or identity document in force to the border control officials if the exit is made through an authorised post and that these documents must be checked by the control officials in order to determine whether those affected are involved in any legal case of prohibition to exit the country for reasons of national security or public health or for reasons stipulated in the Spanish Penal Code.

B. RESIDENCE

Royal Decree 240/2007 concerning the holder of the right to residence takes two situations into account. The first is residence of EU or EEA citizens for over three months (article 7). In this case, those concerned who have been in Spain for more than three months since 2 of April 2007 or previous to this and did not have a valid EU residence card must personally request their registration in the Central Register of Aliens at the Office of Aliens in the province where they intend to reside or where they resided without the EU Residence Card, using

the official form (termed EX. 16). To do so, they must present the passport or the valid ID card in force.

This registration enables them to automatically obtain a registration certificate which will contain the name, nationality and address of the person registered, his alien identity number (Alien Identity Number (NIE)) and the date of registration. The analysis of article 7.1 of Royal Decree 240/2007 shows that the Spanish legislator opted for the minimum period included in article 8.2 of Directive 2004/38. Specifically, article 7.1. establishes that, *"...This application (for register) must be presented within a period of three months counting from the date of entry into Spain*" and article 8.2 of Directive 2004/38 establishes that "*The deadline for registration may not be less than three months from the date of arrival"*. In addition, the obligation included in article 8.2. of Directive 2004/38 to the effect that, "Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions", is included in section 8 of article 15 of Royal Decree 240/2007 when it states that failure to comply with the obligation to apply for the certificate of registration will entail the application of monetary sanctions which, in identical terms and for similar cases, is also established for Spanish citizens as regards the National Identity Card.

It is surprising that the Spanish legislator has not transposed the conditions established in article 7.1 of Directive 2004/38 in article 7 of Royal Decree 240/2007, nor in any other provision of Royal Decree 240/2007, that is to say,

> "(a) they are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their periods of residence and have comprehensive sickness insurance cover in the host Member State; or (c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c.".

In practice, this very important omission supposes, in principle, that the citizens of the EU or of the EEA must not accredit any of these conditions when registering in Spain, which means that those citizens are in an extremely advantageous situation in comparison with other Member States.

In fact, neither article 7, nor article 12 of Royal Decree 240/2007, nor form EX 16 for the registration of EU or EEA citizens and their families include the obligation that the EU or EEA citizens prove that they are in any of the situations stipulated in article 7.1 of the Directive, nor that they have the conditions which article 8.3 of Directive 2004/38 (Administrative formalities for Union citizens) makes it possible to impose on EU or EEA citizens depending on whether the residence is greater than three months and is for work as an employed or self-employed person, regardless of whether it is residence without being a burden for the host State or whether it is for studies. The absence of any reference in the Spanish legislation to these residence situations and the proof that they meet the conditions required by the Directive may give rise to restrictive interpretations by the Spanish authorities.

Thus, it may be thought that the Spanish legislator has voluntarily omitted to include these situations and conditions in order to be able to demand conditions other than those stipulated in articles 7 and 8 of Directive 2004/38.

The second case of residence is the so called permanent residence (article 10.1, Royal Decree 240/2007). This permanent residence can be held by the EU or EEA citizens who accredit having stayed in Spain legally and continually for more than five years. At the request of the person concerned, the Office of Aliens in the province where he resides will provide him with the certificate which recognises his right to reside permanently as soon as possible and once the duration of the residence has been verified. Articles 10.1 and 2. of Royal Decree 240/2007 is a literal transposition of sections 1 and 2 of article 16 of Directive 2004/38 referring to the right of permanent residence of EU or EEA citizens, as well as article 19 of Directive 2004/38 related to the documentation accrediting permanent residence. Section 3 of article 16 of the Directive is included in article 14.3 of Royal Decree 240/2007.

The cases involving the acquisition of the right to permanent residence before having complied with the five years of continual residence stipulated in articles 17.1 and 2 of Directive 2004/28 were transposed in section 2 of article 10 of Royal Decree 240/2007. However, the Spanish legislator has not transposed the stipulations in article 17.1.a) which states that

> "If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60".

Sections 3 and 4 of article 17 of Directive 2004/38 are transposed in Spain in sections 3 and 5 of article 10 of Royal Decree 240/2007.

When analysing the administrative procedure for the processing, resolution and issue of the registration certificates and residence cards for EU or EEA citizens and their families stipulated in article 12 of Royal Decree 240/2007, the Spanish legislator establishes the principle that the application for and processing of the registration certificate for the EU or EEA citizens and the residence permit for their families cannot be an obstacle for their "provisional permanence" in Spain nor for them to carry out their economic activities, understood to be economic.

In this administrative procedure, section 3 of article 12 of Royal Decree 240/2007 enables

> "the competent authorities to process and resolve the applications for the registration certificate or for the residence cards can, exceptionally, collect information on possible criminal records of the persons concerned from the authorities in the countries of origin or from those in other States".

This non-systematic control of criminal records of EU or EEA citizens and their families is possible in accordance with the stipulations in article 27.3 of the Directive but, unlike the Community provision, the Spanish legislator does not refer to "when this is judged to be essential" but only alludes with the term "exceptionally" to the fact that these consultations cannot be of a systematic nature as established by the provision of the Directive mentioned.

Finally, the loss of the right to permanent residence which article 16.4 of Directive 2004/38 conditions to an absence of more than two consecutive years is included literally in article 10.7 of Royal Decree 240/2007. The case of loss of residence included in article 21 of Directive 2004/38 when it establishes that "*Continuity of residence is broken by any expulsion decision duly enforced against the person concerned*" is transposed in section 3 of arti-

cle 15 of Royal Decree 240/ 2007 which will be dealt with in detail below as this is the Spanish provision which transposes the totality of the limitations on entry and residence due to reasons of public order, public security or public health.

Judicial practice

No cases have been found on Community citizens as regards residence. The only case refers to the refusal of the Community family residence card of Spanish nationals who are not the subject of this report.

C. DEPARTURE

As regards restrictive measures, article 15.1 of Royal Decree 240/2007 (in line with article 27.1. of Directive 2004/38) establishes that, in general, entry to Spain can only be prevented and registration in the Central Register of Aliens refused or the expulsion or return of EU or EEA citizens from Spanish territory ordered when there are reasons of public order, public security or public health. In the case of EU or EEA citizens with permanent residence, it is expressly established that an expulsion measure can only be adopted when there are serious reasons of public order or public security. Moreover, before the expulsion decision is adopted, the competent Spanish authority must evaluate the duration of the residence, the social and cultural integration of the person concerned in Spain, his age, state of health, family and economic situation and the importance of the links with his country of origin, as factors indicating settlement which must be taken especially into account. This final paragraph of article 15.1 of Royal Decree 240/207 is the transposition of articles 28.1 and 2 of the Directive.

However, there is a very substantial difference between the Spanish and the Community laws. Specifically, as we have just analysed, the Spanish legislator will only take into account the circumstances stated above when it is a question of expelling EU or EEA citizens or involves the permanent residence of their families. While section 1 of article 28 of the Directive states that these circumstances will be taken into account when adopting an expulsion decision against any EU or EEA citizens or their families, regardless of their permanent residence or not. Therefore, it must be understood that, in the final subsection of article 15.1 the Spanish legislator clearly limits the scope of the protection measures against an expulsion stipulated in article 28.1. of the Directive and fails to comply with what is laid down in this legislation.

In the cases of prohibitions of EU or EEA citizens to enter Spain, article 15.2 of Royal Decree 240/2007 stipulates that these persons can request the lifting of the prohibition within a period of two years, alleging the reasons they consider appropriate which accredit a material change in the circumstances which justified the prohibition to enter Spain. This request must be resolved within a period of three months. Section 2 of article 15 of Royal Decree 240/2007 is the transposition of article 32 of Directive 2004/38. If both provisions are compared, it can be seen that, in this case, the Spanish Legislator opts for more favourable periods than those stipulated in the Community legislation. Specifically, the Directive in section 1 of article 32 stipulates the revision of the decision to prohibit entry in any case to three years after its execution and the resolution of the application for lifting the prohibition was fixed at six months as from its presentation.

It is necessary to point out that section 1 of article 33 of Directive 2004/38 related to the expulsion as an accessory penalty or measure has not been transposed in Royal Decree 240/2007. This non-transposition is due to the position of the Spanish Government recorded in Memorandum 2/2006 of the Director of Public Prosecutions[1] (dependent on the Ministry of Justice) of July 27, 2006 on several aspects of the regime on aliens in Spain.

The Memorandum 2/2006 expressly states that, in accordance with the stipulations in Memorandum 3/2001 and with the new drafting of article 89 of the Criminal Code of 1995, the substitution of imprisonment by expulsion

> "can hardly be applied to a Community citizen, and it can also be seen that there is an additional difficulty for the (expulsion) measure to be effective, bearing in mind that there is a common area with no borders created by the Schengen rules ... These conclusions are reinforced by the regulation contained in the recent Directive 2004/38".

The argumentation of the Memorandum continues with a reference to articles 33, 27 and 28 of this Directive and the Director of Public Prosecutions concludes that

> "the criteria that the Prosecutors must, in general and except in exceptional cases, give a negative report concerning the applications for expulsion for Community citizens or assimilated citizens who, under the stipulations in articles 57.7 of the Organic Law and 89 of the Penal Code, are transferred to them for reports by the competent judicial organisms is maintained. These exceptional cases must be treated otherwise due to reasons of public order, public security or public health as referred to … Directive 2004/38/EC…".

The content of section 2 of article 33 of Directive 2004/38 is fully transposed in section 4 of article 15 of Royal Decree 240/2007. However, this lacks meaning as we have stated, since the Spanish legislation transposing the Directive does not refer to the adoption of an order of expulsion from the territory as a penalty or measure accessory to a penalty involving the deprival of freedom, and Memorandum 2/2006 of the Public Prosecutor's Office clarifies that a negative report will be made of its execution. In practice, this omission entails that the expulsion order, regarding which section 2 of article 33 of Directive 2004/38 allows execution to be reconsidered if two years have elapsed after it is dictated, taking into account the present situation and the reality of the threat the person concerned poses for public order or public security and the examination of any material change of circumstances which might have occurred from the time the expulsion order is issued, will not take place in Spain. Taking this situation into account, section 4 of article 15 of Royal Decree 240/2007 must be understood to refer to any expulsion order dictated by the Spanish authorities and this expulsion order is a penalty or measure accessory to a penalty involving the deprival of freedom. Consequently, the Spanish regime in this regard is more favourable than the regime in article 33 of the Directive.

Sections 1 and 2 of article 27 of Directive 2004/38 are transposed into Spanish legislation in section 5 of article 15 of Royal Decree 240/2007. Specifically, in section 5 of article 15 of Royal Decree 240/2007, it is established that the general restrictive measures based on public order, security and public health, as well as the measures based on serious reasons of public order and public security are subject to determined criteria when being adopted. Thus, they must be adopted in accordance with the principle of legality, they can be revoked ex officio if there is a change in the circumstances which gave rise to these or at the request of a party concerned, and they cannot conceal reasons of an economic nature. In addition, when

[1] See. http//www.fiscal.es/ (last visit February 28, 2007)

the measures concern public order or security, they must comply with the criteria included in the Case Law of the ECJ as regards the derogated Directive 64/221, that is to say, the restrictive measures adopted must be based exclusively on the personal conduct of the party concerned, and this conduct must constitute a real, present threat which is sufficiently serious to affect a fundamental interest of society. The existence of previous criminal sentences cannot be a reason in themselves for adopting such a measure. However, in the Spanish law, no reference is made to the stipulations in the second paragraph of section 2 of article 27 of Directive 2004/38, that is to say, "*Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted*". This omission in Spain should be rectified as shown by the Case Law of the ECJ (Case 67-74, 26 February 1975 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln*) as, on occasions, the Member States have resorted to measures of general prevention in order to limit the rights of the citizens of the EU.

Section 4 of article 27 of Directive 2004/38 which establishes the obligation that

> "the Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute",

is not included in Royal Decree 240/2007. The obligation imposed by the Directive poses the question of the need to keep in force the agreements as regards the border readmission of nationals between Member States of the EU and the doubt concerning the compatibility of these with Community Law. Spain has several agreements on border readmission with other Member States of the EU[2] which affect the respective nationals and which question the elimination of the land border controls of the States which are parties to Schengen. In fact, these controls continue to be systematically in effect. Spain and France allege that the majority of these are to control extra-Community nationals who cross the territory of both countries despite the fact that these are Schengen interior areas.

Section 3 of article 28 of Directive 2004/38 regarding protection against expulsion establishes that "An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: (a) have resided in the host Member State for the previous 10 years; or (b) are minors, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989". This obligation is included fully in section 6 of article 15 of Royal Decree 240/2007.

Article 29 of Directive 2004/38 regarding the measures for reasons of public health establishes that

[2] Agreement between the French Republic and the Kingdom of Spain on the readmission of persons in irregular situation, 26 November 2002, OJ: nº 309, 26.12.2003, p. 46109. Agreement between Spain and Rumania on the readmission of persons in irregular situation, 29 April 1996, OJ; nº 55, 5.03.1999, p. 8859.Agreement between the Kingdom of Spain and the Republic of Bulgaria on the readmission of persons in irregular situation, 16 December 1996, OJ nº 51, 28.02.1997, p. 6757. Agreement between the Kingdom of Spain and the Republic of Lithuania on the readmission of persons in irregular situation, 1 March 2000, OJ, nº 94, 19.04.2000, p. 15818. Agreement between the Kingdom of Spain and the Republic of Estonia on the readmission of persons, 28 June 1999, OJ , nº 51, 28.02.1997, p. 6757. of the Agreement between the Kingdom of Spain and the Republic of Latvia on the readmission of persons in irregular situation, 30 March 1999, OJ; nº 93, 18.04.2000, p. 15586. Agreement between the Kingdom of Spain and the Slovakian Republic on the readmission of persons in irregular situation, 3 March 1999; OJ; nº 94, 20.04.1999, p. 14600. Agreement between the Kingdom of Spain and the Republic of Poland on the readmission of persons in irregular situation; 21 May 2002; OJ; nº 176, 22.07.2004, p. 26809.

> "1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.
> 2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.
> 3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine".

This provision is included textually in section 9 of article 15 of Royal Decree 240/2007.

Judicial practice

The most relevant Decision is that of the Spanish High Court of 29 November 2007 which annuls the Decision of the Provincial Court of Oviedo which condemned a Dutch citizen to five years in prison, disablement of the right to active suffrage during the period of condemnation which would be substituted by expulsion from Spain and the prohibition to enter for 10 years. After evaluating the case, the High Court admitted the motives alleged by the Prosecutor's Office (in accordance with Memorandum 2/2006 mentioned above) and rejected the expulsion measure alleging that

> "1. It is not recorded that the parties have been heard before the decision on the expulsion. 2. The nationality of Luis, a citizen of the Netherlands, determines, in accordance with article 1.3 of the Law on rights and freedoms of aliens in Spain and Directive 2004/38/EC of the European Parliament and of the Council, on the one hand, which means that Luis cannot be attributed the character of non-resident legally in Spain, and another, regarding which the expulsion order can only be issued in accordance with articles 27 and 33 of the Directive, for reasons of public order or public security, adjusted to the principle of proportionality and based exclusively on the personal conduct of the person concerned or on reasons of public health. The challenge to the Public Prosecutor's Office must be admitted, when there are no grounds to agree to the expulsion, as well as for the lack of audience previous to the decision".

D. REMEDIES

In relation to the guarantees of procedure stipulated in sections 1 and 3 of article 15 of Directive 2004/38 which respectively establish that,

> "1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health…and 3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies",

it should be pointed out that the Spanish legislator has not transposed any of these sections referring to these restrictive measures other than those adopted for reasons of order, security and public health.

On the contrary, as regards the obligations imposed by article 30 of Directive 2004/38 regarding the notification of the expulsion decisions, it must be pointed out that sections 1 and 2 of article 30 are not transposed directly but through a second additional provision which, for questions of procedure, refers to the general legislation on aliens and to common administrative procedure. This remission makes it possible to understand that the obligations in sections 1 and 2 of article 30 are complied with although it would have been preferable to

have had an express reference. In fact, as stated in section 3 of article 30 of Directive 2004/38 which is literally transposed in section 2 of article 18 of Royal Decree 240/2007, this circumstance should have been taken advantage of in the provision in sections 1 and 2 of article 30 instead of opting for a remission to general legislation.

Notwithstanding the above, the Spanish legislator opted for an outstanding system of guarantees when it established in article 16 of Royal Decree 240/2007 that, before the adoption of the administrative resolution of expulsion, in addition to the administrative and judicial resources applicable against this, it will be the subject of a previous report by the State Advocacy. This report will not be required in the event that there are due reasons of urgency. Furthermore, as a second guarantee, it is stipulated that, on request by the party concerned, an examination of the resolution of the competent authority is requested in order to adopt the expulsion by the State Judicial Service Department or by the State Advocacy Office in the Province. The party concerned can personally present its means of defence before the consultative organism unless there are reasons concerning the security of the State which advise against this. The decision of the State Advocacy Office will be submitted to the competent authority so that it might confirm or revoke this resolution.

The procedural guarantees of article 31 of Directive 2004/38 have been transposed in article 17 of Royal Decree 240/2007 in another way. Thus, section 1 of article 31 can be understood to be included in Royal Decree 240/2007 through the leeway offered by articles 16 and 18 of this Decree. Section 2 of article 31 of Directive 2004/38 which establishes that

> "Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except: where the expulsion decision is based on a previous judicial decision; or where the persons concerned have had previous access to judicial review; or where the expulsion decision is based on imperative grounds of public security under Article 28(3)",

presents a problem in the transposition to Spanish legislation.

Specifically, we believe that there is an error in section 1, letter c) of article 17 of Royal Decree 240/2007 since letters a) and b) literally copy what is set out in section 2 of article 31, but letter c) states "*that the expulsion resolution is based on pressing reasons of public security as stated in article 15.5.a) and d) of this Royal Decree*". Here lies the error, as the third case in section 2 of article 31 of Directive 2004/38 refers to the two cases in section 3 of article 28 (have resided in the host Member State for the previous 10 years; or is a minor, except if the expulsion is necessary in the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989 .), while the remission made by the Spanish law should have stated section 6 of article 15 which directly transposes section 3 of article 28 of the Directive, instead of article 15.5.a) and d).

Finally, section 3 of article 31 is not expressly referred to in Spanish legislation. On the contrary, section 4 of article 31 of Directive 2004/38 has been directly transposed in section 2 of article 17 of Royal Decree 240/2007.

E. TREATMENT OF JOBSEEKERS

The analysis of the regulation of nationals of the EU or assimilated citizens (nationals of the European economic Area and Switzerland) who travel to Spain in search of work is focused on two questions.

In the first place, article 3.4 of Royal Decree 240/2007 determines that it is a right for these nationals that they can access any work as an employee or as self-employed, in the same conditions as Spanish citizens. The second is that this provision excludes the relatives in the ascending line of the Community citizen or assimilated citizens from this right, as well as the relatives in the ascending line of students and their spouses.

Recent legal literature

MERCADER UGUINA, J. R., MORENO SOLANA, A. "De la movilidad de los trabajadores a la movilidad de los ciudadanos: notas al Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos comunitarios y sus familias", *Relaciones Laborales*, No. 13, Quincena del 8 al 23 Jul. 2007, Año XXIII, page. 983, Volume 2, editorial LA LEY.

Chapter II
Access to Employment

A. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

As regards equal treatment in access to employment for those who are nationals of the EU or of the EEA there is an apparent absence of direct or indirect discrimination. The private work placement agencies have the same obligations as regards Community workers, assimilated workers and their families as does the National Employment Institute as the public authority by virtue of the Resolution of July 11, 1996.

B. LANGUAGE REQUIREMENT

In the employment conditions in the private sector, there is such freedom to contract that it has not been possible to establish a contracting model which excludes Community or assimilated workers due to language. In fact, the majority of private job offers request knowledge of English or another Community language.

C. RECOGNITION OF DIPLOMAS

Text in force

The Royal Decree of the Ministry of Education and Science of May 11, 2006[3] whereby the general criteria for determining and complying with the complementary training requirements previous to the approval of foreign higher education certificates is regualted. The main objective of this Royal Decree is to implement Royal Decree 285/2004, of February 20, whereby the conditions for the approval and validation of foreign higher education certificates and studies are regulated, modified by Royal Decree 309/2005 of March 18.

This Order establishes the possibility that a foreign certificate (it is not specified whether this is issued by a Member State of the EU or of the European Economic Area or of a third State) can be approved is conditioned by the previous compliance of the person concerned with certain complementary training requirements when certain gaps are detected in the foreign training as compared with the training required to obtain the Spanish certificate whose approval is sought.

Specifically, article 21 of Royal Decree 285/2004 establishes that, when the approval of a certificate corresponding to education received in accordance with educational systems of countries of the European Union, the requirements in section 1 letter c) and section 2 of article 19 are obligatory. In accordance with these sections, the Spanish resolution on approval will have to take into account the correspondence between the academic level of the studies leading to the obtaining of a foreign certificate and the corresponding Spanish academic level for which approval is applied. As regards the approval of the Spanish academic level of Graduate, Architect or Engineer, the foreign certificate must permit access to postgraduate studies in the country of origin.

[3] *Official State Gazette*, May 11, 2006.

In any case, the First Additional Provision lays down that what is established in Royal Decree 285/2004 is understood without prejudice to what is established as regards the matter in the European Community Treaty, the European Union Treaty and the derived Community Law. Precisely in this respect, a new Royal Decree 1393/2007[4], of October 29, was approved dealing with the regulation of official university education. Articles 12 to 22 regulate access and admission to graduate, master, doctorate and to the European doctorate level in accordance with the Bologna guidelines.

From the point of view of the recognition of professional qualifications, it is important to point out the modifications made by the Spanish Government in the area of work in private security. As is known, through the Decision of January 26, 2006, the ECJ condemned Spain due to failure to comply with its obligations under the TEC, as it kept certain provisions of Law 23/1992, of July 30, on Private Security and its Implementation Rules, approved by Royal Decree 2364/1994, of December 9, in force. These impose a number of requisites on companies and private security personnel from other Member States which wish to carry out private security work in Spain.

The ECJ considered that the requirements demanded by Spain concerning the provision of private security services might infringe the principles of freedom of establishment and the free provision of services, as this may, de facto, place citizens or companies from other Member States in an unfavourable position as regards Spanish citizens or companies. Specifically, first of all, it calls into question the absence of proportionality between the interest in protecting and the requirements demanded by Spanish legislation regarding the provision of private security services by companies. In the second place, the non-application of mutual recognition of professional qualifications in this sector which have been acquired in another Member State. In the third place, as concerns the requirement that private security personnel might be in possession of a specific administrative authorisation or entitlement, issued by the Spanish authorities, the Decision points out that Spanish legislation does not stipulate the possibility of taking into account the requirements which have already been accredited by each of the staff members of these companies in their Member States of origin. Finally, the Decision states that the professions the Regulations on Private Security apply to are professions regulated under Directives 89/48 and 92/51, given that their exercise is subjected to the Spanish Law which stipulates the possibility of recognising qualifications obtained in other Member States. Specifically, as regards the profession of private detective, at the present time in Spain, there is no system for the mutual recognition of professional qualifications related to this profession.

In order to comply with the Decision of the ECJ of January 2006, the Spanish Government approved Royal Decree-Law 8/2007, of September 14, whereby certain articles of Law 23/1992, of July 30, on Private Security[5] were modified and, subsequently, Royal Decree 4/2008, of January 11, whereby certain articles of the Regulation of Private Security were modified.[6] Due to these two Spanish Laws, it is understood that the considerations put forward by the ECJ have been complied with and, therefore, the obstacles to the freedom of establishment, the free provision of services and the questions concerning employees of the security companies together with the recognition of the professional qualifications obtained in other Member States of the EU have been eliminated.

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4 *Official State Gazette*, October 30, 2007.
5 *Official State Gazette*, September 19, 2007.
6 *Official State Gazette*, January 12, 2008.

Another infringement procedure against Spain is due to not transposing Directive 89/48/EEC on a general system for the recognition of professional qualifications in the case of the profession of hospital pharmacist. This Directive 89/48/EEC[7] is designed to ensure freedom of movement within the Union for a large number of regulated professions. Spain decided to implement this Directive by means of a decree applicable to all the regulated professions listed exhaustively therein. However, the profession of hospital pharmacist, although regulated in Spain, was not included in the decree. This means that qualified hospital pharmacists from other Member States have difficulties in obtaining the right to practise in Spain and, consequently, are denied the rights of freedom of movement and freedom of establishment granted by the Treaty. Although another Community instrument (Directive 85/433/EEC) provides for the automatic recognition of formal qualifications in pharmacy, it relates solely to basic diplomas guaranteeing the right of establishment. As a result, specialist pharmacy qualifications, such as those relating to hospital pharmacists, are covered by the directives on the general system for the recognition of professional qualifications. Spain has failed to respond to the reasoned opinion sent to it by the Commission.

Draft legislation

There is a draft of a Royal Decree whereby Directive 2005/36 of September 7, 2005 on the recognition of professional qualifications, modified by Directive 2006/100, of November 20, is incorporated into Spanish legislation. This draft of a Royal Decree means that Spain has failed to comply with the period of adaptation stipulated in Directive 2005/36 which ended in October 2007. It is expected that, at the end of 2008, the Spanish Government will have approved this draft of a Royal Decree and it will be possible to analyse whether the transposition has been correct or not.

Judicial practice

The first judicial pronouncement corresponds to the request made by a Greek citizen for the approval of the qualification of Bachelor of Economic Sciences obtained at the London School of Economics (University of London-UK) as equivalent to the Spanish Degree in Economics in order to subsequently apply for the approval of the certificate of Doctor in Economic Science obtained from the Université Livre de Bruxelles in order to work as a full Professor at the Universidad Carlos III de Madrid. The application for approval was rejected by the Ministry of Culture on January 23, 2004 and an appeal was submitted against this Spanish decision as it infringed the free movement of workers in article 39 of the TEC and article 12 of the TEC. In a Decision of July 20, 2006, the National Court made an interesting judicial evaluation of the difference in Spain between the approval of certificates which have their own judicial regimes and their recognition for the purposes of professional practice. It specifically points out that the approval is regulated by Spanish internal law in Royal Decree 86/1987 while recognition is regulated by Royal Decree 1665/1991, which incorporates Directive 89/49 to Spanish legislation. Thus, after pointing out that this appeal must be analysed in the light of Royal Decree 86/1987 and in accordance with the Decision of the ECJ of January 23, 2000, it confirmed that the Spanish Administration had not taken all the steps required to approve the certificate and decided to annul the decision of the Spanish Ministry

[7] IP/06/1789 Brussels, 13 December 2006

of Education and Culture and obliged it to again evaluate all the dossier of the Greek citizen with the criteria required by articles 6 and 7 of Royal Decree 86/1987.

In the Decision of the National Court of November 15, 2006 an appeal was lodged against the refusal of the Spanish Ministry of Education and Culture of January 20, 2003 to approve the Degree of Architecture obtained in Portugal and against the subsequent resolution of the Ministry of Education and Culture which conditioned approval to the Portuguese citizen doing a combined exam on the foundations of physics, mathematics, conditioning and services. The Portuguese citizen alleged the infringement of the free movement of workers and Directive 95/384, as well as an excessive delay in the resolution of his application which resulted in financial damage for him. After evaluating all the data on the case, the National Court decided not to approve the Degree in Architecture applied for taking into account the circumstance that that, as from January 6, 2006, the Degrees in Architecture obtained at the "Gallaecia School" appears in the list of certificates which will be automatically recognised in accordance with Directive 85/384/EEC, but it stresses that this procedure is different from that of approval which was the procedure applied for.

In 2007 a number of judicial pronouncements were made regarding the approval of certificates which is different from the recognition of certificates for professional practice. Below there is a brief mention of the cases and the results obtained.

The first case involves the application of a person made to the Spanish Ministry of Education and Culture for the recognition of the Official Degree in Medicine in the Specialisation of Geriatrics and a second application for the recognition of the Speciality of Endocrinology and Nutrition. The first application for recognition was submitted on April 26, 2000, and requested the Spanish Administration to recognise the training in Geriatrics, received in the United Kingdom, as equivalent to Specialist Doctor in Geriatrics. In order to achieve this, he submitted a certificate issued by the authority of the United Kingdom ("Specialist Training Authority of The Royal Medical Colleges") which stated the periods of practice and education in medical specialties made until February 2000. This certification was issued in accordance with article 8.2 of Directive 93/16/EEC, and is a certificate of training as a resident, specifying the periods and places in which this training was carried out as well as the medical speciality he was trained in. The Spanish Administration granted recognition on October 27, 2003 although it stipulated that complementary training would have to be carried out for 18 months, and the person concerned was authorised to do this training in the United Kingdom.

On the contrary, the second application for recognition was rejected in November 2003 despite the fact that the person provided the same certificate issued by the authority of the of the United Kingdom ("Specialist Training Authority of The Royal Medical Colleges") of February 8, 2000 with the extension of the training to December 2002. This rejection gave rise to the Decision of the National Court of March 20, 2007 which was based on the conclusions of the Advocate General Stix-Hackl in the conclusions of October 4, 2001 in the appeal of the Commission against Spain (C-232/99), this concluded that:

> "the training received in the United Kingdom, according to the reports issued by the Commission for the Evaluation of the Speciality of November 3, 2003 and of February 18, 2004 (contained in the dossier and described in the first of the judicial grounds to this resolution), is clearly insufficient to obtain the certificate as a Specialist Doctor in Endocrinology due to its duration (he was only trained for one year and ten months in this speciality as compared with the there years which are required by Community legislation as a minimum); nor was it possible to evaluate the content of the training programme carried out, the capacity for the acquisition of the responsibility of professional practice or compliance with the general objectives which are established for

> the Spanish training programme from the certification provided. This is regardless of the fact that part of the training in the United Kingdom was taken into consideration by the Administration in order to recognise the certificate of Specialist Doctor in Geriatrics after the required complementary training. All these reasons make it possible to conclude that the intention of the appellant is not feasible".

The third case involved the submittal for the approval of the Ministry of Education and Culture in 2004 of the certificate of "Bachelor of Science in Computer Systems and Business Applications", issued by the University of Wales, a university which is duly constituted pursuant to British legislation, and its official certificates respond to the syllabuses of this university which have been authorised by the Higher School of Computing and Business CESINE to be taught, with full validity and recognition in the United Kingdom, and this also exercises the corresponding control over the centres of this university, including those which it has in Spain, aspects which are not questioned by the Spanish Administration claimed against although it fully rejects the approval. Through its Decision of October 9, 2007, the National Court established that the resolution of the Ministry of Education and Culture is not in consonance with judicial legislation insofar as it rejects the approval directly on invoking the lack of an official nature of the studies carried out in order to obtain the certificate submitted by the appellant for approval as this certificate is official and fully valid in the country in which it was issued (UK), the Administration cannot question this character, as its definition does not correspond to this, as explained, but it has to carry out the procedure established in Royal Decree 86/87 and the Implementation Rules and resolve in consequence, with a previous examination of the technical regulations which are established in these laws and taking into account the result of the judgement on the equivalence of the scope of the training received in relation to what is required to obtain the corresponding Spanish certificate.

However, one of the most interesting aspects of this Decision of October 9, 2007 is the reference it makes to the Spanish legal framework in force as regards approval, the effect of Directive 2005/36 and the effects of the Decision of the ECJ of November 13, 2003, (*NERI*, C-153/02), and concludes with a global evaluation of how Spanish laws on approval must be applied in the light of Community Law and its considerations should be included literally:

> "A correct interpretation of the Spanish laws on approval of certificates must be made so that a Community Law is not restricted or impaired, as was analysed in the Decision and in the light of the laws of the Treaties and derived law, in this case in particular of Directive 89/48, of December 21, 1988, of the Council, whose objective is, as stated in the aforementioned Decision of the Community Court, "to facilitate the European citizens with the exercise of all the professional activities in the host Member States who must be in possession of post-secondary school education on condition that they have certificates which capacitate them to exercise these activities, and which sanction a cycle of studies of at least three years and have been issued in another Member State". In this regard, the interpretation made of Royal Decree 86/87 in repeated Decisions in this Court and Section in appeals similar to this one are more in agreement with the criteria of the Court of Luxembourg (JEC of November 13, 2003, Neri, as. C- 153/02), as it is understood that this regulation norm requires that a judgement be made on the equivalence of the studies, and a request for approval of an official certificate issued by university of a European country empowered to do so cannot be rejected due to the mere fact that all or part of the studies have been carried out at a centre located in a centre located in Spain and the centre referred to has an agreement to facilitate the official certificate to those who have carried out and passed these studies; thus, the criteria proposed here on the repeated legislative basis of Royal Decree 86/87 does not require the raising of the pre-judicial question stipulated in article 234 of the Community Treaty".

The second case was resolved in the National Court through the Decision of October 25, 2007 and referred to the appeal against the resolution of November 30, 2005 of the Ministry of Education and Science which rejected the request for approval of the "Certificate of Training" of December 16, 2004, issued by the Specialist Training Authority of the Royal Medical Colleges" in the United Kingdom, as equivalent to the Spanish Medical Specialist in Psychiatry. The National Court based its decision on the Decision of the ECJ of May 16, 2002, and expressly referred to its considerations 30 to 34, and the Community framework, including Directive 2005/36, of September 7, 2005, and especially, its Decision of March 20, 2007, it determines that the approval of the certificate requested was not applicable. To do so, it argues that,

> "although the certificate submitted referred to a medical speciality in both countries accredits the existence of some periods of training in the United Kingdom, it does not demonstrate the possibility of exercising the profession as such a specialist in this country, this is also deduced from the document submitted regarding his admittance to the British Royal College of Psychiatrists, which refers only to the first part of an examination, which is not sufficient to enter the list of specialists, but it is necessary to comply with the other requirements expressed in this communication".

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Chapter III
Equality of Treatment on the Basis of Nationality

A. WORKING CONDITIONS, SOCIAL AND TAX ADVANTAGES

As general principle, section 4 of article 3 of Royal Decree 240/2007 establishes that, in accordance with the stipulations in this Royal Decree, all the citizens of the Union who reside in Spain will have equality of treatment with Spanish citizens in the area of application of the Treaty of the of the European Community. The effects of this right will extend to the family members who do not have the nationality of the Member State of the EU or the EEA beneficiaries of the right of residence or the right of permanent residence.

This principle of equality of treatment is complemented by the stipulations in the explanation of reasons of Royal Decree 240/2007 which states,

> "In any case, the approval of the aforementioned Directive 2004/38/CE, of April 29, 2004, has made it necessary to incorporate its content to Spanish legislation, in accordance with what is stipulated in *articles 17* and *18* of the Treaty Constituting the European Community *as regards citizenship of the* Union, as well as the rights and principles inherent to these and to the principle of non-discrimination due to reasons of gender, race, colour, ethnic or social origin, genetic characteristics, language, religion or convictions, political opinions or of another type, belonging to a national minority, assets, birth, incapacity, age or sexual orientation".

As can be seen, it also guarantees non-discrimination in Spain for reasons other than nationality.

An important legislative innovation in Spain which must be taken into account by any citizen of the EU or the EEA and their families who wish to work as self-employed persons is Law 20/2007, of July 11, on the Statute of the Self-Employed Worker[8]. In its explanation of reasons it refers to the absence of a unitary legal regime on work as a self-employed worker. Specifically, it states that, in the European Union, self-employed work has been treated in regulation instruments such as Directive 86/613/EEC of the Council of December 11, 1986, as regards the application of the principle of equality of treatment between men and women who work as self-employed workers, including agricultural work, as well as regarding the protection of maternity, which gives a definition of the self-employed worker in its article 2.a), or in the Recommendation of the Council of February 18, 2003 on the improvement of occupational health and safety protection for self-employed workers. The comparative law of the countries in our area does not have examples of the regulation of self-employed work as such. In the countries of the European Union, the same occurs as in Spain: the references to the self-employed worker are dispersed throughout all the social legislation, especially the legislation on Social Security and on the prevention of risk. Thus, the importance of this Proposal of Law should be stressed as it is the first example of the systematic and unitary regulation of self-employed work in the European Union, which undoubtedly constitutes a landmark in our legislation.

The rights recognised for self-employed workers in Spain are outstanding and an analysis of the Law 20/2007 has failed to detect any direct or indirect discrimination against citizens of the EU or the EEA and their families who might come under the scope of application of this Law. Article 1 of Law 20/2007 establishes the persons affected and its section 4 refers

[8] *Official State Gazette*, July 11, 2007.

to extra-Community aliens but not Community or EEA citizens. This final omission must not be understood as excluding them from Law 20/2007.

Another important innovation from the point of view of employment conditions would be what affects the work of lawyers. Specifically, Law 2/2007, of March 15,[9] on Professional Companies has been approved. This Law 2/2007 on Professional Companies is intended to enable the appearance of a new class of professional belonging to the association of Lawyers, which is the professional company itself, through its constitution in accordance with this Law and its registration in the Professional Company Registry of the corresponding Professional Association. This Law 2/2007 is also applicable to the lawyers from other Member states of the EU or the EEA and their families who wish to settle in Spain.

From the point of view of fiscal advantages reference must be made to Law 35/2007, of November 15, whereby the deduction for birth or adoption is established for Income Tax Returns and the single payment to the Social security for birth or adoption.[10] This Law 35/2007 stipulates the reduction of 2,500 euros in Income Tax due to a birth in Spain or due to the adoption of children. The doubt arises when an analysis is made of article 1 of Law 35/2007 which establishes the beneficiaries and especially its section 2 which establishes an additional residence condition for aliens which is probably also applicable to the citizens of the EU or the EEA and their families and which would require a clarification of the Spanish Government as regards whether it affects these citizens of the EU or the EEA and their families or not. Specifically, section 2 establishes that,

> "In any of the cases stated in the previous section (article 1.1), a necessary requisite will be that the beneficiary has legally, effectively and continually resided on Spanish territory for at least the two years previous to the birth or the adoption. Residence will be determined for those persons who meet the above requirements and do not have Spanish nationality, as stipulated in Organic Law 4/2000, of January 11, on the rights and liberties of aliens in Spain and their social integration, in the international treaties and in the agreements which are established with their countries of origin".

As regards social advantages, attention should be drawn to Law 9/2007, of March 12 on the Guaranteed Income of Citizens of the Community of Valencia, whose article 12.1, letter a) establishes the requirements for those who wish to access the services and one of the conditions is

> "a) To have Spanish nationality or the nationality of any Member State of the European Union. Moreover, the nationals of other countries will have the right to a guaranteed income in equality of conditions as Spaniards and the nationals of any country of the European Union on condition that all the members who are given a right to the benefits referred too in this Law accredit their legal residence in the Community of Valencia, in the terms established in Organic Law *4/2000, of January 11, on the rights and liberties of aliens in Spain and their social* integration, reformed by Organic Law *8/2000, of December 22 and its Implementation Rules*".

As can be seen, no mention is made of nationals of the EEA or of Switzerland and their families, which might entail discriminatory treatment as regards social advantages.

In relation to possible discriminations as concerns social advantages, it should be pointed out that Royal Decree 1721/2007, of December 21, whereby the regime for personalised grants and study assistance is established might be discriminatory due to the content of its article 4. This article 4 establishes the conditions of the beneficiaries and stipulates that,

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9 *Official State Gazette*, March 16, 2007.
10 *Official State Gazette*, November 16, 2007.

> "1. In order to be a beneficiary of the grants as study assistance regulated in this Royal Decree, it will be necessary: a) Not to be in possession of or not to have the legal requirements for obtaining a certificate of the same or a higher level to the one corresponding to the studies for which the grant or assistance is requested. b) To comply with the basic requirements established in this Royal Decree as well as those established by the Educational Administrations in the announcement for the grants or assistance in question. c) To be enrolled in any of the educational courses of the Spanish Educational System which are listed in article 3 of Organic law 2/2006, of May 3 on Education. d) To be Spanish, or have the nationality of a Member State of the European Union. In this last case, the student or those who maintain him must be working in Spain. In the case of non-Community students, the stipulations in the legislation on the rights and liberties of aliens in Spain and their social integration will apply".

As can be seen, requisites are established for nationals of the EU, and we suppose also for those of the EEA, which are clearly discriminatory when the student or those who maintain him are required to work in Spain.

In this same regard, Order ECI/4067/2007, of December 13, whereby Order ECI/1702/2007, of June 12, which regulates loans to university graduates linked to the possession of future income, is modified, establishes in its article 2 that, in order to be a beneficiary of these loans,

> "The applicants will have to have Spanish nationality or the nationality of a country which is a member of the European Union and be resident in Spain during the two years immediately previous to the date of application".

B. OTHER OBSTACLES TO THE FREE MOVEMENT OF WORKERS

No obstacles of another nature have been found in relation to the free movement of workers.

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

Frontier workers

The only reference to frontier workers concerns the recognition of beneficiaries of the right to permanent residence before the period of five years finalises. Specifically, article 10, section 2, letter c) establishes that,

> "The self-employed worker or the employee who, after three consecutive years of continued work and residence in Spanish territory works as self-employed or as an employee in another Member State and maintains his residence in Spain, returning to Spanish territory daily or, at least, once a week. For the exclusive purposes of the right of residence, the periods of work in another Member State of the European Union will be considered to have been carried out in Spain". This drafting corresponds to the stipulations in article 17.1, letter c) of Directive 2004/38, although the Spanish Legislator does not transpose the third section of letter c) of article 17.1, which is, "Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment".

Sportsmen/Sportswomen

Article 194.1 of the General Regulations of the Royal Spanish Football Federation of January 2007 establishes that

> "in the national area, foreign Community footballers can register in Spanish football with no kinds of restrictions in any of the current divisions or categories and in any new ones which might be established".

Therefore, this norm guarantees the principle of equality among Community footballers. The only exception being that Rumanian and Bulgarian footballers who have employment contracts will continue to occupy one of the posts stipulated for non-Community foreigners. Memorandum No. 34 of the Royal Spanish Football Federation establishes this point. However, it seems that the possibility is opened for these footballers not to have an employment contract but a contract to provide services; therefore, they are not subject to the transitory period marked out by their Accession Treaties to the EU.

In relation to Women's Football it is necessary to stress the stipulations in the regulatory norms of the Women's Football Championship for the 2007-2008 season. Specifically, in the second and third sections of article 3 the following is established as in article 3:

> "2) In the First Division-Super-League, both as regards the National League Championship and in the Spanish Championship /The Queen's Cup, the clubs belonging to this category can register and line up two foreign players who are not eligible to be selected for the Spanish national team. 3) In the National First category in its National League Championship and in the phase involving promotion to the Super-League, the clubs can register and line up one foreign player who is not eligible to be selected for the Spanish national team. A player with this condition registered in the national First category cannot be lined up in the team belonging to the Super-League".

The limitation to two foreign players who are not eligible to be selected for the Spanish national team and to one player who is not eligible to be selected for the Spanish national team give rise to serious doubts as it may suppose a discriminatory quota as regards Community or EEA players.

In the area of Basketball article 20.2. of the General and Competition Regulations for 2007/2008 continues in force and, as was stated in the previous report, these give rise to some doubts as they establish that,

> "2.- A player must comply with the following requirements in order to subscribe to the application for a licence: a) Be Spanish or have the nationality of one of the Member States of the European Union or of the European Economic Area. In addition, immigrants legally resident in Spain can also subscribe to a licence, as long as they continue in this situation. However, in the case of professional competitions, which are understood to be those for which an employment contract made by the Club and the player are required, restrictions may be introduced for reasons of nationality, in consonance with the regulation of the employment market and the protection of the Spanish national teams".

Nevertheless, in the bases or rules of the competition for the 2007/2008 season, it is stated that,

> "1.- The clubs must register a minimum of eight and a maximum of eleven players (of these eleven, two can have nationalities which do not correspond to the European Union). For the purposes of these Competition Bases, it is understood that a Community player is one who has the nationality of a Member State of the European Union or of the European Economic Area and has acquired the right to free movement".

However, in the Agreement subscribed to on March 18, 2008 up to the 2011-2012 season by the Spanish Basketball Federation, the Association of Basketball Clubs and the Association of Professional Basketball Players, clearly established the following rule with contracting

quotas. Specifically, it was established that there must be a minimum quota of 4 or 5 players who might be selected for the Spanish national team, depending on whether the squad is made up of 11 or 12 players, a maximum of 2 extra-Community players, which is not obligatory, and there must be 5 players from the European FIBA area, without including countries belonging to the Cotonú Agreement. Evidently, this quota favouring 4 or 5 Spaniards is contrary to the free movement of workers.

In the case of Handball, point 1.11 of the General Legislation on competitions organised by ASOBAL establishes that, as regards participating players,

> "b) Each participating team must sign a minimum of twelve players and can attain as many as 18 senior players, two of which must be national players who may be selected for the Spanish national team and they must have been born in 1987, 1988 or 1989".

Another of the areas where doubts have arisen is in Aid to High Level, High Performance Sportspersons, taking into account the possibility of their being selected to represent Spain. Royal Decree 971/2007, of July 13, on high level and high performance sportspersons stipulates a number of fiscal benefits, insertion into the employment area and education for sportspersons who are qualified as high level and high performance. Article 2 section 3 of this Royal Decree recognises this condition and, therefore, this group of benefits in the following terms:

> "3. Without prejudice to the competences of the Autonomous Communities, They will be considered to be high performance sportspersons and the measures stipulated in article 9 of this Royal Decree will be applied as regards the continuance of their studies to the sportspersons with licences issued or approved by the Spanish Sports Federations, and who comply with the any of the following conditions: a) they have been selected by the Spanish sports federations in order to represent Spain in official international competitions in the senior category, during at least one of the last two years; b) they have been selected by the Spanish sports federations in order to represent Spain in official international competitions in age categories below the senior level, during at least one of the last two years; c) they are qualified as high performance or the equivalent sportspersons by the Autonomous Communities in accordance with their legislation. The support measures deriving from this condition will extend for a maximum period of three years, which will begin to count from the day following the date on which the Autonomous Community published the condition of the person concerned as a high performance or equivalent sportsperson for the last time; d) they follow programmes directed by the Spanish Sports Federations at high performance centres recognised by the Sports Council; e) they follow technical programmes directed by the Spanish Sports Federations developed by the Sports Counci; f) they follow technical programmes directed by the Spanish Sports Federations; g) They follow programmes directed by the Autonomous Communities or the Autonomous Sports Federations".

As can be seen, the Community or EEA sportspersons who reside in Spain cannot access these types of benefits.

Maritime sector

The comments made in the previous report continue to be valid as, in the maritime sector, Royal Decree 652/2005, of June 7,[11] whereby Royal Decree 2062/1999, of December 30, whereby the minimum level of training in maritime professions is regulated, was modified continues to be valid and Directive 98/35/EC of the Council, of May 25, 1998, whereby Directive 94/58/EC related to the minimum level of training in maritime professions, was in-

[11] *Official State Gazette*, June 16 2005.

corporated into the internal legislation. As stated above, section 2 of 7 continues to present doubts concerning compatibility with Community Law as it establishes that

> "2. The recognition of a professional certificate will be required to directly access employment in the crews of Spanish merchant ships, except for those posts which entail or may entail the exercise of public functions legally attributed to Spaniards, such as captain, skipper or first officer, which are reserved to Spanish citizens, without prejudice to what is laid down in article 8.2. Recognition will be made through ratification, at the request of the person concerned or of the shipping company, in accordance with rule I/10 of the annex to the STCW agreement and section A-I/10 of the training code, and for this, the corresponding professional card of the merchant navy will be issued".

The fact that this norm then refers to article 8[12] concerning the recognition of the certificates issued by other Member States, and imposes the obligation to be submitted to an examination on Spanish maritime legislation, in accordance with the stipulations in section 3 of article 7 cited above. Therefore, there are still doubts regarding whether the practical application of both provisions cannot give rise to obstacles for citizens of the EU or the EEA.

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[12] See Article 8. "Specific norms on the recognition of professional certificates issued by Member States of the European Union. 1. The Department of the Merchant Navy can directly recognise the professional certificates issued by a Member State of the European Union, in accordance with the national provisions applicable. 2. The citizens of the European Union who do not have Spanish nationality and have a professional certificate with sufficient attributions, issued by a Member State, and once they have passed a test on knowledge of Spanish maritime legislation, can exercise command of merchant ships with a gross tonnage below 100 GT which transport cargo or less fewer than 100 passengers on condition that they operate exclusively between ports or points located in areas in which Spain exercises sovereignty, sovereign rights or jurisdiction."

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F. RELATIONSHIP BETWEEN REGULATION 1408/71 AND ARTICLE 39 AND REGULATION 1612/68

Texts in force

Among the provisions in 2007, we must point out the entry into force of Law 39/2006, of December 14, on the Promotion of Personal Autonomy and Attention for persons in dependent situations (hereinafter, the Law on Dependence). The protection of dependence, in accordance with the ECJ comes under health care protection, and, as such, it belongs to the area of protection in Regulation 1408/71 EC.

The law which establishes a subjective right to the beneficiaries sets out the requirement of the residence of the beneficiaries in order to access the services stipulated in the law.

Specifically, the basic requirements to have the rights established in the Law are as follows*:*

> "Article 5. Holders of rights.
> 1. The Spaniards who comply with the following requirements are holders of the rights established in this Law:
> To be in a situation of dependence in any of the levels established.
> As regards minors under 3 years old, the stipulations in the thirteenth additional provision will apply.
> To reside on Spanish territory and have done so for five years, two of which must be immediately previous to the date of submission of the application. As regards minors under five years old, the period of residence will be required for the person who exercises custody of the child.
> 2. As regards the persons who comply with the above requirements and do not have Spanish nationality, the stipulations established in Organic Law 4/2000, of January 11, on the rights and liberties of aliens in Spain and their social integration, in the international treaties and agreements established with their countries of origin will apply. As concerns minors who do not have Spanish nationality, the stipulations in the Laws on Minors in force will apply, both at State and Autonomous Community level as well as the international treaties.
> 3. The Government can establish protection measures for Spaniards who are not resident in Spain.

> 4. With a previous agreement of the Territorial Council of the System for the Autonomy and Attention for Dependence, the Government will establish the conditions for accessing the System of Attention for Dependence for Spanish emigrants who return to Spain".

The Law includes as services involving dependence attention (article 14) both economic services and services in kind, the latter will be of a priority nature and will be provided through the public offer of the Network of Social Services by the respective Autonomous Communities through duly accredited public centres and services or private centres and services with agreements with the State. (The economic provisions and services are incompatible with each other, except for distance assistance for those not in residences).

The requirements concerning nationality and residence could present problems regarding the right to free movement, and, for example, hinder the exportability of the economic services stipulated in the Law.

In relation to the protection of dependence, the Case Law of the ECJ must be taken into account, especially:

- Case C-160/96, *M. Molenaar*, in which the Court interpreted that, in relation to these services, they are services in kind or in cash which complement those of the health care insurance. Thus, the first are granted in accordance with the legislation of the country where the person resides; however, considering that the economic services are paid by the institution of the country of the insurance or affiliation, consequently, they are exportable.
- Case C-215/99, *F. Jauch* – which confirmed the line initiated in the *Molenaar* Case: the Court considered that the "assignment of Austrian assistance, payable to persons who reside in Austria in order to provide aid and these persons can live autonomously despite being included in annex II bis of Regulation (EEC) 1408/71 (which would exclude exportation) was, nevertheless, in the opinion of the ECJ, considered to be a provision of a nature identical to the German services referred to in the *Molenaar* Decision. Consequently, it was considered that this was a service in cash which completed the services of the health care insurance in order to improve the state of health and the standard of living of persons requiring special care. It added that, for these purposes, it is irrelevant that that the "assignment of assistance" be of a contributory nature or not. In Spanish legislation, the services of the Law of Dependence do not require previous contributions, and although these belong to the social protection system, they seem to be situated by the legislator beyond the limits of the Spanish Social Security System for internal purposes.

This Case law of the ECJ is repeated in Case C-286/03, *S. Hosse v. Land Salzburg Case*: a service can be considered to be a Social Security service insofar as it is granted to its beneficiaries, apart from any individual and discretional appreciation of personal needs, depending on a legally defined situation and to the extent that the service refers to any of the risks expressly listed in article 4, section 1, of regulation No. 1408/71, as

> "the services granted objectively, depending on the legally defined situation, in order to improve the state of health and the standard of living of the dependent persons are fundamentally intended to complete the services of the health care insurance and must be considered to be "illness services" in the sense of article 4, section 1, letter a), of Regulation No. 1408/71 (Molenaar and Jauch Decisions)".

It adds that

> "the fact that the concession of the allowance is not necessarily linked to the payment of a health care insurance service or a pension which has been granted due to the health care insurance cannot alter this analysis";

the ECJ also states that

> "and even when they have particular characteristics, these services must be considered to be "illness services" in the sense of article 4, section 1, letter a), of Regulation No. 1408/71".

The limitations to free movement could also be extended as regards access to services or payment in kind, if these are understood as social services integrated into the protection system of the Social Security. In accordance with article 38.1 of the General Law on the Social Security:

> "the protective action of the Social Security system will include: the provision of social services which might be established as concerns re-education and rehabilitation of invalids and assistance to the elderly, as well as those matters where this is considered to be advisable".

However, we must wait for the Law of Dependence which is still pending its Implementation Rules. These Rules may specify the vague drafting of the Law and provide its precise requirements.

Judicial practice

The Spanish Courts continue to address the issue of the calculation of fictitious contributions made by migrant workers to the Spanish Social Security (Employment Mutuality) previous to January 1, 1967 and taking these into consideration in order to access a retirement pension, as well as the application of the principle "pro rata temporis" in the calculation of the contributions of migrant workers, which include among others, sea workers.

Chapter IV
Employment in the Public Sector

A. ACCESS TO THE PUBLIC SECTOR

The nationality condition for access to positions in the public sector

In 2007 Law 7/2007, of April 2, on the Basic Statute of the Civil Servant (BOE No. 89, of April 13) – hereinafter, EBEP- has been passed, a legal text of a basic nature within which the Autonomous Communities must dictate their implementation legislation concerning the civil service.

The basic State regulation concerning access to the Civil Service by Community citizens maintains the general principle of extension of the free movement of workers to the scope of the Civil Service. It maintains the subjective scope of the norm and adds some singular stipulations as regards an extension of the progressive principle although with no essential changes (despite the fact that the intention declared in the Declaration of Reasons of Law 7/2007 is *"to introduce greater possibilities for the opening of our public employment to citizens who do not have Spanish nationality, in application of Community Law or for reasons of general interest*").

Article 56.1 of the EBEP stipulates that among the requirements to be able to participate in the selection processes is to have Spanish nationality, without prejudice to what is stipulated in the following article, which deals with *"access of nationals from other States to public employment"*, a question which appears as regulated for the first time in this Law which applies at State and general level and intends to include nationals from States other than those which make up the European Union.

This Law starts with the basic distinction between the employment and functional mode of being linked to the corresponding Administration. Thus, it starts by acknowledging the general principle, with the limits mentioned, according to which

> "the nationals of the Member States of the European Union can access public employment as civil servants, in equal conditions with Spanish nationals, except for those which directly or indirectly involve participation in the exercise of public power or those functions which are intended to safeguard the interests of the State or of the Public Administrations",

and it corresponds to the competent organism in each public Administration to determine the groups of civil servants (article 76 EBEP) which citizens from other Member States cannot access or, in other words, those which are reserved to Spanish nationals.

As regards the subjective scope, this remains as it has been until now after the drafting incorporated in 1999 to Law 17/1993 (article 57.2 EBEP), extending the possibility of incorporation to public employment as Civil Servants of the persons included within the scope of application of the International Treaties made by the European Union and ratified by Spain, in which the free movement of workers applies..

The condition of employee means that the difficulties involved in being linked in this way to the Public Administrations are less. Thus, section 4 of article 57 sets out that *"The aliens referred to in the above sections, as well as aliens with legal residence in Spain, can*

access the Public Administrations, as employees, in equal conditions with Spanish nationals".

Finally, a reservation of Law of the Parliament or of the Legislative assemblies Autonomous Communities is established "in order to be exempt from the nationality requirement to access the condition of Civil Servant for reasons of general interest". This is an innovation incorporated on the suggestion of the Commission of Experts which drafted the White Paper. Two aspects should be pointed out: the first, which refers to extra-Community citizens and the second, which does not require reciprocity for the admission of these citizens to these posts (as civil servants).[13]

The Autonomous Community legislation promulgated during 2007 is specified in the following texts.

- Decree 12/2007, of January 23, whereby the system for the selection of statutory personnel is regulated, as well as the provision of basic, singular posts in the Health Care Service of Extremadura (D.O. Extremadura No. 12, of January 30, 2007):
  In order to be able to participate in the selection processes for permanent statutory personnel, among others, this provision has the following requirements, those which are legal and those established in the corresponding call for applications: to have Spanish nationality or the nationality of a Member State of the European Union or of the European Economic Area, or have the right to the free movement of workers in accordance with the Treaty of the European Union or other treaties ratified by Spain, or have this right recognised by legislation (article 13.1.a).
- Law 3/2007, of March 27, (B.O. Illes Balears No. 49, of April l3), on the Civil Service of the Autonomous Community of the Balearic Islands, article 50.1.a) The following are general requirements to access Autonomous Community Civil Service: a) To have Spanish nationality or another nationality which permits access to public employment in accordance with the legislation in force on this matter.
- Finally, we cite Resolution 1275/2007, of April 16, whereby, as regards the offer of public employment of the Administration of the Community of Navarre and its autonomous organisms for 2007, the posts whose access requires Spanish nationality as they entail the exercise of public powers or responsibility as regards safeguarding the interests of the Administration of the Community of Navarre and its autonomous organisms are determined (based on article 4 of Jurisdictional Decree 8/2007, of January 29, whereby the offer of public employment in the Administration of the Community of Navarre is approved).

The Navarre Law regulating its civil service (Statute of the Personnel at the Service of the Public Administrations of Navarre 1993, in its current drafting it became Jurisdictional Law 10/2001, of May 24) establishes that the nationals of the other Member States of the European Union can access all public employment in equal conditions with Spanish nationals, except for those which directly or indirectly involve participation in the exercise of public power or those functions which are intended to safeguard the interests of the State or of the

[13] According to the Commission of Experts which prepared the guidelines for the drafting of the EBEP, "this innovation takes into account the possible needs of our Public Administrations which must have this type of personnel due to the absence of nationals or Community citizens (…). It also takes into account our current demographic reality, characterised by an advanced process for the integration of immigrants who have a sufficiently stable situation in our society". Finally, taking into account the fungibility which the conditions of employee and civil servant have at the present time as regards many tasks, it cannot be explained why citizens be contracted with some functions in some Administrations and not in others as these have been reserved for civil servants.

Public Administrations and involve civil servants whose mission is to safeguard the interests of the State or of the Public Administrations.

The posts listed by this resolution include, among others, Fireman Sergeant (see the report corresponding to 2006).

Language requirement

The following texts are relevant:

- Decree 12/2007, of January 23, whereby the system for the selection of statutory personnel is regulated, as well as the provision of basic, singular posts in the Health Care Service of Extremadura (D.O. of Extremadura No. 12, of January 30, 2007):
  This Law is primarily intended to regulate the systems for the selection of its statutory personnel and the provision of vacant basic and singular posts in the area of the Health Care Service of Extremadura is such that, as from the entry into force of this provision, all the calls for the selection of new statutory personnel such as those in the selection processes for transfer competitive examinations, must be regulated by the prescriptions contained in the call for the competitive examination.
  The convening of the selection tests may establish a test to accredit the knowledge of Spanish of those candidates who do not have Spanish nationality and knowledge of Spanish cannot be deduced from their origins (article 11.3). This test will be evaluated by the Tribunal in charge of the selection tests which may be assisted by active civil servants on the Teaching Staff of the Official Schools of Languages or Secondary Schools.
  The test will be graded as apt or not apt by a Resolution of the General Secretariat of the Health Care Service of Extremadura, and it is necessary to obtain the grade of apt in order to access the selection test.
  Those who have the Higher Diploma in Spanish as a foreign Language or the Certificate of Aptitude in Spanish for Foreigners issued by the Official Schools of Languages are exempt from this test. If accrediting documentation is not provided, they cannot be exempt and must take the test.
- Law 3/2007, of March 27, (B.O. Illes Balears No. 49, of April 3), on the Civil Service of the Autonomous Community of the Balearic islands, article 50.1.f)
  The following are general requirements to access the autonomous civil service: to accredit knowledge of Catalan which is determined by regulation, respecting the principle of proportionality and adaptation regarding the level required and the corresponding functions. Further on (article 124.1.g), it lists among the obligations of the civil servants at the service of the Administration of this Autonomous Community " to know the official languages at the level determined by regulation and to facilitate the right of the citizens to use these in their relations with the Autonomous Community Administration.
- Decree 59/2007, of May 24, whereby the regulations governing the profession of tourist guide in the Principality of Asturias are re-approved (B.O. Principality of Asturias, No. 144, of June 21).
  This Law is intended to regulate the exercise of the profession of tourist guide within the Principality of Asturias in accordance with the requirements of Community Law (taking into account, as pointed out in the Declaration of Reasons for this Law, the fact that, on March 22, 1994, the European Court of Justice condemned Spain for failing to comply with the obligations established in articles 48, 52, 59 and 5 of the Treaty of the

EEC as an order of the Principality of Asturias subordinating access to the profession of tourist guide and Interpreter Guide to the possession of Spanish nationality, among other reasons, had been approved.

The Law cited and approved in 2007 contains among its requirements to access the condition of tourist guide in the Principality of Asturias "to accredit knowledge of Spanish, as well as a foreign language". Thus, in order to obtain authorisation as a tourist guide, there will be language tests, accrediting fluency in, at least, one of the foreign languages stated in each call through oral and written exercises. In the case of applicants who have the nationality of a non-Spanish speaking country, the language test will refer to fluency in Spanish (article 5.3).

- Law 13/2007, of July 27, of the Parliament of Galicia, whereby Law 4/1988, of May 26, on the civil service in Galicia is modified (D.O. Galicia, No. 165, of August 27).

  This Law was promulgated once the EBEP was approved at State level in order to adopt a number of urgent measures for improving, rationalising and modernising Autonomous Community public employment.

  In relation to compliance with the already existing duty in Galicia to accredit knowledge of the Galician language in order to access Autonomous Community public employment, some measures were established with a view to ensuring this duty in order to facilitate compliance with the stipulations in the Linguistic modernisation Plan within the civil service and approved by the Parliament of Galicia and with the stipulations in the Law on Linguistic Normalisation of Galicia (Law 3/1983, of June 15, D.O. Galicia No. 84, of July 14, 1983).

  In its new drafting, article 33 of the Law on the civil service in Galicia now stipulates the following:

  "In order to comply with the normalisation of the language of Galicia in the Public Administration of Galicia and in order to guarantee the right of the public to use the language of Galicia in their relations with the Public Administration in the area of the Autonomous Community, and in compliance with the obligation to promote the normal use of this language by the public powers in Galicia determined by article 6.3 of the Law on Linguistic Normalisation in Galicia, in the selection tests which are carried out in order to access posts in the Administration of the Autonomous Community of Galicia and in the local entities of Galicia, the knowledge of the language of Galicia must be demonstrated.

  For these purposes, the bases of the calls will establish that one or more of the tests in the selection process must be done exclusively in the language of Galicia, without prejudice to additional tests which might be stipulated for those posts which might require a special knowledge of the language of Galicia".

- Decision of the High Court of Justice of the Community of Madrid of March 21, 2007 (Westlaw 2007/230526).

  On the occasion of the challenge to the Resolution of October 27, 2003 of the Department of Local Administration which called a unitary competitive examination for the provision of posts reserved for civil servants of the Local Administration with authorisation of a national nature (Secretaries-Supervisors and Supervisors-Treasurers), in a decision concerning the requirement of a knowledge of languages of Autonomous Communities as obligatory to access the civil service, in this case of Valencia, the High Court of Justice of the Community of Madrid pronounced a decision.

  The Resolution challenged includes the excluding requirement of the *"knowledge of the Autonomous Community language and merits determined by the Autonomous Community"* and, according to the claimants, there are no grounds for this as posts are being of-

fered which do not involve direct dealing with the citizens and, therefore, an adequate knowledge of the Autonomous Community language cannot be demanded as a requirement.

As cited by the High Court of Justice, the Decision of the Constitutional Court of February 28, 1991 provides that

> "the principle of merit and capacity entails that the person who accesses a certain function has the responsibility to accredit the capacities, knowledge and suitability required for the function the person aspires to. Thus, the requirement of the knowledge of the language which is official in the territory where the Administration aspired to acts is perfectly includible within the merits and capacities required. The requirement of the knowledge of Catalan must not be understood to be an "ad extra" requirement, regardless of the merit and capacity accredited, but, like any other knowledge or condition required to access the civil service, a requirement with whose accreditation is in accord with these constitutional principles, insofar as they involve a capacity and a merit which has to be accredited and valued in relation to the function to be carried out and, therefore, has a due relation with merit and capacity as imposed in article 103 of the Spanish Constitution".

The essential point is that the requirement of the knowledge of the language must be related to the functions of the post to be covered as, otherwise, article 14 of the Spanish Constitution might be infringed, this is in accordance with the criteria in this respect laid down by the High Court and accepted by the High Court of Justice:

- First: The general principle continues to be that the knowledge of Spanish languages other than Castilian Spanish can be evaluated as a "non-eliminatory merit".
- Second: For specific, determined posts, the competent public powers can give this eliminatory character to the test of knowledge of the co-official language of the Autonomous Community.
- Third: The finality of this exception to the general principle is to provide personnel who speak the vernacular language in the Administration, as a way to guarantee the right of the citizens of the Community to use this language.
- Fourth: the appreciation of compliance with this specific finality means that it is obligatory to consider the aforementioned requirement discriminatory when it is imposed in order to cover posts which are not directly linked to the use by the citizens of the language of their Autonomous Community, and must be reserved for those in which the impossibility to use the language can lead to a substantial perturbation of their right to use it in their relations with the Administration.
- Fifth: This last point involves the need to evaluate the functions which are the competence of the post intended to be covered, in each case, as well as the totality of the civil servants a determined service corresponds to, so that, as regards those where it is appreciated that this perturbation might appear, it can be guaranteed that a civil servant speaks the particular language of the Community, without prejudice to the fact that this civil servant also has the constitutional duty to know Castilian Spanish, imposed by article 3 of the Spanish Constitution on all Spaniards.
- Sixth: When none of these circumstances are involved, the constant Case Law thesis which considers that the requirement of a compulsory knowledge of the languages of the Autonomous Communities is discriminatory, either because this is expressly stated in the call or because it is implicitly deduced from this, is fully applicable".

This doctrine of the High Court is fully in force and does not oppose the doctrine of the Constitutional Court as regards posts in which the relation with the citizens is direct and

immediate, which is precisely what is taken into account by the High Court as fundamental data for the exception to the general rule not to absolutely demand the knowledge of the language of the Autonomous Community.

In the case examined in the aforementioned decision of the High Court of Justice of Madrid,

> "the problem derives from the fact that the knowledge of Valencian has become a requisite and not a merit. And, as the posts do not entail direct dealings with the citizens, this infringes the interpretation which the High Court has given, and also article 23 in relation to 14 of the Spanish Constitution, as there is nothing which prevents the knowledge of a language being valued as a merit, but it is not justified as a requirement excluding the possibility of applying for the post", as established in the basis of the resolution which is challenged. "This requirement infringes the right of access to the civil service in conditions of equality and the exclusion which this basis establishes is far from the valuation of an Autonomous Community language, in this case, Valencian, as a merit".

In conclusion, the High Court of Justice declared that

> "the seventh basis must be annulled as it is counter to Law, insofar as it infringes the laws mentioned and transforms the knowledge of a language into an excluding requirement, and this should in fact be considered as a merit, for certain specific posts which do not require a direct relation with the citizens, a necessary and essential requirement for the exception to the general rule that the knowledge of the language of the Autonomous Community be considered to be "a non-eliminatory merit" to operate, as established by the High Court".

Consequently the High Court of Justice admits the appeal.

Chapter V
Members of the Family

Text in force (since 2nd April, 2007)

As we have mentioned, transposition of Directive 2004/38 was made in Spain through *"Royal Decree 240/2007, of February 16, on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states parties to the agreement of the European Economic Area"*, in force since April 2, 2007. This point addresses the innovations referring especially to the family nucleus of the EU or EEA citizens who do not have any of these nationalities.

Article 2 of Royal Decree 240/2007 defines family members of the EU or EEA citizen as follows:

> "a) The spouse, on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place.
> b) The partner he has a union analogous to the matrimonial union with, which is registered in a public register established for this purpose in a Member State of the European Union or in a State which is a party to the European Economic Area, which prevents the possibility of two simultaneous registrations in this State, on condition that this registration has not been cancelled, which must be sufficiently accredited. Matrimony and registration as a registered couple will be considered to be incompatible with each other.
> c) The direct descendents and those of the spouse or registered partner on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place or the registration as a couple has not been cancelled, those under twenty-one years old, those over this age who live under his charge or are incapacitated.
> d) The direct grandparents, and those of the spouse or registered partner who live under his charge, on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place or the registration as a couple has not been cancelled."

As can be appreciated, the Spanish legislator has chosen the widest definition of the family nucleus and equates married couples with common law partners legally registered in another Member State equating these to those recognised in Spain. The right to enter, leave, move within and reside freely on Spanish territory is recognised for all these persons as essential rights.

In addition to these rights, these family members, with the exception of the descendents over twenty-one years old and the descendents under his charge, can access any type of employed or self-employed work in equal conditions with Spaniards.

Regarding conditions that family members need to fullfil in order to enter Spanish territory, Royal Decree 240/2007 stipulates that:

> "in the cases in which a citizen of a Member State of the EU or the EEA, or a family member does not have the travel documents required to enter Spanish territory or a visa, the Authorities responsible for border controls will give these persons, before their return, maximum facilities so that they can, in a reasonable period of time, obtain or receive the documents required, or so that they can confirm or prove by other means that they are beneficiaries of the scope of application of this Royal Decree, on condition that the lack of a travel document is the only reason which prevents entry to Spanish territory".

This final phrase seems to show that the lack of a visa is not a reason for the refusal to enter through a Spanish exterior border. However, section 2, article 4 of Royal Decree 240/2007 expressly states that the family members of EU or EEA citizens included within Regulation 539/2001, "*are subject to the obligation of a visa in order to cross external borders*. As we have already pointed out in Chapter I, in the event that a family member of a EU or an EEA citizen without an entry visa, will not be allowed to enter Spain and will be returned, this will not comply with the stipulations of the ECJ in the MRAX case

The corresponding entry visa must be granted free of charge and deliver as soon as possible. The obligation to have this entry visa is waived if it can be demonstrated that the person has the residence card of a family member of a citizen of the EU valid, in force and issued by a State which is a Party to the Schengen Agreement.

Having a passport or an ID Card in force are also the conditions required in article 6 of Royal Decree 240/2007 (similar to article 6 of Directive 2004/38) for the cases in which EU or EEA citizens remain in Spain (termed a stay) for a period less than three months regardless of the finality of this temporary stay. The difference with article 6 of Directive 2004/38 is that the Spanish legislator conditions the entry of family members of EU or EEA citizens for a stay which is less than three months to compliance with the requirements of article 4 of Royal Decree 240/2007. Such a remittal means that they must have an entry visa so that they might avail themselves of the three month stay as stated above.

In the cases of residence for the family members of EU or EEA citizens (or of Spanish citizens) in Spain for more than three months, the obligation is laid down to request and obtain a residence card of a family member of a citizen of the EU. This request will be made to the Office of Aliens and a receipt of request will be granted until the effective handover of the residence card (article 8 Royal Decree 240/2007).

The documentation which must be submitted to this Office of Aliens is as follows:

> "a) The valid passport of the applicant in force. In the event that this document has expired, a copy must be submitted together with the application for renewal.
> b) Accrediting documentation of the family, matrimonial or registered union bond, when necessary, duly translated and with an apostille or legalised, which grants the right to the card.
> c) The certificate of the registration of the family member who is a citizen of a Member State of the European Union or of another State party to the Agreement on the European Economic Area who accompanies the applicant or whom the applicant is going to join.
> d) In the cases in which this is required by article 2 of the present Royal Decree, documentation accrediting that the applicant for the card lives under the charge of the citizen of a Member State of the European Union or of another State party to the Agreement on the European Economic Area, and is a family member.
> e) Three recent colour photos with a white background, ID card size."

Once all these requirements are complied with, the residence card of a family member of a Community citizen will be given to the applicant and this will be valid for five years.

As regards the case of permanent residence, this is also recognised for the family members of EU and EEA citizens who have resided legally in Spain for a continual period of five years (article 10 Royal Decree 240/2007). In order to accredit this permanent residence, the Spanish authorities will issue a permanent residence card to these family members within a period of three months from application. This card will be automatically renewable every ten years and the interruptions of residence in Spain which do not exceed two years will not affect the validity of the permanent residence card of the family members.

Finally, from the point of view of the restrictive measures adopted for reasons of public order, security and health against the family members of EU or EEA citizens, the considerations stated in Chapter I are also applicable to the them.

Recent legal literature

DE LA PUEBLA PINILLA, A., "La relación laboral especial de residencia para la formación de especialistas en ciencias de la salud. Comentario al RD 1146/2006, de 6 de octubre (LA LEY 9694/2006)(BOE 7 de octubre de 2006)", *Relaciones Laborales*, Nº 3, Año XXIII, Quincena del 8 al 23 Feb. 2007, page. 797, Volume 1, Editorial La Ley.

SOTO MOYA, M., "La entrada y residencia en España de las parejas registradas y de hecho", *Diario La Ley*, N.º 6786, 25 Sep. 2007, Año XXVIII , Ref. D-201, Editorial LA LEY.

Chapter VI
Relevance/Influence/Follow-up of Recent Court of Justice Judgments

There are no special mentions in Spanish Case Law or in administrative practice to the cases which the European Commission has an interest in. See Chapter II Spanish Case Law on recognition.

Chapter VII
Policies, Texts and/or Practices of a General Nature with Repercussions on Free Movement of Workers

The more relevant Spanish legal provisions during 2007 with repercussions regarding the free movements of workers were as follows:

- Royal Decree of the Ministry of Education and Science of May 11, 2006;
- Royal Decree-Law 8/2007, of September 14, whereby certain articles of Law 23/1992, of July 30, on Private Security[14] were modified and, subsequently, Royal Decree 4/2008, of January 11, whereby certain articles of the Regulation of Private Security were modified;[15]
- Law 20/2007, of July 11, on the Statute of the Self-Employed Worker;[16]
- Law 2/2007, of March 15,[17] on Professional Companies;
- Law 35/2007, of November 15, whereby the deduction for birth or adoption is established for Income Tax Returns and the single payment to the Social Security for birth or adoption;[18]
- Law 9/2007, of March 12 on the Guaranteed Income of Citizens of the Community of Valencia;
- Royal Decree 1721/2007, of December 21, whereby the regime for personalised grants and study assistance is regulated.
- Order ECI/4067/2007, of December 13, whereby Order ECI/1702/2007, of June 12, which regulates loans to university graduates linked to the possession of future income;
- Royal Decree 652/2005, of June 7[19], whereby Royal Decree 2062/1999, of December 30 is modified, whereby the minimum level of training in maritime professions is regulated;
- Law 39/2006, of December 14, on the Promotion of Personal Autonomy and Attention for persons in dependent situations;
- Law 7/2007, of April 2, on the Basic Statute of the Civil Servant.

[14] *Official State Gazette*, September 19, 2007.
[15] *Official State Gazette*, January 12, 2008.
[16] *Official State Gazette*, July 11, 2007.
[17] *Official State Gazette*, March 16, 2007.
[18] *Official State Gazette*, November 16, 2007.
[19] *Official State Gazette*, June 16 2005.

Chapter VIII
EU Enlargement

A. INFORMATION ON TRANSITIONAL ARRANGEMENTS REGARDING MEMBER STATES WHICH JOINED THE EU IN 2004

As we mentioned last year, the Spanish Ministry of Employment issued the Instruction of April 25, 2006 on the withdrawal of restrictions to the free movement of salaried workers who are nationals of the States which acceded to the EU on May 1, 2004 and their family members. From May 1, 2006, Royal Decree 240/2007, February 16, applies fully to all these citizens and their families.

B. INFORMATION ON TRANSITIONAL ARRANGEMENTS REGARDING MEMBER STATES WHICH JOINED THE EU IN 2007

The Spanish Council of Ministers approved an Agreement whereby the continuity of the transitory period is established as regards the free movement of workers from Bulgaria and Rumania. On December 22, 2006, the Spanish Executive approved an Agreement whereby it was stipulated that the transitory period established in the Treaties for the accession of the Republics of Bulgaria and Rumania to the European Union as concerns the free movement of workers had a maximum duration of two years, counting from January 1, 2007. This text stated that

> "at the end of the first year, the Government, together with the social intermediaries, will carry out an evaluation of the effects of the application of this transitory period and, depending on the conclusions reached, it will agree to the continuity of this period for up to two years or, possibly, terminate the period and apply the Community legislation on free movement as from this time".

Complying with the Agreement and in the light of the situation of the job market, the Government decided to maintain the continuity of this transitory period throughout 2008.

C. SPANISH CASE LAW PERTAINING TO THE TRANSITIONAL ARRANGEMENTS REGARDING NATIONALS OF MEMBER STATES WHO JOINED THE EU IN 2007

In the Decision of the High Court of Justice of Madrid of September 14, 2007 the decision dictated by the Contentious-Administrative Court of Madrid was appealed against. This Decision had declared that the resolution of 27.2.2006 of the Delegate of the Government in Madrid which refused to provide a Rumanian citizen with a Community Residence Card was null. The High Court of Justice of Madrid rejected the argument used by the Contentious-Administrative Court which considered that

> "after examining article 27 of Directive 2004/38/EC of April 29, 2004 ... the doctrine of the High Court summed up that, in order for it to be possible to refuse the residence card, it is necessary that there be a real, current and serious risk to public order, understood as the free exercise of fundamental rights in Spain .. and the fact that the person concerned could not be registered as non-admissible in accordance with the Schengen Agreement to a penalty imposed of less than one year, it carried out an analysis of the penal and police situation of the person concerned, and

> concluded that he did not constitute a serious threat to public order, therefore, the decision to refuse the Community Card is disproportionate as regards the finality it seeks".

Nevertheless, the High Court of Justice of Madrid understood the existence of a penal condemnation and the application of a substitute penalty of expulsion and confirmed the resolution of the Delegate of the Government.

As can be appreciated, the High Court of Justice of Madrid infringes article 27 of Directive 2004/38 when it admits the expulsion of the Rumanian citizen.

Contrary to the above, we found eight Decisions of the High Court of Justice of Murcia of February 23, 2007 (a Rumanian citizen), of April 30, 2007 (a Bulgarian citizen), of June 22, 2007 (a Rumanian citizen), of June 28, 2007 (a Bulgarian citizen), of June 28, 2007 (a Rumanian citizen), of July 13, 2007 (a Rumanian citizen), of September 12, 2007 (a Bulgarian citizen) and September 14, 2007 (a Bulgarian citizen) in which the Court analysed the appeals of the of the Delegation of the Government in Murcia against these citizens which had dictated an expulsion order and a prohibition to enter the country for five years in accordance with the Law on Aliens 4/2000, annulled all the expulsion resolutions by applying Directive 2004/38 and understanding that, since the entry of Rumania and Bulgaria to the EU, their citizens are subject to the regime on aliens of Law 4/2000 as regards economic activities as employed persons, but they are excluded from the sanctioning regime of the Law on Aliens 4/2000 and, therefore, they cannot be expelled pursuant to this legislation on aliens if they have not the necessary documents. In this same regard, the Decisions of the High Court of Justice of the Community of Valencia of October 3, 2007 and of July 24, 2007. In its Decision of October 3, 2007, the same Court used the same arguments to accept the precautionary measures suspending expulsion and the annulment of the expulsion resolution.

Through the Decision of October 11, 2007, the High Court of Justice of Catalonia admitted the appeal against the expulsion resolution of the Spanish Administration accepting the arguments put forward by a Rumanian couple which arrived in Spain in the summer of 2001, and their daughter Sandra. They requested asylum alleging that they had fled from Rumania as members of the gypsy ethnic group, due to the discriminatory and humiliating treatment which was counter to the most elementary application of Human Rights, and which the Rumanian authorities carry out against the gypsy minority and is a daily sociological reality. The application for asylum was rejected and an expulsion resolution was dictated. However, the High Court of Justice of Catalonia dictated in their favour as it considered that the omission and delay in compliance with the administrative formalities their presence in Spain was subjected to, similar to the rest of the Community citizens, might, in their case, constitute a minor administrative infringement, article 52 of the Law on Aliens, sanctioned this with a fine of up to 300 euros, but it cannot be catalogued as "an irregular stay", for the purposes of article 53 a) Law on Aliens, since, as from January 1, 2007, their presence in Spanish territory does not require authorisation or permits, and is subject, exclusively, to mere administrative control involving registration and a possible work permit as an employed person.

In the Decision of the High Court of Justice of the Basque Country of May 8, 2007, the annulment of the resolution rejecting the Community resident family card was admitted for a Rumanian citizen married to a Spanish woman who had been condemned to one year and nine months imprisonment, but his imprisonment had been suspended. After analysing article 27.2 of Directive 2004/38 and the Case Law of the ECJ in the Decision of October 27, 1977 Bouchereau and the Decision of January 19, 1999 in the Calfa Case, the High Court of

Justice of the Basque Country concluded with the annulment of the resolution to reject the Community resident family card.

However, undoubtedly the most relevant case law ruling as regards Rumanian and Bulgarian citizens is given by the Decision of the High Court of May 29, on which the Decision of the High Court of July 2, 2007 (in this case favourable for a Lithuanian citizen) and the Decision of the High Court of October 15, 2007 are based. By virtue of these Decisions, the Rumanian and Bulgarian citizens cannot be tried for an offence of clandestine immigration. Specifically, it is possible to point out the arguments put forward in the Decision of the High Court of May 29 which the others refer to.

In the opinion of the Spanish Supreme Court,

> "With regard to the citizens of Bulgaria and Rumania, who are now citizens of the European Union, and, therefore, have the rights deriving from citizenship, with the protection mechanisms proclaimed in the Treaties of the Union, it is not possible to consider conduct involving failure to comply with a specific safeguard clause exercised temporarily by Spain and submitted to a Declaration of Urgency as regards the approximation to Community Legislation and to the Schengen Treaty, as the conditions which affect the rights of the citizens of the European Union appear as protected and safeguarded by the Legislation of the Union not affected by the safeguarding clause which, it should be remembered, only affects the employment contracting conditions for a determined period of time.
> In these cases, the interest of the State as regards the safeguarding of migratory flows, appears to be sufficiently protected by the legislation on aliens and their protection appears to be provided for in this legislation as an administrative infringement (article 54 of Organic Law 4/2000),so that, as stated in the High Court Decision 1087/2006, of November 10, "the interest of the State in the control of migratory flows, already protected through administrative action, only has penal protection if the rights of alien citizens are seriously and negatively affected by the conduct, either currently and effectively or at least as regards a highly probable risk of materialisation", circumstances which, in the case of citizens belonging to the European Union, it is not possible to predicate given the scope of protection equitable with that of the nationals".

Recent legal literature

CUGAT MAURI, M., "Las repercusiones de la incorporación de Rumania y Bulgaria a la UE en la interpretación del delito de tráfico de extranjeros (art. 318 bis CP): Comentario a la STS de 29 de mayo de 2007", *Diario La Ley*, N.º 6873, 31 Ene. 2008, Año XXIX, Ref. D-25, Editorial LA LEY.

Chapter IX
Statistics

The national statistical sources of the Ministry of Interior do not allow the distinction between workers of the European Economic Area (E.E.A.) and their families. The reason is mainly legal: these residents obtain a Community residence permit in order to work and reside. The Community residence permit does not specify whether this is only to reside or whether they are allowed to work as it does with nationals from third countries.

As we can see, from 2004 data are obviously referred to the extended European Union.

However, statistics from Social Security provide us with figures for nationals of the E.E.A. who are working and paying Social Security contributions.

On 1 January 2007 Bulgaria and Romania became full members of the EU. However, Spain established a two-year transitory period for Romanian and Bulgarian workers, from January 1st, 2007to December 31th, 2008.

Able 1. E.E.A. Countries and Third Countries

Country of Origin	2001	2002	2003	2004	2005	2006	2007***
E.E.A.	325,511	355,857	398,150	489,337	559,001	649,792	1,546,309
Third Countries	783,549	968,144	1,248,861	1,487,954	2,179,931	2,372,016	2,432,705
Total	1,109,060	1,324,001	1,647,011	1,977,291	2,738,932	3,021,808	3,979,014

Source: Statistical Yearbook on Aliens. Ministry of the Interior.
* Data from 2000, 2001, 2002, and 2003 correspond to the European Union comprised of 15 members and not include Norway, Iceland and Liechtenstein)
** Data from 2004, 2005 and 2006 corresponding to the E.E.A.
*** Data from 2007 include Romania and Bulgaria as part of EEA

In a period of six years, from 2001 to 2007, immigration from Member States of the European Economic Area has grown 375% while immigration from third countries has increased 210%. In the last year, from 2006 to 2007, with the incorporation of Romania and Bulgaria and according to table No. 1, the growth of nationals of E.E.A. was increased around 138%, while the growth of regular residents of third countries was just 2,6%.

In 2001, nationals from the E.E.A. represented 29% of the foreign population. Twelve years ago EEA nationals had represented 47.5%, while in 2007 the E.E.A. decreased to 39%. Despite the slight growth over these years, the increase of nationals from third countries has inverted the relationship between both groups of countries, thus at the present time the group of third countries (even excluding Romania and Bulgaria) represents the majority.

Table 2. Gender

	EEA		Third countries	
	Men	Women	Men	Women
2001	51.62	48.38	59.82	40.18
2002	51.97	48.03	57.4	42.6
2003	50.9	49.04	57.85	42.15
2004*	52.55	47.45	56.92	43.08
2005*	52.98	47.02	55.5	45,50
2006*	53.46	46.54	54.37	45.63
2007**	54.83	45.17	54.04	45.96

Source: Statistical Yearbooks on Aliens from those years.
*Data from the E.E.A.
** Data from 2007 include Romania and Bulgaria as part of EEA

Referring to gender distribution of E.E.A. nationals, men are over-represented with a 54.83% of total; between 2001 and 2007 men have experienced a relatively significant increase around of 3 percentage points. Comparing these figures with the ones from third countries, the difference of gender in these countries underwent around a 15 point gap in favour of men until 2004, with a substantial decrease of 8 percentage points up to 2007.

Table 3. Age

		0 to 15 years	**16 to 64 years**	**More than 64 years**	**Not recordered**	**Total**
2001	**EEA**	20,262	252,794	52,455		325,511
	Third Countries	95,124	668,263	20,162		783,549
2002	**EEA**	22,802	275,535	57,518	2	355,857
	Third Countries	125,958	818,112	23,881	193	968,144
2003	**EEA**	25,857	307,965	64,323	5	398,150
	Third Countries	175,527	1,045,218	27,914	202	1,248,861
2004	**EEA**	28,853	383,995	76,489		489,337
	Third Countries	237,476	1,220,175	30,117	186	1,487,954
2005	**EEA**	34,576	438,219	86,204	2	559,001
	Third Countries	277,839	1,867,099	34,812	181	2,179,931
2006	**EEA**	39,183	510,408	100,194	7	649,792
	Third Countries	339,800	1,992,724	39,300	192	2,372,016
2007	**EEA***	111,083	1,316,738	118,464	24	1,546,309
	Third Countries	392,720	1,999,647	40,189	149	2,432,705

Source: Statistical Yearbooks on Aliens for those years. Ministry of the Interior.

In 2002, 77.5% of the residents of the E.E.A. were in the 16 to 64 age range. In other words, based only on their age, they would be able to perform any productive activity. Five years later, in 2007, that figure had increased a 378% due to the recent accession of Bulgaria and Romania to the EU. The population under 16 also increased up to 7%. Comparing these figures with the ones from third countries, we can see that the latter had a higher percentage of people old enough to work (85%) in 2002, decreasing three points (82%) in 2007. On the other hand the population under 16 from third countries was double the same age range from the E.E.A. (13%) in 2002; five years later that difference increases to stand at 16%. Regard-

ing the population older than 64, we can observe a very unusual fact: while in 2002 they represented 16.3%, the absolute numbers increased 106% in 2006 (118,464). Although the global percentage decreased to 7.7%, this figure seems enormous when compared with over-64 non-EEA nationals. This fact seems to confirm the attraction which Spain has for the retired population from the countries of northern Europe. As concerns third countries, the difference decreased even more visibly from 2.5% in 2002 to a very low 1.6% in 2007.

Table 4. Residents from the E.E.A. by country of origin 2001-2005

	2001*	**2002***	**2003***	**2004****	**2005****	**2006****	**2007*****
Germany	62,506	65,823	67,963	69,719	71,513	77,390	91,670
Austria	3,711	3,931	4,172	4,290	4,420	4,775	5,886
Belgium	13,541	14,631	15,736	15,798	16,050	17,216	18,757
Denmark	5,818	6,167	6,568	6,910	7,122	7,606	8,718
Slovakia	----	----	----	1,988	2,947	4,062	6,192
Slovenia	----	----	----	----	----	380	625
Estonia	----	----	----	210	381	505	846
Finland	5,186	5,672	5,906	6,041	5,882	6,363	7,391
France	44,798	46,986	49,196	49,918	52,255	56,170	68,377
Greece	1,033	1,183	1,367	1,613	1,851	2,115	2,693
Hungary	----	----	----	1,255	1,934	2,950	5,318
Ireland	3,779	4,208	4,882	5,831	6,572	7,467	8,815
Italy	35,647	45,236	59,745	72,032	84,853	98,481	124,936
Latvia	----	----	----	499	900	1,276	1,898
Lithuania	----	----	----	6,338	11,296	13,810	17,740
Luxemburg	235	246	---	---	----	----	316
Netherlands	17,488	18,722	20,551	21,397	23,040	25,958	30,055
Poland	----	----	----	23,617	34,600	48,031	70,850
Portugal	42,634	43,309	45,614	50,955	59,787	72,505	101,818
United Kingdom	80,183	90,091	105,479	128,283	149,071	175,870	198,638
Czech Republic	----	----	----	2,166	3,068	4,040	6,212
Sweden	8,952	9,652	10,415	10,751	11,176	12,121	14,426
Iceland	231	264	----	292	347	406	536
Lichtenstein	23	20	----	----	----	----	12022
Norway	5,587	6,717	8,049	8,865	9,256	9,806	10,354
Romania							603,889
Bulgaria							127,058
Other EU	----	---	556	569	680	489	273
Total	325,511	355,857	398,150	489,337	559,001	649,792	1,546,309

Source: Statistical Yearbook on Aliens. Ministry of the Interior.
* Data from 2000, 2001, 2002, and 2003 correspond to the European Union comprised of 15 members and not include Norway, Iceland and Liechtenstein
** Data from 2004, 2005 and 2006 corresponding to the E.E.A.
*** Data from 2007 include Romania and Bulgaria as part of EEA

In 2001, the founding countries of the European Union comprised 54% of the immigration from the E.E.A. However, in 2007 this figure dramatically decreased 32 percentage points to 22%. In the last 4 years (2004-2007) an analysis of the increase in immigration from countries of the E.E.A. shows four groups of countries classified according to their growth rates. The first group of countries has a low or very low increase of below 10%. The countries in this group are: Norway, Belgium, Finland, Denmark, Germany, Sweden, France, Austria, and the Netherlands. The second group is between 10 and 15%, and is constituted by Ireland and the United Kingdom. The third group has a growth ranging from medium to high, 15 to

25%. The countries belonging to this group are Greece, Italy, Iceland and Portugal. The fourth group is composed by those countries recently included in the EEA (Lithuania, Czech Republic, Poland, Slovakia, Latvia, Bulgaria, Estonia, Hungary and Romania); for those, average increase interannual growth is around 72%; it ranges from Lithuania (45%) to Romania (156%).

Table 1. Distribution by Autonomous Communities

Autonomous Communities	2001	2002	2003	2004*	2005*	2006*	2007***
Andalusia	60,662	68,509	78,360	94,934	106,598	125,554	244,712
Balearic Islands	33,456	33,780	36,340	41,047	43,798	48,395	80,337
Canary Islands	43,228	45,745	51,818	60,212	63,937	71,026	92,082
Community of Valencia	46,583	53,719	67,291	87,455	105,494	131,813	258,708
Murcia	4,534	4,998	7,477	13,024	17,997	22,894	42,714
Catalonia	51,062	57,277	62,366	69,790	75,304	81,878	204,055
Madrid	39,739	42,990	44,899	63,872	77,005	86,321	265,571
Others	46,247	48,839	49,599	59,003	68,868	81,911	358,130
Total	325,511	355,857	398,150	489,337	559,001	649,792	1,546,309
% living in tourist areas (highlighted)	58%	58%	61%	61%	60%	62%	46%

*Data from 2004, 2005 and 2006 correspond to the Extended European Area.
*** Data from 2007 include Romania and Bulgaria as part of EEA

The geographic distribution of nationals of the European Economic Area shows that around 46% live mainly in tourist areas (Andalusia, Balearic and Canary Islands, Valencia and Murcia, highlighted in the table). This figure had maintained consistent around 60 % over the last lustrum. The 16 percentage point decrease observed in 2007 is due to the addition of Bularian and Romanian to EEA population.

Table 2. Aliens Paying Social Security Contributions (by economic sector)

EEA						
	2002	2003	2004	2005	2006	2007
Agriculture	7,103	12,909	14,738	12,685	24,108	57,194
Industry	14,904	16,241	19,567	21,880	26,363	62,179

Construction	16,141	19,605	30,225	41,337	57,718	157,465
Services	141,425	159,156	186,724	210,988	242,976	395,249
Total EEA	179,573	207,911	251,254	286,890	351,165	672,087
Third countries						
	2002	**2003**	**2004**	**2005**	**2006**	**2007**
Agriculture	110,595	117,656	110,920	169,680	151,404	120,372
Industry	60,398	67,066	77,405	107,089	121,666	113,299
Construction	112,044	126,532	160,311	276,903	320,182	260,367
Services	368,608	405,419	476,512	847,857	879,553	814,981
Total Others	651,645	716,673	825,148	1,401,529	1,472,805	1,309,019
Total workers	831,218	924,584	1,076,402	1,688,419	1,823,970	1,981,106

Source: Ministry of Employment and Social Affairs 2002-2007.

We can finally regard the economic sectors where the European nationals are employed. Data from the Ministry of Employment and Social Affairs show that most of the EEA nationals work on the Services Sector (59% in 2007, versus the 62% of non EU nationals). Additionally, referring to foreign workers´ professional level, data from the Survey on Active Population (average 2006) reveal that most of the nationals of EEA (50%) are employed at high professional levels (44% Spanish workers); less than 10% of third countries´ citizens had reached that level.