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

Rapporteurs: D. Carrillo,
M.J. Castaño and C.J. Gortázar
University Pontifical Comillas

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Intorduction

1. Spain has not transposed the EU citizen's condition *to be workers or self-employed* established in article 7. (1,a) of Directive 2004/38. Thus, the Spanish RD 240/2007, under the provision on *Right of residence for more than three months* explains *that 'citizens of the EU or of the EEA have the right of residence in Spain for a period longer than three months'* without any mention at all to any ground of working conditions or others.

This is not coherent at all with the European Commission (ES*; España*) information page (http://ec.europa.eu/youreurope/nav/en/citizens/services/eu-guide/rights/index_es.html#_141 35_20) in which all different situations are specified and -as Directive 2004/38- the 'reasonable period to seek for a job, etc.' is mentioned. However, nothing on this matter is included at Spanish RD 240/2007. Therefore (apparently) there is no limitation for jobseekers. Probably, non-transposition of provision on working conditions has been an involuntary error from Spanish legislator.

2. On 27 October 2008 the ECJ *(Commission of the European Communities v Kingdom of Spain)* declared that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2005/36/ECon the recognition of professional qualifications, the Kingdom of Spain has failed to fulfil its obligations under the Directive. On 21 November 2008, Royal Decree 1837/2008, of November 8 (on transposition into Spanish law of Directive 2005/36/EC) entered into force. RD 1837/2008 aims to join in a text the whole issue of EU recognition of professional qualifications.

3. Concerning family members, Spain has an issue regarding partners (with whom the Union citizen has contracted a registered partnership) as family members. Under Directive 2004/38 family members means – inter alia – '*the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of the Member State (...) if the host Member State treats registered partners as equivalent to marriage'*. This is the case of Spain. Thus, RD 240/2007, Article 2 (b) states regarding the partner as a family member the following conditions:

> 'The partner who has an analogous union to the matrimony, 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.'

However, the Spanish General Director for Immigration approved on 22nd March 2007 the Instruction DGI/SGRJ/O3/2007 in which paragraph 1º (3) pointed out that the different Partner Unions Registers throughout Spain (*Comunidades Autónomas and Ayuntamientos)* were no valid enough to the effects of Directive 2004/38 as far as currently they do not comply with the requirements of RD 240/2007, Article 2 (b) to prevent enough '*the possibility of two simultaneous registrations in this State'*.

4. Instruction DGI/ SGRJ/2009, of February 5, 2009, puts an end to the transitory period for Bulgarian or Romanian paid employees and theirs family members since 1st January 2009. Moreover, new RD1161/2009 amending section 2 of article 4 of Royal Decree 240/2007 states that *third country nationals* family members of EU or EEA residing lawfully in Bulgaria or Rumania will be allowed to enter Spain without an entry visa.

Chapter I
Entry, Residence, Departure

Text(s) in force

1. 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 (Hereinafter, RD240/2007).
2. Royal Decree 1161/2009, of July 10, amending 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 July 24, 2009 (Hereinafter, RD1161/2009).

Orders, Circulars, etc.

1. Order PRE/3654/2007 of 14 December 2007 on taxes to be paid in order to obtain administrative authorisations, immigration documents and frontier visas (including the EU or EEA citizens Registration Certificate and Residence Cards as Family Member of EU or EEA citizens) Official Journal number 300 of 15 December 2007. (See, http:// extranjeros.mtin.es/es/NormativaJurisprudencia/Nacional/RegimenExtranjeria/RegimenGeneral/documentos/Orden_PRE-3654-07.pdf)
2. Order PRE/3654/2007 of 14 December 2007 on taxes to be paid in order to obtain administrative authorisations, immigration documents and frontier visas (including the EU or EEA citizens Registration Certificate and Residence Cards as Family Member of EU or EEA citizens). Updated by Act 51/2007 on General Budget of the State 2008, Official Journal number 309 of 24 December. (See, http://extranjeros.mtin.es/es/NormativaJurisprudecia/Nacional/RegimenExtranjeria/RegimenGeneral/documentos/orden_pre3654_07_actualizada_2008.pdf).
3. Application for Registration Certificate or Residence Cards as Family Member (which can be downloaded from www.extranjeros.mtas.es, www.mtas.es or www.mir.es) See: http://www.map.es/servicios/servicios_on_line/extranjeria/modelos_oficiales_solicitudes/ex16/document_es/EX16.pdf.
4. General Information on regulations governing EU citizens in Spain: Basic Information, English version: http://extranjeros.mtin.es/es/InformacionInteres/FolletosInformativos/archivos/VERSION_INGLES.pdf.

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS:

Art. 7(1a) Right of residence for more than three months

The Directive provides that workers and self-employed persons have the right to reside without any conditions other than being a worker or self-employed person, the same right applies to providers of services. It is not the case for students and other economically inactive persons (Students must be enrolled at an establishment accredited or financed by the host Member State for the principal purpose of following a course of study or vocational training; must

have comprehensive sickness insurance cover; must have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State. Other economically inactive persons must also have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance cover).

However, the Spanish legislator has not transposed the EU citizen's condition *to be workers or self-employed* established in article 7 (1,a) of Directive 2004/38 in any provision of RD 240/2007.

Thus, the Spanish RD 240/2007, under the provision on *Right of residence for more than three months* explains *that 'citizens of the EU or of the EEA have the right of residence in Spain for a period of longer than three months*' without any mention to their condition of workers , self-employed or any other working condition…

Moreover, Article 3, 2 RD240/2007 explains that all persons to whom the RD is applicable with the exception of dependent descendants over the age of 21 and dependent direct relatives in the ascending line have the right to access to any work activity, studies, in the same conditions as Spaniards

Art. 7 (3 a-d) Retention of the status of worker

As the condition of worker or self-employed (established in article 7 (1a) of Directive 2004/38) has not been transposed in Spain, the Spanish legislator does not mention either the retention of the status of worker of the article 7 (3) of Directive 2004/38.

Art. 8 (3a); Registration certificate

> (…) a valid identity card or passport and a confirmation of engagement from the employer or a certificate of employment /or proof that they are self-employed persons.

RD 240/2007, in coherence with what we have just explained, does not mentioned any administrative formality in order to obtain the Registration Certificate except that UE or EEA citizens are obliged to apply for the registration certificate before the end of the three months period time after their arrival (and to enter the Spanish territory they only need to present a valid identity card or passport).

Once the citizen has made the application and paid the relevant fee, s/he will be given a registration certificate displaying his name, nationality, address, date of registration and Foreigner's Identity Number (NIE).

Art. 14 (4 a-b) Retention of right of residence

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

In accordance with the other RD 240/2007 provisions just quoted, there is no mention at all to any ground of working conditions (or jobseekers conditions) regarding expulsion.

Art. 17 Cases in which the right of permanent residence in the host MS shall be enjoyed before completion of a continuous period of five years of residence

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 RD 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'.

Art. 24 (2) Equal treatment

> By way of derogation from paragraph 1, the host MS shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for Article 14 (4) (b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Article 24 (2) of Directive 2004/38 has not been transposed into Spanish legislation. Regarding equal treatment in general, article 3 (4) of RD 240/2007 establishes that

> 'All the Union citizens residing on the basis of this Royal Decree in Spain shall enjoy equal treatment with the Spanish people within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State, or other states parties to the agreement of the European Economic Area, and who have the right of residence or permanent residence'.

2. SITUATION OF JOB-SEEKERS

RD 240/2007 does not regulate job-seekers' situation as a consequence of the lack of transposition of working conditions in general. That needs to be understood as a right for these job-seekers to stay and look for work as Spaniards, without specific limitation.

Moreover, as said *supra*, article 3, 2 RD240/2007 explains that all persons to whom the RD is applicable with the exception of dependent descendants over the age of 21 and dependent direct relatives in the ascending line have the right to access to any work activity, studies, in the same conditions as Spaniards…

They have to register just like other EU or EEA citizens (that means before the end of the three months period after entry).

If the EU or EEA citizen spends less than three months in Spain, s/he only needs his passport, or a valid identity card that shows his nationality. Family members who are not

members of an EU or EEA State need to enter with a valid passport and in many cases (Regulation EC 539/2001) with a visa. After three months they need to ask for a residence card.

They can ask for social assistance/other benefits.

Miscellaneous (administrative practices, etc.)

In practice, the non-transposition of working conditions and jobseekers means that those citizens are in an extremely advantageous situation in comparison with other Member States.

Thus, may it be thought that the Spanish legislator has voluntarily omitted those provisions in order to be able to demand conditions other than those stipulated in the Directive? No, there is not at all practice until now in that direction. It seems to be an involuntary lack of transposition.

However, 2009 is the first year in which workers (and job-seekers) from Romania and Bulgaria have no more *transitory measures* and, therefore, from January 2009 they have free access to labour market and to reside in Spain. Currently, the Instruction by which those transitory measures for Romania and Bulgaria have been set out (SGRJ/2009, of February 5, 2009), makes reference to the working conditions (see *infra* Chapter VIII). Thus, why now and not before (when approving RD 240/2007)? Of course, because free movement of Bulgarian and Romanian workers coming to Spain constitutes a hot issue to Spanish public powers.

Recent legal literature

ADRIÁN ARNÁIZ, A.J., La libre circulación de trabajadores, la ampliación a Bulgaria y Rumanía y el Tratado de Lisboa sobre la Unión Europea, *Revista Información laboral. Legislación y convenios colectivos*, Nº 37, 2008, p. 2-14.

GIL IBÁÑEZ, J.L., La ciudadanía europea: un nuevo enfoque para la libre circulación de personas, *Unión Europea Aranzadi*, Vol. 35, Nº 2, 2008, p. 5-13.

LÓPEZ ALVAREZ, A. & ORTEGA GIMÉNEZ, A., El régimen jurídico de entrada, libre circulación y residencia en España de ciudadanos comunitarios, *Diario La Ley*, Nº 6978, 2008.

PIPAÓN PULIDO, J., Comentarios al Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea, *Noticias de la Unión Europea*, Nº 290, 2009, p. 83-94.

RUIZ-GIMÉNEZ ARRIETA, I.: La libre circulación, un derecho amenazado, *Contrastes: Revista cultural*, Nº. 52, 2008 (Ejemplar dedicado a: Derechos Humanos), p. 75-81.

Chapter II
Access to Employment

Texts in force

1. Royal Decree 1837/2008, of November 8 on transposition into Spanish law of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications and Council Directive 2006/100/EC of 20 November 2006 adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania. In addition, Commission Regulation (EC) 1430/2007, of 5 December 2007, amending Annexes II and III to Directive 2005/36/EC of European Parliament and of the Council on the recognition on professional qualifications, has also been incorporated into the Spanish legislation, in force, since November 21, 2008 (hereinafter, RD 1837/2008).
2. Resolution, of June 26, 2008, from the Secretary-General of the University Coordination Council, which listed the official postgraduate programs offered by the universities for the 2008-2009 academic year, in force, since July 10, 2008.
3. Resolution of December 23, 2008, from the Secretary of State for Universities, which established the official bachelor's degrees, in force, since January 9, 2009.

Special issue regarding transposition in Spain of Directive 2005/36/EC

As we know, on 27 October 2008 the ECJ *(Commission of the European Communities v Kingdom of Spain)* declared that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2005/36/EC on the recognition of professional qualifications, and, in any event, by failing to communicate those provisions to the Commission, the Kingdom of Spain has failed to fulfil its obligations under the directive.

On 21 November 2008, *Royal Decree 1837/2008*, of November 8 (on transposition into Spanish law of Directive 2005/36/EC) entered into force.

RD 1837/2008 aims to join in a text the whole issue of EU recognition of professional qualifications. The date of this Royal Decree means that Spain has failed to comply with the period of adaptation stipulated in Directive 2005/36 which terminated in October 2007 (therefore, the judgment of the ECJ 27 October 2008 just mentioned).

RD 1837/2008 has replaced all Royal Decrees on transposition of the fifteen existing Directives in the field of the recognition of professional qualifications.

The main newness of this system for recognition of professional qualifications is the explicit consecration of the European Court of Justice Doctrine, by which the application of the general system settles down, for all the assumptions of 'sectorial' professions in which the necessary requirements for the automatic recognition are not fulfilled.

The structure of the RD 1837/2008 follows the systematic of Directive 2005/36/CE, so that the titles, chapters and sections agree with those of this one. Moreover, Annexes I to VII establish the content of the corresponding Annexes of the Directive implementing the RD.

In addition, due to the fact that the central concept of this system for recognition of professional qualifications is the one named 'regulated professions', the RD 1837/2008 estab-

lishes a list of 'regulated professions', that in accordance with the Sentence 386/1993 of the Spanish Constitutional Court, includes both professions, in strict sense, and activities; all of them regulated by the Spanish State, in accordance with article 36 of the Spanish Constitution. In this context, Annex VIII of the RD 1837/2008 establishes the list of professions and activities regulated in Spain. Annex IX is about those that required a precise knowledge of Spanish law in order to be practiced. In Annex X, there are designated the competent Spanish authorities in relation to the different regulated professions.

Finally, Annex XI of the RD 1837/2008 establishes a declaration proposal for the cases of displacement of the self-employed to provide services. This declaration is based on a proposal of a common model for the whole European Union, studied within the Committee on the Recognition of Professional Qualifications created by article 58 of the Directive 2005/36/CE.

In addition of the recognition of professional qualification that has an exclusively professional effect, in Spain there is a homologation and validation process of foreign degrees by the Spanish Ministry of Education that gives the foreign degree the same effects (both academic and professional) as the Spanish degree or academic grade.

Basic legislation concerning homologation and validation of foreign degrees are the Royal Decree 309/2005, 18 March, which modified Royal Decree 285/2004, 20 February, regulating the requirements for homologation and validation of foreign degrees and studies in higher education; the Royal Decree 285/2004, 20 February, which regulated the requirements for homologation and validation of foreign degrees and studies in higher education; and the Royal Decree 49/2004, 19 January, which addressed the homologation of curricula and degrees that are official and valid throughout Spain.

Currently, the Spanish framework of reference for developing the European Higher Education Area is made up of the Resolution of 23 December 2008, which established the official bachelor's degrees; and the Resolution of 26 June 2008, which listed the official postgraduate programs offered by the universities for the 2008-2009 academic year.

Judicial practice

1. Spanish Supreme Court on 15 January 2009 (and its relationship with the Judgment of the ECJ of 23 October 2008 (C-286/06) against Spain)

On 25 November 2005, Spanish *Audiencia Nacional* estimated the appeal of eleven engineers whose title on *Diploma de Licenciatura* issued by *Universitá Politecnica delle Marche* (Italy) jointly with the accreditation to have passed the State Exam (necessary in Italy for the exercise of the profession) were not recognised by Spanish Goverment Both, the Advocat of the Spanish State and the Spanish *Colegio de Ingenieros, Caminos y Puertos* appealed to the Spanish Supreme Court against the resolution of Spanish *Audiencia Nacional* and, therefore, on recognition of the eleven engineers tittles.

Nevertheless, the legal representation of the Spanish State desisted on the appeal once he received from the Spanish Supreme Court notification on the Judgment of the ECJ of 23 October 2008 (C-286/06) a case in which the same situation was treated and resolved against Spain.

The Spanish Supreme Court, on 15 January 2009, after a detailed exam of the ECJ Judgment of 23 October 2008 (C-286/06), failed against *the Colegio de Ingenieros de*

Caminos, Canales y Puertos and resolved in favour of the recognition of the tittles of the eleven engineers.

2. Judgment of the ECJ of special relevance for Spain, ECJ (Second Chamber) of 29 January 2009

Reference for a preliminary ruling from the Consiglio di Stato, Italy; *Consiglio Nazionale degli Ingegneri v Ministero della Giustizia, Marco Cavallera* (Case C-311/06) Recognition of diplomas.

In this case of a double university title, the *Consiglio Nazionale degli Ingnegneri* understood that recognising the Spanish title of Cavallera in Italy was against Directive 890/48 as far as he avoided passing the Italian State Exam needed to enter the profession. The ECJ stated that the provisions of Council Directive 89/48/EEC of 21 December 1988 (on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration) cannot be relied on, for the purpose of gaining access to a regulated profession in a host Member State, by the holder of a certificate issued by an authority of another Member State which does not attest any education or training covered by the education system of that Member State and is not based on either an examination taken or professional experience acquired in that Member State. This ECJ judgment is relevant regarding Spanish jurisprudence on the issue.

3. Case C-563/08

Reference for a preliminary ruling from the *Juzgado Contencioso-Administrativo de Granada* (Spain) lodged on 18 December 2008 – (*Carlos Sáez Sánchez and Patricia Rueda Vargas v Junta de Andalucía and Manuel Jalón Morente and Others*, co-defendants)

Question referred are Articles 2.3 and 2.4 of State Law 16/1997 of 25 April on pharmaceutical services, in so far as they define territorial and demographic limits on the opening of pharmacies, contrary to Article 43 of the Treaty establishing the European Community, in that they constitute a disproportionate, even counterproductive, system for limiting the number of pharmacies, in terms of the objective of the proper provision of medicines in the relevant territory

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

There is an apparent absence of direct or indirect discrimination in Spanish legislation and practice. The private work placement agencies have the same obligations as regards EU or EEA citizens and their families as does the National Employment Institute as the public authority by virtue of the Resolution of July 11, 1996.

2. LANGUAGE REQUIREMENT

Article 71 RD 1837/2008, of November 8, establish that

'Persons benefiting from the recognition of professional qualifications shall have knowledge of Spanish, or languages other than Spanish which have been declared official language in the Autonomous Communities, which are necessary for practising the profession in accordance with Spanish legislation'.

Recent legal literature

LÓPEZ ALVAREZ, A. & ORTEGA GIMÉNEZ, A., El régimen jurídico de entrada, libre circulación y residencia en España de ciudadanos comunitarios, *Diario La Ley*, Nº 6978, 2008.

Chapter III
Equality of Treatment on the Basis of Nationality

Text(s) in force

1. 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 (Hereinafter, RD240/2007).

1. WORKING CONDITIONS

Section 4 of article 3 of RD 240/2007 established that 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 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 *RD 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. As pointed out in 2007 OFMW, 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 (see 2007 Spanish Report on OFMW).

2. SOCIAL AND TAX ADVANTAGES

1. 'Baby-check'

As already pointed out on 2007 report, on fiscal advantages reference must be made to *Law 35/2007, of November 15*, whereby a deduction for birth or adoption is established for Income Tax Returns and the single payment to the Social security for birth or adoption. 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 which is applicable to third country nationals and also to citizens of the EU or the EEA and their families.

Specifically, section 2 establishes 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 (…)'.

During 2008, a very controversial issue regarding Law 35/2007 has been discussed in Spanish society. However, this debate has (apparently) nothing to do with free movement of EU workers.

The 'hot issue' has been that of matrimonies of a Spaniard male with a non-Spaniard female: Why? Because, Law 35/2007 regulated that the beneficiary of deduction is the mother's child. Therefore, the mother's child needs to prove a two years residence in Spain in order to benefit from the 2,500 Euros income tax return. In cases of a Spaniard mother and a non-Spaniard father, the two years residence period is evident…Nevertheless, in cases of a Spaniard father and a non-Spaniard mother, the two years period of residence is *a sine qua non* condition. During 2008 this has been deeply contested by public opinion, NGOs, Trade Unions, etc. as a discriminatory legal provision, and a reform of Law 35/2007 has been required .in order to put an end to this discrimination.

On 31 March 2009, the Spanish Parliament (Congreso de los Diputados) has made public its unanimous positive opinion on the Proposition to reform the Law 35/2007 and amplify the 'baby check' to include the so called mixed-couples (non-Spaniard mother and Spaniard father) without the requirement of effectively and continually residence on Spanish territory for at least the two years previous to the birth or the adoption.

However, no voice has been heard on discrimination for European Union citizens and their families! We will follow carefully the development of Law 35/2007 reform.

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS

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

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

4.1. Frontier workers

There is no controversial issue, neither did case law relate with C-212/05 *Hartmann* in Spain.

The only reference to frontier workers into RD 240/2007 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'.

4.2 Sportsmen/ Sportswomen

Text(s) in force

1. Royal Decree 638/2009, of April 17, intended to develop the organization chart of the Government Presidency, in force, since May 9, 2009 (hereinafter, RD 638/2009).
2. Royal Decree 1026/2007, of July 20, changing Royal Decree 1835/1991, of 20 December, concerning Spanish sports federations and Register of Sports Associations. In force, since July 22, 2007 (hereinafter, RD 1026/2007).
3. Royal Decree 971/2007, of July 13, on high level and high performance sportspersons in force, since July 26, 2007 (Hereinafter, RD 971/2007).
4. Act 35/2006 of 28th November, of Personal Income Tax and partial modifications of laws of Company Taxes, about Residents and non-Residents and about Personal Assets, in force since January 1st, 2007 (hereinafter, Act 35/2006 of 28th November).
5. Sports Act 10/1990, of October 15, in force, since October 18, 1990 (hereinafter, Sports Act 10/1990).

Orders, Circulars, etc

1. *General Legislation on competitions* organised by the Spanish Association Clubs Handball.
2. 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.
3. Instruction DGI/ SGRJ/2009, of February 5, 2009, the regulations governing the free movement of Bulgarian or Romanian paid employees and their family members since 1st January 2009, has been set out in the provisions of RD 240/2007, of February 16.
4. *General and Competition Regulations for 2008/09* organized by the Spanish Basketball Federation.
5. *Memorandum No. 33 of the Royal Football Federation.*

6. Regulatory norms of the *Women's Football Championship for the 2007-2008 season* organized by Royal Football Federation.

Citizenship clauses, residence clauses, quotas (direct/indirect discrimination)

In the case of *Handball*, point 1.11 of the *General Legislation on competitions* organised by the Spanish Association Clubs Handball (ASOBAL) establishes that, as regards participating players, there must be a minimum of two national players who may be selected for the Spanish national team.

In the area of *Basketball*, in the Agreement subscribed to on March 18, 2008 up to the 2011-2012 seasons by the Spanish Basketball Federation, the Association of Basketball Clubs and the Association of Professional Basketball Players, The following rule with contracting quotas was clearly established. Specifically, it was set out 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, not including countries belonging to the Cotonú Agreement.

Although Memorandum No. 34 of the Royal Spanish *Football* Federation establishes that Rumanian and Bulgarian footballers who have employment contracts must occupy one of the posts stipulated for non-Community foreigners. As result of Instruction DGI/ SGRJ/2009, of February 5, 2009, the regulations governing the free movement of Bulgarian or Romanian paid employees and theirs family members since 1st January 2009, has been set out in the provisions of RD 240/2007, of February 16.

Another nationality restrictions in sport concerns the Aid to High Level, according to Article 2 section 3 of RD 971/2007, of July 13, *on high level and high performance sportspersons* Community or EEA sportspersons who reside in Spain cannot access a number of fiscal benefits related to insertion into the employment area and education for sportspersons who are qualified as high level and high performance.

Rules on transfers setting quotas of EU citizens

In the area of Basketball, Article 15 of the *General and Competition Regulations for 2008/09* establish that an International Transfer Certificate (ITC) shall be required to transfer community players from one national association to another national association.

In the case of football, *Memorandum No. 33 of the Royal Football Federation* also establishes the requirement of the International Transfer Certificate. Although, this memorandum specifies that the ITC must be issued freely and with no conditions or deadlines.

In addition, Article 3 of the regulatory norms of the *Women's Football Championship for the 2007-2008 season* establishes a discriminatory quota as regards Community or EEA players: 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.

***Beckham Act:* a possible situation of reverse discrimination**

It's important to remark again the debate regarding the tax benefits that the Spanish tax regulation represents for the foreign players who sing up with Spanish clubs, given that they can pay as non-residents even if the work and life in Spain.

In this context, all those European players who apply with requirements of Article 39 of Act 35/2006 of 28th November (so call *Beckham Act*) –not being tax residents in Spain for the last decade, when their duty is undertaken in Spain and in benefit of an Spanish company– may opt for 'non native countries regimen' In this sense, during the tax period in which the change of residence occurs and the following 5 years, the player who opted for paying as non-resident will do it with a tax rate of 24% just for the Spanish based incomes while Spanish residents pay a 43% tax rate for their worldly income (!).

4.3. The Maritime sector

Of special interest is ECJ judgment 14 January 2009 – *Commission of the European Communities v Kingdom of Spain* (Case C-18/09). The ECJ declares that, by maintaining in force *Ley 48/2003, de 26 noviembre, de regimen económico y de prestación de servicios de los puertos de interés general* (Law 48/2003 of 26 November 2003 on the economic rules and supply of services for ports of general interest) and, in particular Article 24(5) and Article 27(1), (2) and (4) thereof, which establish a system of rebates and exemptions for harbour dues, the Kingdom of Spain has failed to fulfil its obligations under Community Law and, in particular, Article 1 of Council Regulation (EEC) No 4055/86 of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.

Spanish law provides for a series of exemptions and rebates relating to harbour dues. Those exemptions and rebates depend on the ports of departure or destination of the vessels and have the consequence that more favourable tariffs are applied, first, to traffic between the Spanish archipelagos and Ceuta and Melilla and, second, to traffic between those ports and ports of the European Union and, third, between ports of the European Union. The Commission takes the view that that legislation is discriminatory.

The Kingdom of Spain, which invoked the particular geographic situation of the ports concerned, has not justified either the need for or the proportionality of that measure. Despite having promised to amend the legislation at issue, as far as the Commission is aware, no legislation has been adopted to put an end to the infringement.

Another important issue regarding the maritime sector and non-discrimination principle, an issue we have followed with special interest on last years OFMW Spanish report as finally resolved by the ECJ. Judgment of the Court (Sixth Chamber) of 20 November 2008 - Commission of the European Communities v Kingdom of Spain (Case C-94/08) OJ C 107, 26/04/08, declares that in requiring in its legislation Spanish nationality for persons occupying the posts of ship's captain and chief mate of all merchant ships flying the Spanish flag other than merchant ships with a gross tonnage less than 100 GT-, which carry cargo or fewer than 100 passengers and operate exclusively between ports or points situated in areas in which the Kingdom of Spain has sovereignty, sovereign rights or jurisdiction, the Kingdom of Spain has failed to fulfil its obligations under Community law and, in particular, under Article 39 EC.

4.4. Researchers/artists

As has been explained *supra,* the Spanish legislator has not transposed the EU citizen's condition *to be workers or self-employed* established in article 7 (1.a) of Directive 2004/38 in any provision of RD 240/2007. The Spanish RD 240/2007, under the provision on *Right of residence for more than three months* explains *that 'citizens of the EU or of the EEA have the right of residence in Spain for a period of longer of three months*' without any mention to their condition of workers , self-employed or any other condition…

There are no specific provisions under RD 240/2007 regarding artists, so general aliens' regulations could be mentioned.

Regarding researchers, although there are no specific provisions under RD 240/2007, the new Spanish legislation on the European Higher Education Area (EHEA) contains specific provisions applicable to EU citizens.

Text(s) in force

(General aliens law, no reference to free movement of EU citizens)

1. Organic 4/2000 of 11 January, on Rights, Freedoms and Social Integration of Aliens in Spain, amending Organic Act. 2000Act 8/2000 of 22 December (Hereinafter, Organic Act 8/2000).
2. Royal Decree 2393/2004 of 30 December on the Implementation Rules to the Organic Act 4/2000 of 11 January 2000 amended by the Organic Act 8/2000 of 22 December, on Rights, Freedoms and Social Integration of Aliens in Spain.(Hereinafter, RD 2393/2004).

Artists

(Not referring to free movement of EU citizens)

3. Royal Decree 26/1985, self-employed artists obtained the same rights and obligation as all workers. Performing artists and bullfighters were then grouped together under a special heading within the general social security system.
4. Royal Decree 2621/1986, made specific provisions for income averaging in view of considerable monthly fluctuations in artists income as well as a provision regarding the possibility of early retirement for performing artists in an effort to compensate them when they reached the age when they could no longer perform.
5. Intellectual Property Act (23/2006 Act) obliges copy right societies to set up welfare and support services for 'authors, performing artists or cultural workers', either themselves or though third parties. Societies are to spend 20% of their copyright fees on such services.

Researchers

6. Organic Act 4/2007, of 12 April, on Universities, is the legal framework regulating the training requirements needed for each of the different categories of lecturers, amending Organic Act 6/2001, of 21 December. (Hereinafter, Organic Act 4/2007).
7. Royal Decree 63/2006, of 27 January, establishing the status of the research fellow.
8. Royal Decree 1393/2007 regulates the new official Bachelor, Master and Doctorate university studies. (Until full implementation of these studies is carried out, university provision is still regulated according to the Royal Decree 1497/1987 and subsequent legislative development).

Orders, Circulars, etc. (artists)

Artists
(Not referring to free movement of EU citizens)

1. Application form UGE 2, adopted by Spanish Council of Ministers on February 16, 2007, in relation to stage artists of international repute as well as their coaches whose presence is required for the stage performance that their stays in Spain exceed a five days period or twenty days for a period of up to six (see: http://extranjeros.mtas.es/es/UnidadGrandesEmpresas/documentos/2009/Artistas.pdf).
2. Artist residences in Arteleku is a mobility scheme open to national or international artists (see, http://www.arteleku.net/4.1/index.jsp?idioma=ingles).
3. Funds for artistic and contemporary projects to be carried out jointly with artists from the Pyrenees-Mediterranean region are a mobility scheme open to nationals or residents from three territories of the Euro region must be involved. . They may be companies located in Catalonia or in a member state of the European Union or European Economic Area which has a permanent establishment in Catalonia; private non-profit entities located in Catalonia; local government of Catalonia; creative or research groups without a legal personality (see, https://www.gencat.net/eadop/imagenes/5112/08042112.pdf).
4. Exchange Programme of Can Xalant is a mobility scheme open to all visual artists and curators residing in Catalonia (see, http://www.canxalant.org/index.php?s=projectes& subsec=pintercanvis& lang=en&p=1&idsec=12).

Researchers

5. Researchers Mobility Portal This manual answers researchers' main questions when they arrive in Spain, alone or accompanied by their family (see, http://www.eracareers.es/fe-cyt/index_en.jsp).

4.5 Access to study grants

See, *Order EDU/1901/2009, of 9 July*, on university study grants for academic year 2009-2010, Official Journal, 15 July 2009. As other years and following Spanish and EU legislation, study grants are open to Spaniards and to other EU citizens (in this last case the students or their parents must have a work in Spain)

The novelty is that the Spanish President, *Rodríguez Zapatero*, has announced as special measure to tackle the current Spanish situation of unemployment an amount of 70 million Euros to provide special study grants for unemployment persons between 25-40 years old, with a university Grade (Licenciatura), in order to follow an Official Master Programme at the Spanish Public University. '*Discurso del presidente de Gobierno en el debate sobre el estado de la nación'* 12 may, 2009, page 18. The idea is to obtain better qualification while they are unemployed and to improve their possibilities to find a job. In university circles is quite unclear if the candidates to that measure are only Spaniards or every unemployed person resident in Spain between 25 to 40 years old and with a university Grade title. In the first case, an issue relevant to this Observatory could appear.

Judicial Practice

Judgment of the ECJ of special relevance for Spain: Case C-222/07, (Second Chamber) 5 March 2009 (Reference for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 18 April 2007, received at the Court on 3 May 2007, in the proceedings *Unión de Televisiones Comerciales Asociadas (UTECA*) v *Administración General del Estado.*

(The comment to this Judgment is taken verbatim from Christina Angelopoulos, Institute for Information Law (IViR), University of Amsterdam)

In 2007, the Spanish Tribunal Supremo (Supreme Court) referred to the ECJ for a preliminary ruling a case involving an action brought by the Unión de Televisiones Comerciales Asociadas (Association of Spanish Commercial Televisions - UTECA) against Spanish national legislation implementing the EC Television without Frontiers (TwF) Directive.

The legislation in question involves the Royal Decree 1652/2004 which require television operators to earmark 5% of their operating revenue for the previous year for the funding of full-length and short cinematographic films and European films made for television and to allocate 60% of that funding to the production of films the original language of which is one of the official languages of Spain. UTECA sought to have the decree declared inapplicable on the grounds of infringement of Community law. These claims were opposed by the Administración General del Estado (General State Administration). The ECJ was asked by the Spanish Supreme Court to assess the compatibility of the national provisions with the TwF Directive, as well as with Article 12 EC Treaty on the prohibition of discrimination on the grounds of nationality and Article 87 EC Treaty on State aid.

According to the Court, the measure requiring the allocation of 5% of operating revenue for the pre-funding of European cinematographic films and films made for television does not endanger these freedoms. By contrast, the obligation to reserve 60% of that 5% of operating revenue for the production of films of which the original language is one of the official languages of Spain does constitute a restriction on the freedom to provide services, the freedom of establishment, the free movement of capital and the freedom of movement for workers. As such, the provision may only be permitted where it serves overriding reasons relating to the general interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain this objective. In the present case, the cultural aim of Spanish multilingualism provides such a defence, while, according to the ECJ, the measures under examination were also appropriate and proportionate in relation to this aim.

With regard to Article 12 EC, the Court pointed out that, in relation to the freedom of movement for workers, the right of establishment, the freedom to provide services and the free movement of capital, the principle of non-discrimination has been implemented by specific provisions of the EC Treaty (i.e., Articles 39(2) EC, 43 EC, 49 EC and 56 EC respectively). Since the Spanish national legislation does not seem to contravene these provisions, no breach of Article 12 can be said to have taken place either.

Finally, as concerns compatibility with EC State aid law, the ECJ recalled that classification as State aid requires that all conditions set out in Article 87 be met. Hence, (a) there must be an intervention by the State or through State resources; (b) the intervention must be liable to affect trade between Member States; (c) it must confer an advantage on the

recipient; and (d) it must distort or threaten to distort competition. In the case at issue, the Court ruled that it is not apparent how the measure disputed constitutes an advantage granted either directly or indirectly by the State or through State resources. Moreover, since the measure applies to television operators, it does not appear that the advantage in question is dependent on the control exercised by the public authorities over such operators. Consequently, the measures adopted by the Royal Decree 1652/2004 and the legislative provisions on which the decree is based should not be considered to be aid within the meaning of Article 87(1) EC.

As a result, according to the preliminary ruling of the ECJ, a measure adopted by a Member State which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for works of which the original language is one of the official languages of that Member State does not infringe Community law.

Recent legal literature

PÉREZ CAMPOS, A.I., Libre circulación y Seguridad Social: alcance de las excepciones a la regla de conservación de los derechos adquiridos, *Aranzadi Social*, Nº 3, 2008.

RODRÍGUEZ CRESPO, M.J., Contenido y limitaciones de la libre circulación de trabajadores, *Iuris: Actualidad y práctica del derecho*, Nº 126, 2008, p. 40-50.

VVAA, Cumbre sobre la igualdad profesional: Conferencia internacional – Impacto de la libre circulación de trabajadores: comunicación de la Comisión europea, *Europa Euskadi*, Nº 250, 2008, p.. 9-13.

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

The essence of the coordinating norms of the Social Security in the Community area lies in the difference between the services included and excluded in these services, and as regards the recognition of services, in the interplay of the application of Regulation 1408/71 and the safeguarding of the free movement of workers through article 39 of the Treaty and Regulation 1612/68. To deal with this, we must start from the difference between the so-called *special non-contributory Community services* and the *social assistance services*. In the case of the special non-contributory Community services, these require, at least, positive identification in order to differentiate them from social assistance and to be able to include these in Regulation 1408/71.

In order to achieve this, it cannot be ignored that, for a number of years, the ECJ has attempted to provide an extensive interpretation of the notion of Social Security in opposition to Social assistance, excluded from Regulation 1408/71, so that it can be concluded that it defended the position that a service would be non-contributory Community Social Security if it met the following 3 requirements:

- That it is recognised regardless of any individual and discretional appreciation of personal needs;
- That it is granted to beneficiaries depending on a legally defined situation;
- That it refers to any of the risks expressly listed in section 1 of article 4 of Regulation 1408/71.

In any case, with regard to the special non-contributory services, we must not forget the novelty contained in Regulation 883/2004, which consists of the substantial reform of the definition of special non-contributory service contained in its article 70, as compared to article 4.2 bis of regulation 1408/71. However, the differences are more important than real and there is something which remains unalterable: In order not to be exportable, notification of the special non-contributory services must be given in a specific annex, which, in the case of Regulation 883/2004 is Annex X.

Consequently, the relevant point is not the definition in itself, but the inclusion of the service in the Annex since, although a service can be classified as a special service in non-contributory cash in accordance with the new definition contained in article 70 of Regulation 883/2004, if it does not appear in Annex X, it will be exportable to other States where the aforementioned Regulation is applicable.

Finally, it should be stressed that, although Regulation 883/2004 has not yet come into force, the new definition contained in it concerning the special non-contributory services has come into force as it was incorporated into the text of Regulation 1408/71 through the reform of its article 4.2 bis in Regulation 647/2005. As compared to the concept of non-contributory service, Social Assistance would be configured as subsidiary and would only operate in relation to services which require the evaluation of the personal situation and when there are insufficient resources. Although article 4.4 of Regulation RE 1408/71 states that *this Regulation will not apply to social and medical assistance,* there may be gray areas in which it is

difficult to delimit whether the case involves a service of art. 4.2 bis, that is to say, of a non-contributory nature, or a case of article 4.4, concerning social assistance.

This complex demarcation has been the subject of repeated case law in the ECJ (Decisions of the ECJ of 22.06.1972 Frilli, C 1/72; of 09.10.1974, Biason C 24/73; of 28.05.1974 Callemeny C-183/73, and of 20.06.1991 Newton 356/89). In some cases, the ECJ has chosen to consider a service as non-contributory depending on the relationship between what is contributed and what is received. In this regard, the decision of 16.01.07 Pérez Naranjo C-265/05.

Social Assistance, therefore, is expressly excluded from the material area of application of Regulation 1408/71 (unless it is a special service in cash of a non-contributory nature according to article 4.2 bis of Regulation 1408/71), however, according to the case law of the ECJ, this, together with other similar services for the insurance of the minimum to survive, falls within the «social advantages» of article 7.2 of Regulation 1612/68, to which the principle of equality of treatment for all Community workers is applied regardless of their nationalities. All the social services which are paid in order to palliate a situation of need are included in this category, but within the framework of Regulation 1612/68, workers in the strict sense, that is to say, only those who are currently working in another Member State or those and, insofar as they have done so, they have the right to remain in this State and to seek other employment, but not those who move to another Member State for the first time to seek employment.

However, since the nineties, the ECJ has taken up a position against this general exclusion from the Social Assistance services of Community Law which coordinates the social protection systems and has facilitated the access of Community citizens to these services, even when they do not work, through the interpretation of the legislation on EU citizenship, in particular, freedom of movement (article 18 ECJ) in connection with the prohibition to discriminate for reasons of nationality (article 12 ECJ). Two decisions of the Grand Chamber of the ECJ, both of July 18, 2007, have analysed the regime which must be applied to these services, both arising from litigation which originated in Germany, based on Regulation (EEC) No. 1612/68, due to the consideration of social advantage these aids have (Hartmann, case C-212/05 and Geven decision, case C-213/05,)

In this delimitation between services included and excluded from Regulation 1408/71, and allowing free movement and the 'social advantages' of Regulation 1612/68, in the Spanish case there could be difficulties as regards recognition and the right to free movement, due to the non-contributory / assistance nature of the following services:

- *Unemployment benefit*: for years difficulties arose as regards determining the inclusion or exclusion of the assistance services for unemployment from Regulation 1408/71, and the possible existence of discrimination due to nationality as concerns the subsidy for emigrants returning from community countries although these seem to have been corrected.
- In 2008, approval was given to *Royal Decree 8/2008*, of January 11, whereby the service due to necessity for Spanish residents abroad and those returning is regulated, and its reception is subject to having Spanish nationality or having resided for 10 years on Spanish territory.
- Despite the character of dependence defended by the ECJ as complementary health care protection and, thus, apparently included in the objective scope of Regulation 1408/71, from the internal point of view, the national *Dependence System* and its services consti-

tute an independent protector group of the Social Security, thus, the possible difficulties concerning practice which might arise as regards recognition.

- *The assistance service* for giving birth or adoption of children is subject to the requirement that the beneficiary have been resident for two years (see supra Chapter III)
- *Health care assistance* is the case in which the possibility of applying for services by practising the so called 'social tourism' seems to be more probable.

Chapter V
Employment in the Public Sector

Text(s) in force

1. Royal Decree 1837/2008, of November 8 on transposition into Spanish law of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications and Council Directive 2006/100/EC of 20 November 2006 adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania. In addition, Commission Regulation (EC) 1430/2007, of 5 December 2007, amending Annexes II and III to Directive 2005/36/EC of European Parliament and of the Council on the recognition on professional qualifications, has also been incorporated into the Spanish legislation, in force, since November 21, 2008 (hereinafter, RD 1837/2008).
2. Act 7/2007, of April 12 regulating the civil servant status, in force, since April 14 (hereinafter, A7/2007).
3. Royal Decree 45/2007, of January 19, modifying the Regulations on the notary system and organisation, in force, since January 30, 2007 (hereinafter, RD 45/2007).

1. ACCESS TO THE PUBLIC SECTOR

The Spanish Supreme Court (Tribunal Supremo) on May 20, 2008 (2008/65888) resolved on the challenge brought by the Association of Property and Commercial Registrars of Spain against Royal Decree 45/2007, whereby the regulations on the system and organisation of notaries was modified, by deeming the appeal partially grounded. However, it does not include any considerations on the nationality requirement for notaries.

Recognition of professional experience for access to public sector

Spanish Supreme Court (Tribunal Supremo) 6 March, 2008 (2008/13733)
In this case, the Supreme Court (Tribunal Supremo) resolved that the appeal for review filed against the decision of the National Court /Audiencia Nacional- (which confirmed the resolution whereby the recognition of the title of mouth, jaw and facial surgeon obtained in Germany was conditioned to additional training of one year in oncological surgery) was rejected. The technical discretional nature of the matter reduces the possibilities of jurisdictional control over the evaluation of the organisms of the Administration practically to the cases of failure to observe the regulated components of the exercise of administrative power and demonstrable or manifest error.

The Decision of the Supreme Court (Tribunal Supremo) 14 March 2008 (2008/17229) is also interesting. It refers to several case law judgements on the rejection by the Ministry of Education and Science of the application for equal status of foreign degrees obtained by persons concerned regarding several disciplines after the applicants had studied in centres in

Spain which, in the period in which part or all of the studies were done, they lacked official authorisation to teach courses leading to the issue of a foreign university degree.

The decision of the Supreme Court challenged argued that it is different to deal with the equal status of foreign degrees than to deal with the requirements to be complied with in order to create universities or university centres. Therefore, the lack of such authorisation cannot be a reason for rejecting an application and the in accordance with Royal Decree 86/1987 the corresponding dossier must be processed through a request for a report from the Academic Commission of the Council of Universities and the consequent resolution.

An interesting case – as it sets case law doctrine of the Supreme Court (Tribunal Supremo) on this question and closes possible compensation claims – is the one resolved by two decisions in which the applicability of the Public Administration compensation for those who have not obtained the equal status of their degrees (due to a reason attributable to the Public Administration) is analysed. Although the decision rejected the claim as it did not consider that the requirements concerning the employer responsibility of the Administration existed at all.

The Decision of the Supreme Court of 1 November 2008 (2008/1815) rejected the claim regarding employer responsibility for moral, professional and economic damages, arising for the parties due to the undue delay of the Administration as regards the equal status of the degrees of specialist doctor. The Court states that, although a unjustified delay on the transposition of the Community Directives 75/363 and 93/16 has taken place, however, a norm which is intended to confer rights on individuals, in order to constitute 'per se' a manifest, serious infringement and give rise to the obligation to compensate, a causal link between the infringement and the damage must be proven. The Court did not appreciate a causal link between the infringement and the damage invoked as the late transposition of a Directive did not automatically presuppose the existence of damage.

The Decision of the Supreme Court of 31 January 2008, (2008/6217) establishes the following doctrine:

The simple annulment of the resolution, first presumed and then expressly, which rejects the equal administrative status –declared contrary to the legislation by the decision of the national Court of December 4, 1999- does not generate, as the appellant seems to pretend, a right to compensation. This results from article 40.2 of the Law on the Judicial Regime of the State Administration and from article 142.4 of Law 30/1992, on the Judicial Regime of the Public Administrations and the Common Administrative procedure, insofar as it declares that

> 'the administrative annulment or annulment by contentious-administrative jurisdictional order of the administrative acts or provisions does not presuppose a right to compensation, and this is declared in the case law doctrine of this High Court, among others, in the decisions of February 5 , 1996, November 4, 1997, March 11, 1999, June 28, 1999, January 13, 2000 and July 12, 2001'.

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

Text(s) in force

1. 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 (Hereinafter, RD240/2007).
2. Royal Decree 1161/2009, of July 10, amending 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 July 24, 2009 (Hereinafter, RD1161/2009).

Orders, Circulars, etc.

1. Draft bill to amend Organic Act 4/2000 of January 11, on the rights and freedoms of Aliens in Spain and their Social Integration, amended by Organic Acts 4/2000, of December 22; 11/2003, in force, since January 13, 2000 (Hereinafter, Draft bill to amend Organic Act 4/2000).

1. RESIDENCE RIGHTS (DIRECTIVE 2004/38)

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 RD 240/2007.

Family members who are not nationals of a Member State (*so-called third country family members*) enter Spain with a valid passport: if they come from countries which are subject to visa obligation, they are required to have an entry visa. Countries whose nationals are subject to visa are listed in Regulation (EC) No 539/2001, or under national law in the case of the United Kingdom and Ireland.

Possession of the valid residence card issued by any Member State exempts the family members from the visa requirement. Spain shall grant third country family members every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

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 RD 240/2007).The documentation which must be submitted to this Office of Aliens are 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 fam-

ily, 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.'

On July 10, 2009 the Spanish Council of Ministers – by proposal of Labour and Immigration, Interior, and Foreign Affairs and Cooperation Ministers – approved Royal Decree 1161/2009, of July 10 amending 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.

As a result of Royal Decree 1161/2009, of July 10, 2009, amending section 2 of article 4 of Royal Decree 240/2007 on transposition into Spanish law of section 2 of article 5 Directive 2004/38, *third country nationals family members* of EU or EEA residing lawfully in Bulgaria Cyprus, Ireland, United Kingdom or Rumania will not be subject to the obligation of a visa to enter to Spain.

1.1. Situation of family members of job-seekers

RD 240/2007 does not regulate job-seekers' situation as a consequence of the lack of transposition of working conditions in general. That needs to be understood as a right for these jobseekers to stay and look for work as Spaniards.

1.2. Application of Metock judgment

Nor the first *Metock* question neither the second one is currently an issue in Spain. It is necessary to be aware that RD 240/2007 does not require a national of a non-member State who is the spouse of a Union citizen resident in Spain, to have previously been lawfully resident in another Member State before arriving in Spain. Therefore, no mention on judicial practice to this Metock question exists.

This is also the case regarding the second question treated in Metock: that is, whether the spouse of a Union citizen who has exercised his/her right of freedom of movement by becoming established in a Member State whose nationality he or she does not possess, benefits from the provisions of Directive 2004/38 irrespective of when and where the marriage took place and the circumstances in which s/he entered the host Member State.

The question of reverse discrimination in Spain

In the *Metock* case, regarding reverse discrimination (in so far as nationals of the Member State who have never exercised their right of freedom of movement would not derive rights to entry and residence from Community law for their family members who are nationals of non-member countries), the Court remembered the position of the ECJ jurisprudence:

> 'In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (Case C- 212/06 Government of the French Community and Wallon Government (2008) ECJ I-0000, paragraph 33) Any difference in treatment between those Union citizens and those who have exercised their right of freedom of movement as regards the entry and residence of their family members, does not therefore fall within the scope of Community law.'

RD 240/2007 introduces a new provision under the general alien's regulations in order to apply RD 240/2007 to Spanish family members with a third country nationality. However, under this provision the family member concept is more restrictive for Spaniards than for EU or EEA citizens; regarding ascendants who live under their charge, the regulations to be applied are those under general alien's legislation (*Ley de Extranjería*).

Spanish family reunion requirements under general alien's law are obviously more restrictive than under RD 240/2007.

Judicial practice

In Spanish Sentence 00378/2008 of 27 November 2008. (Jdo. Contencioso Administrativo number. 1 of Lleida, (Catalonia) , the judge understands that 'different treatment to ascendants (third country nationals) of a Spaniard from treatment delivered to ascendants of a EU or EEA citizen *is not justified(...)It is against article 14 of Spanish Constitution on fundamental right to equal treatment and no discrimination principle*'
Of course, it is to be noted that this is an issue under Spanish Constitution and not under Community Law. We need to wait and see on the final position of higher Spanish courts.

1.3. Problems of abuse of rights (marriages of convenience)

According Article 54 (2 f) of Draft bill to amend Organic Act 4/2000 currently under discussion on Spanish Parliament, introduces into Spanish Aliens law '*marriages of convenience'* or '*common law couple*' as very serious infringements. We will follow the development of that proposed provision.

2. ACCESS TO WORK

RD 240/2007 does not regulate jobseekers situation as a consequence of the lack of transposition of working conditions in general. That needs to be understood as a right for these jobseekers to stay and look for work as Spaniards.

Nevertheless, article 3, 2 RD240/2007 explains that all persons to whom the RD is applicable with the exception of dependent descendants over the age of 21 and dependent direct relatives in the ascending line have the right to access to any work activity, studies, in the same conditions as Spaniards. Therefore, jobseekers are generously regulated except for some family members (ascendants and descendants over 21).

3. OTHER ISSUES CONCERNING EQUAL TREATMENT

Spain has an issue regarding partners (with whom the Union citizen has contracted a registered partnership) as family members. Under Directive 2004/38 family members means – inter alia – '*the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of the member Sate (...) if the host Member State treats registered partners as equivalent to marriage'*. This is the case of Spain.

Thus, RD 240/2007, Article 2 (b) states regarding the partner as a family member the following conditions:

> 'The partner who has an analogous union to the matrimony, 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'

However, the Spanish General Director for Immigration approved on 22nd March 2007 the Instruction DGI/SGRJ/O3/2007 in which paragraph 1º (3) pointed out that the different Partner Unions Registers throughout Spain (*Comunidades Autónomas and Ayuntamientos)* were no valid enough to the effects of Directive 2004/38 as far as currently they do not comply with the requirements of RD 240/2007, Article 2 (b) to prevent enough '*the possibility of two simultaneous registrations in this State'*.

Judicial practice

During 2008 and 2009 there have been several judicial pronouncements in Spain on this issue. The Spanish judges understand that the Instruction DGI/SGRJ/O3/2007 of General Director for Immigration is against Spanish law: as it refuses an individual right established by the Spanish legislation. That is to say: if the partner's registration fulfilled with all the requirements of the respective Autonomous Act on Registration of Partners, then it is not fair to conclude that those requirements are not sufficient guarantee *vis-à-vis* the existence of another simultaneous registration.

The *ratio decidendi* of those judgments is that it is not legal to refuse a right on free movement on grounds of insufficient guarantees while, just in case, the inexistence of those guarantees are up to the Spanish central public powers.

A partner fulfilling all legal requirements to be registered in an Autonomous Partner Register in Spain, is entitled to all consequences of this legal regulation: that is : s/he is also entitled to received his /her EU residence card (in case he or she is a family member under Community Law). See, Sentence 00325/2008 of 27 November 2008. Jdo. Contencioso Administrativo number. 3 of Pontevedra (Galicia).

Similar case and similar argumentation in Sentence 019/2009 of 27 January 2009. Jdo Contencioso-Administrativo number 5 of Malaga (Andalucía): the judge understands not only on the illegality of that Instruction DGI/SGRJ/03/2007 but indeed that article 2 (b) of RD 240/2007 (a unique public register which avoid simultaneous registration in more than one register in the same State) is against article 2, 2 (b) of Directive 2004/38 in which no

special requirement for such a unique system of registration of partners is required. Sentence 44/2009 of 19 February 2009. Contencioso Administrativo number 2 of Pontevedra (Galicia). Same issue.

There is a Sentence from the High Court of Burgos by which the sentence of a Jdo Contencioso Administrativo of Avila, 14 April 2008 in which the interpretation to RD 204/2007 article 2 (b) made by Instruction DGI/SGRJ/03/2007 was applied and therefore the communitary residence card denied to a third country national register partner.

The High Court resolved that the inexistence of a Central Register of partners in Spain can not be an obstacle to the exercise of an individual right legally established; that interpretation of the Instruction means to empty the significance of article 2(b) of RD204/2007 related which partners as family members and it is against jurisprudence of Spanish Supreme Court on equal rights of matrimony and *de facto* partners; and, finally ,that Spain has not transposed properly Directive 2994/38 as far as transposition means any legal, administrative, etc measure… 'That is, if a Central Register of partners needs to be created this is under the responsibility of Spanish public powers and in no case an individual right born from the Directive can be refused'.

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

No mention at all to any of the cases in Spanish jurisprudence.

Spanish legal situation

On 30 April 2009, the Spanish Government has presented a First Report on a Draft Taxation Act in order to transpose EU legislation on the subject of transnational professionals. The Draft Taxation Act intents to adapt Spanish legislation on taxation of non-residents in order to improve free movement of workers, services and capital.

Regarding frontier services a new rule is introduced on taxation in the reception State while currently the Spanish rule is taxation in the State of origin. Concerning Real Estate taxes, the Draft includes rules on pay taxation in the MS in which the real estate is located. On devolution of quotas, a one-stop-shop is established and taxpayers with a right to devolution of VAT (Value Added Tax) in a MS in which they are not established may ask for that devolution in the MS of residence in order to simplify the procedure.

On the other hand, the Draft Act introduces especial rules for incomes obtained without a permanent establishment by taxpayers residents in another MS. (http://www.la-moncloa.es/NR/rdonlyres/7957D594-622A-44AF-AD4C-5C920323622D/95806/refc20090430.pdf, p. 19-20.

This Draft will be follow by Spanish OFMW on 2009 Report.

In Spain, legislation regarding researchers 'in training' (*investigadores en formación)* allows two different situations:

- The old system: four years of a grant as researcher in training (no labour contract);
- The new system: two years of a grant as researcher in training (no labour contract) and two more years of a labour contract.

In both models the two first years there is not a recognised labour relation with all the social security consequences of that situation.

Chapter VIII
Application of Transitional Measures

The EU second phase started on 1 January 2009 and will come to an end on 31 December 2011, after which it will be possible to continue to apply the restrictions only in case of serious disturbances (*or a threat thereof*) of the labour markets for maximum of two years.

Spain decided not to apply a second phase, therefore, from 1 January 2009, nationals from Bulgaria and Romania have the same free movement as any EU citizen. Thus, Bulgarian and Romanian workers and their family members have no need of a work permission to work in Spain.

Text(s) in force

1. 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 (Hereinafter, RD240/2007).
2. Royal Decree 1161/2009, of July 10, amending 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 July 24, 2009 (Hereinafter, RD1161/2009).

Orders, Circulars, etc.

1. Instruction DGI/ SGRJ/2009, of February 5, 2009, to lift the transitional arrangements introduced by the Spanish Government in relation to the free movement of Bulgarian or Romanian paid employees and their family members.

http://extranjeros.mtin.es/es/NormativaJurisprudencia/Nacional/RegimenExtranjeria/InstruccionesDGI/documentos/2009/INSTRUCCION_1-2009.pdf)

The end of transitional measures

On December 22, 2006 the Spanish Council of Ministers approved 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 (first phase), counting from January 1, 2007. In 2008, the Spanish Government decided to continue applying the transitional measures in force during 2008, until the end of December.

As a result of Instruction DGI/ SGRJ/2009, of February 5, 2009, the regulations governing the free movement of Bulgarian or Romanian paid employees and theirs family members since 1st January 2009, has been set out on the provisions of RD 240/2007, of February 16.

Scope of Instruction SGRJ/2009, of February 5, 2009

The Instruction scope includes:
1. Every Bulgarian or Romanian holding a work permit by 1st January 2009.
2. Also, every Bulgarian or Romanian who applies (before or after 1 January 2009) for an initial work permit, a renewal or a modification of their work permit, an exception to the work permit and Bulgarian or Romanian students who apply for a work permit;
3. All family members (according to Article (2) of Royal Decree 240/2007, of February 16) of Bulgarian and Romanian workers;
4. And last but not least, Bulgarian or Romanian (workers or not workers), that according to Article (7) of RD 240/2007, of February 16, have obtained the Registration Certificate during the transitional period and, therefore, with restrictions during that period time (2007/2009) concerning the freedom of movement for the purpose of taking up a job (a kind of extraordinary regularization? We will deal with this issue at the final report).

Besides, Instruction DGI/ SGRJ/2009, of February 5, 2009 recognises to any Bulgarian and Romanian nationals and their family members under the scope of the Instruction, the right to enter, stay an reside under conditions contained in RD 240/2007 (in which there are no specific provisions on work conditions neither at all of job-seekers status!)

Judicial Practice

In addition, Instruction DGI/ SGRJ/2009, of February 5, 2009 establishes the end of all the pending Administrative-Contentious or judicial process in which Bulgarian or Romanian workers could be concerned once the new situation (end of transitional measures for workers) has entered into force.

Amendment of Royal Decree 1161/2009, of July 10, 2009

RD1161/2009 amending section 2 of article 4 of Royal Decree 240/2007 states that *third country nationals* family members of EU or EEA residing lawfully in Bulgaria or Rumania will be allowed to enter Spain without an entry visa.

Miscellaneus (administratives practices, etc.)

The *Programme of voluntary return* represents one of the measures that Spanish government has adopted in order to redjustment the domestic labour market.

In this this context, on May 4, 2009, Spanish Labour and Immigration Minister and Romania's Minister of Labour, Social Solidarity and Family, signed a Memorandum of Understanding between the Romanian National Agency for Employment and the Spanish Public Service of State Labour on labour and social security to facilitate the returns process of Romanian workers to their country.

In addition, in order to increase bilateral relationship between the two countries, another Agreement on cooperation and information exchange has been signed by the Romanian De-

partment of Labour Inspection and the Spanish Department of Labour and Social Security Inspection.

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Chapter IX
Miscellaneous

Recent publications

Spanish Government 30 April 2009 Report on a Draft Taxation Act in order to transpose EU directives, available at http://www.la-moncloa.es/NR/rdonlyres/7957D594-622A-44AF-AD4C-5C920323622D/95806/refc20090430.pdf, p. 19-20.

> 'El Anteproyecto de Ley adapta a la normativa europea el Impuesto sobre la Renta de No residentes con la finalidad de favorecer las libertades de circulación de trabajadores, de prestación de servicios y de movimientos de capitales.
> Impuesto sobre el valor añadido
> El Anteproyecto introduce una nueva regla general de localización de los servicios transfronterizos que supone la tributación de los mismos en el Estado de destino en los casos en los que el destinatario sea un empresario o un profesional. Hasta ahora, la regla general era la tributación en origen. Además, se incluyen numerosas normas técnicas con excepciones a la regla general; por ejemplo, los servicios relacionados con inmuebles tributan en el país en el que radique el inmueble.
> Respecto a la devolución de cuotas soportadas por empresarios o profesionales, el Anteproyecto prevé un nuevo sistema de devolución que se basa en un modelo de ventanilla única, según el cual los sujetos pasivos que tengan derecho a solicitar devoluciones del IVA en un Estado miembro en el que no estén establecidos puedan presentar la solicitud en su país de residencia y no en el que deba efectuar la devolución, lo que supone una simplificación de los trámites.
> Una modificación adicional, que supone la transposición de una pequeña parte de una tercera Directiva que tiene por objeto combatir el fraude fiscal vinculado a las operaciones intracomunitarias, introduce una cautela para evitar el diferimiento del impuesto en determinadas prestaciones de servicios transfronterizos.
> Impuesto Indirecto Canario
> Además, se modifica en paralelo el lugar de localización de los servicios en el Impuesto Indirecto Canario (IGIC) ya que, al cambiarse el lugar de localización de los servicios en el IVA, existiría el riesgo de que algunas prestaciones de servicios se gravaran dos veces -por IVA e IGIC- y otras no tributasen. Por lo tanto, se establece la misma fórmula en la localización de servicios en el IVA que en el IGIC.
> Impuestos especiales
> Por otra parte, el Anteproyecto de Ley transpone otra Directiva relativa al régimen general de los Impuestos Especiales, en la que se regula aspectos formales relacionados con la documentación que acompaña la circulación de productos sujetos a dichos impuestos, que hasta ahora se presentaba en formato papel y que deberán ser documentos electrónicos a partir del momento en que esta ley se apruebe.
> Impuesto sobre la Renta de No Residentes
> En el Impuesto sobre la Renta de No Residentes, el Anteproyecto de Ley declara exentos los dividendos y participaciones en beneficios obtenidos por fondos de pensiones que sean residentes en otro Estado miembro de la Unión Europea o por los establecimientos permanentes de esos fondos situados en otro Estado miembro de la Unión Europea.
> Por otro lado, se establecen reglas especiales para la determinación de la base imponible correspondiente a rentas que se obtengan sin mediación de establecimiento permanente por contribuyentes residentes en otro Estado miembro de la Unión Europea'.

Researchers and Grant contracts in Spain

Moreno Gené, J., El personal investigador en formación ¿becarios o trabajadores?, *Revista andaluza de trabajo y bienestar social*, ISSN 0213-0750, Nº 78, 2005, p. 95-138.

Resumen: En la actualidad coexisten diversos tipos o vías de financiación de la fase de formación del personal investigador, a saber: a) El modelo tradicional o modelo 4+0 (cuatro años de beca de investigación, sin ningún año de contratación laboral); b) el modelo diseñado en el Estatuto del Becario, que mantiene el modelo tradicional o modelo 4+0, si bien, dotándolo en su fase final -normalmente los dos últimos años de duración de la beta- de una regulación especifica en cuanto a las obligaciones y derechos, especialmente en materia de protección social, de los becarios de investigación; y e) el modelo beca+contrato laboral o modelo 2+2, que alterna el disfrute de una beca de investigación durante los dos primeros años, en los términos descritos para las becas de investigación tradicionales, con la posterior contratación laboral del investigador durante los dos años restantes. Pese a la diversidad de estos modelos, en todos ellos encontramos una nota común consistente en la negación del carácter laboral de la totalidad o cuanto menos de una parte del período inicial de formación del investigador, el cual se articula irremisiblemente a través de becas de investigación. Ninguno de estos modelos, sin embargo, afronta con carácter previo y de un modo riguroso la cuestión de la naturaleza jurídica que cabe atribuir al vínculo existente entre aquellos investigadores que se encuentran en una fase inicial de su formación y las Universidades y otros centros de investigación en que se inician en la actividad investigadora -centros de aplicación de la beca. Por el contrario, los diversos modelos expuestos parecen optar por el sistema de becas de investigación o por la contratación laboral del personal investigador en formación en base a criterios más políticos o de oportunidad que estrictamente jurídicos o de legalidad, no efectuándose al respecto la necesaria reflexión sobre la naturaleza jurídica que cabe atribuir a este colectivo. Frente a la situación expuesta, consideramos que cualquier actuación de los poderes públicos dirigida a este colectivo debe partir como presupuesto previo e indispensable de un análisis sobre la verdadera naturaleza jurídica de la actividad desarrollada por el personal investigador en formación. Precisamente, este trabajo pretende aportar algunos elementos que puedan ayudar a clarificar el complejo debate existente en torno a la naturaleza jurídica -laboral o no- que cabe atribuir al personal investigador en formación, analizándose para ello los diversos modelos existentes en la actualidad de vinculación entre el investigador en formación y la Universidad u otro centro de investigación en el que desarrolla su actividad.