REPORT

on the Free Movement of Workers
in Poland in 2012-2013

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Introduction

There have been no significant changes in Polish legislation on EU citizens and members of their families during the reporting period.

The Act on entry that implements Directive 2004/38 has not been changed at all and there are no pending drafts amending the Act. Also other provisions that are relevant for EU citizens in the sphere of inter alia social benefits have not been changed (such as the Act on Higher Education, Act on Family Benefits) or access to employment (Act on promotion of employment and labour institutions).

During the last reporting period 3 issues concerning EU citizens and migrating Polish citizens and issue concerning third country nationals not having the status of family member shall be mentioned.

First of all, there is a significant interest in Polish media as regards cases of discrimination of Polish workers in the Netherlands. Many cases of discrimination, unfair treatment, unsatisfactory working and living conditions for Polish workers are being reported on a regular basis. Attention has been also put to the Report of the Netherlands Institute for Social Research ‘New in the Netherlands. The lives of recently migrated Bulgarians and Poles’. According to the Report, there are 160 000-180 000 Polish workers in the Netherlands and 79% of them feel to be discriminated and 40% feel to be discriminated very often or often. It is the reason why many of respondents plan to return to Poland.

In June this year the reported in the last year Report problem of granting a certificate for Polish citizens who want to enter into registered partnership in one of Member States has been given a special attention. Poland does not recognize neither same sex marriages and partnerships nor different sex partnerships. Two Polish citizens (women) residing in France wanted to enter into a partnership in France. They were only obliged to present in France a certificate that they are not married. Polish relevant official refused to issue such a certificate due to the fact that applicants declared the future partner/spouse. The official explained that due to the fact that they wanted to enter into same sex relationship, taking into account provisions of Polish constitution according to which a marriage is a relationship between man and woman, it was not possible to issue such a certificate. However, the repeating practice refusing granting such a certificate on basis of Act on civil status is contrary to the consequent position of Polish administrative courts, according to which the aim of the applicant to receive such a certificate cannot be analysed by relevant authorities at all. Art. 71 of the Act on civil status does not entitle to examine with whom, when and where the applicant plans to enter into marriage or other form of relation. The only competence is to check if the applicant is entitled to enter into marriage under Polish law (i.e. to check age, civil status).

The third important issue has been finally resolved in March and June this year. The problem concerned the fact that Poland has not implemented provisions of the Directive 2004/38 on the extended family members (Art.3.2. of the Directive). The Administrative Court in Warsaw claimed that in such a situation there is an obligation to directly apply this provision by Polish authorities whenever relevant. As a consequence of this ruling, in June 2013 the special circular on application of Art. 3.2 of the Directive has been created by the Border Guard. According to the circular, in situation when the EU citizen (including Polish citizen) makes use of EU free movement rights and his accompanied partner may be qualified to one of categories listed in Art. 3.2 of the Directive but does not possess visa or other
equivalent document entitling to entry the territory of Poland, this applicant shall be granted visa valid for 15 days on basis of Regulation 810/2009.

As regards third country nationals, in July 2013 the first anniversary of the end of abolition action for foreigners has elapsed. As a result of the abolition, 4593 positive decisions on the legalization of stay for two years were issued (representing 48% of submitted applications). The majority of applications were submitted by the citizens of Vietnam, Ukraine, Pakistan, Bangladesh and Armenia. The main reasons of denial to issue the positive decision were as follows: not meeting the requirements for the award of the decision, the application or documents contained false personal data or false information and lastly due to grounds of defense or national security. Those foreigners who have met the criteria to be granted a residence permit for a fixed period of 2 years have been granted automatically the right to take up employment.
Chapter I
The Worker: Entry, Residence, Departure and Remedies

1. **Transposition of provisions specific for workers: Art. 7(1a); Art. 7 (3 a-d); Art. 8(3A); Art. 14 (4 a-b), Art. 17, Art. 24 (2) of Directive 2004/38**


The last amendments to the Act on entry entered into force in 2011 and have been listed in the last Report.

**Art. 7 para 1a and art. 8.3.a of the Directive:**

According to Article 16.1.1 of the Act on entry, employees and self-employed are entitled to stay in Poland for a period longer than 3 months. However, they are obliged to register their stay.

In order to register the applicant shall proof his status as an employer or self-employed person. According to the Regulation of Minister of Administration and Internal Affairs of August 24, 2006 on applications and documents on the right of stay at the territory of Poland of EU citizens and members of their families (rozporządzenie Ministra Administracji i Spraw Wewnętrznych w sprawie wniosków i dokumentów w sprawach pobytu na terytorium Rzeczpospolitej obywateli Unii Europejskiej i członków ich rodzin),² employers and self-employed persons shall submit written declarations of employer or entitled entity either confirming the fact of being employed or eagerness to employ the applicant or in case of self-employed a declaration of being registered into the National Court Register or declaration of having a certificate of entry into the records of economic activity.

The request, submitted in person, shall be done not later than on the day following day after the expiry of 3 months from the date of entry to the territory of Poland.

Applications that shall be filled by EU applicants require to list certain information that are not required by the Directive 2004/38 such as: names of parents, PESEL number (if applicable), height, special marks, colour of eyes.

Additionally the template requires to indicate both the place of stay and place of registered stay (permanent or temporary). However, according to 28.5 (concerning right to stay) and Art. 52.5 (concerning right to permanent stay) of the Act on entry, in case if there is neither registered address for permanent nor temporary stay exceeding 3 months these data shall not be included.

The registration template is written in Polish, English and French, however, the application itself must be written only in Polish. In case when documents are submitted in foreign language, the certified translation shall be attached. Such a requirement that only certified

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¹ *Journal of Laws* of 2006, no. 144, item 1043.
² *Journal of Laws* of 2006, no. 154, item 1105.
translation is acceptable may be questionable as it hinders in not proportionate way use of free movement rights. It shall be enough to attach to not certified translation statement that translation is reliable and it fully reflects the foreign language version.

There have been no registered complaints as regards this requirement. Polish regional authorities who are relevant to register a stay for EU citizens and to issue cards for stay are focused to provide all necessary assistance for applicants, therefore in each office there is significant number of leaflets written mainly in English, but also in German and French and clerks do speak in foreign languages in order to be able to support applicants. The rapporteur decided to check it personally in the office in Krakow and may confirm that support is also given as regards filling the application forms.

**Art. 7.3.a-d of the Directive 2004/38**

Art. 17 of the Act on entry implements art. 7.3 a-d of the Directive. Art. 17 has not been amended as from the date of entering into force this Act.

According to this provision, EU citizen who is no longer employed or does not undertake self-employment any more shall keep the rights of employees and self-employed persons in following cases:
1) where he/she does not undertake employment or any other gainful activity in his/her own name and on his/her own behalf because he/she is temporarily unable to work as the result of an illness or accident;
2) where he/she is in duly recorded involuntary unemployment in accordance with the unemployment register kept by the Poviat Employment Office;
3) where he/she embarks on education or vocational training.

If the period of employment or other gainful activity in their own name and on their own behalf in Poland preceding unemployment referred to in point 2 above is less than one year, EU citizens shall retain the right to reside granted to an employee or self-employed person for a period of 6 months from the date of the registration in Poviat Employment Office.

**Art. 14.4 a-b of the Directive 2004/38:**

As regards the expulsion from the territory of Poland of employed EU citizens or those EU citizens that have entered territory of Poland in order to seek employment, the Act on entry concerns only cases where an expulsion decision is taken when an individual behaviour constitutes a threat for defence policy or national security, as well as for public safety, public order or public health (Part V of the Act on entry). The Act on entry does not contain provisions specifically implementing Art. 14 (4a-b) of the Directive 2004/38.

In the Act on entry there is no direct reference to the situation of jobseekers. They shall be treated as non-economically active citizens who shall have a sufficient financial resources in order not to become a burden for Polish state budget. Therefore no direct reference to Art. 14.4.b is made.

However, as the provisions on expulsion contain only situations when EU citizen or member of his/her family constitutes a threat for interests of Polish society such as security or defence, the interpretation leads to a conclusion that in cases listed in Art. 14.4 a-b of the
Directive, in the light of pro-European interpretation of national law, it shall be not possible to expel beneficiaries of the Directive 2004/38 from the territory of Poland when no such threat has been proved.

Additionally, Art. 70 of the Act on entry lists circumstances that shall be mandatory taken into consideration when issuing decision on expulsion. These circumstances are as following: previous period of residence at the territory of the Republic of Poland, age and state of health, family and economic situation, social and cultural integration with the country of stay and links with the country of origin.

The Supreme Administrative Court, although on basis on the Act on foreigners of June 13, 2003 (ustawa o cudzoziemcach), referred to provisions on the Act on entry as regards provisions that entitle to issue the expulsion decision. The Court underlined that in case when the decision refers to individual who has family in Poland, it is necessary in the light of inter alia European Convention on Human Rights to analyse if the decision is not disproportionate in the light of necessity to protect family life. During such an analysis the length of family life, the fact of having children as well as the fact if the spouse has had a knowledge of criminal background of family member shall be taken into account.

The execution of expulsion procedures are extremely rare in case of EU citizens. In 2012 no decision on expulsion was issued against EU citizens (out of 967 in total). The commander of Border Guard in 2012 refused to enter territory of Poland for EU citizens only once - such decision was issued against Romanian citizen (out of 32138 in total in 2012).

**Art. 17 of the Directive 2004/38:**

The Act on entry implements provisions on exemptions for persons no longer working in the host Member State and their family members. According to Art. 45 of the Act on entry, the right of permanent residence can be granted before the 5 year period expires to persons who:

1) Are employed or self-employed and who in the moment this person finished working on their own behalf or finished other economic activity on their own behalf, reached the retirement age referred to in Polish legislation concerning retirement insurance or the person who finished working to exploit the possibilities connected with early retirement in case such person worked or conducted other economic activities on own behalf within the territory of Republic of Poland and resided within the territory of Republic of Poland continuously for the period of more than three years;

2) Employee or a self-employed person who ceased to work or to conduct economic activities on own behalf within the territory for the reason of permanent inability to perform work, in case this person resided within the territory of Republic of Poland continuously for more than two years;

3) Employee or a self-employed person, who, after working continuously for the period of three years within the territory of Republic of Poland, performs work or other economic activity in other Member State, residing at the same time within the territory Republic of Poland or visiting territory of Republic of Poland at least once a week.

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3  *Journal of Laws* of 2011 no. 264, item 1573.
Performance of job or performance of other form of economic activity on own behalf in other Member States is also considered to be performance of job or performance of other form of economic activity on own behalf within the territory of Republic of Poland. These provisions apply also in case of the employee or person working on own behalf who, while retaining residence within the territory of Republic of Poland, performs job or other form of economic activity in other Member State and ceased the performance for the reason of permanent inability to perform work.

The requirements concerning the length of continuous residence and performance of work or other form of economic activity on own behalf as well as the requirement concerning the length of continuous residence do not apply to the spouse of Polish national.

The requirement concerning the length of continuous residence does not apply in case the cessation of work or other form of economic activity on own behalf is caused by permanent inability to perform work resulting from accident or occupational disease.

The periods of job performance or performance of other form of economic activity on own behalf include:
1) The periods of unintentional unemployment as registered in Poviat employment office registers;
2) Periods of cessation of employment or performance of other form of economic activities on own behalf that do not depend on the will of the person
3) Periods when the work was not performed or other form of economic activities were not performed as result of illness or accidents.

The right of permanent residence as obtained by the employee or person working on own behalf on the basis of Art. 45 above extends to the family member who resides with such person within the territory of Republic of Poland, without regard to this person citizenship. In case the employee or person working on own behalf dies during the period of employment or performance of other form of economic activity before obtaining the right of permanent residence on the basis of Article 45 above the family member who resided with such person within the territory of Republic of Poland in the day of this person death, shall be granted the right of permanent residence without regard to this person citizenship, if:
1) The employee or person working on own behalf resided within the territory of Republic of Poland at least for two years before death or
2) The death of the employee or person working on own behalf was caused by accident or occupational disease.

*Art. 24.2. of the Directive 2004/38:*

The Act on entry does not implements directly the provision of Art. 24.2 of the Directive. However it does not mean that in Polish legislation non active EU citizens and their family members shall be entitled to social assistance prior to acquisition of permanent residence right.

Jobseekers are not entitled to any social assistance during the period when they (even actively) look for a job in Poland. The same situation concerns Polish citizens seeking for employment, as they are not also entitled to any financial support. So no discrimination is applicable.
Students are excluded from the general rule of equal treatment as regards access to social assistance. They and their family members are entitled to pursue studies (master and PhD as well as other forms of education) on the same basis as Polish citizens, however, they are excluded from the right to be granted maintenance aid. Article 43 para 5 of the Act of July 27, 2005 on Higher Education (Ustawa o szkolnictwie wyższym) states that EU citizens and members of their families (as well as citizens of Switzerland and European Economic Area Member states), who are not economically active, cannot benefit from social assistance – i.e. maintenance aid for students, special maintenance aid for disabled and aid payment.

Art. 43 para 5 of the Act has been changed since the two last reporting periods. As from October 1, 2011, non-economically active individuals cannot benefit from 3 kinds of social benefits, as mentioned above. Before the amendment, they also could not benefit from accommodation and meals grant. In the explanation to the amendment there is no reasoning of making such a differentiation. However, as in the Act still such social benefits for students as accommodation and meals grant are available, taking into account the general rule on equal treatment of EU students in comparison with Polish students, such an amendment leads to a conclusion that non-economically active citizens shall have a right to be granted these two kinds of social support.

2. SITUATION OF JOBSEEKERS

No direct implementation of Art. 14.4.b of the Directive is made in the Act on entry. There are no special provisions concerning jobseekers in this Act. Therefore general rules are applicable to them - periods of stay of EU citizen or members of his family up to 3 months are not subjected to any requirements other than requirement to have valid identity card or passport (and in case of third country national visa where necessary).

Conditions to be expelled from the territory of Poland are collectively described in Chapter 5 of the Act on entry. EU citizens may receive an expulsion decision in the case when their behaviour constitutes a threat for defense policy or national security as well as for public safety, public order or public health. No reference to financial position is made, therefore it is not possible to expel EU jobseeker on these grounds. Additionally, art. 11a of the Act shall be accordingly taken into account. It requires to apply a proportionate rule when deciding on refusal to grant visa for TCN family member as well as refusal to entry the territory of Poland for both EU citizens and TCN. The provision directly prohibits to take into account economic reasons while issuing such decisions. This provision shall be also taken into account while deciding on expulsion. Therefore lack of sufficient resources shall not be a justified reason to expel jobseeker from Poland.

The status of jobseeker is defined in the Act of April 2004, 20 on promotion employment and labour institutions (ustawa o promocji zatrudnienia i instytucjach rynku pracy). Jobseekers, irrespective their nationality are not entitled to receive any financial benefits. There is a clear distinction between definition of ‘jobseeker’ and ‘unemployed’ seeking for a job. The status of unemployed may be granted only to those who have worked out a certain period (generally period of 365 days within the last preceding 18 months) and are eager to take

6 Journal of Laws of 2011, no. 84, item 455.
7 Journal of Laws of 2008, no. 69, item 415.
up further employment. Only such category of jobseekers may be entitled to unemployed benefit.

Jobseekers, not having the status of unemployed are only entitled to non-financial forms of support, such as in general assistance to find a job or to attend various workshops and vocational trainings that aim at raising his qualifications in order to find a job. No financial assistance can be granted.

A jobseeker may be deprived a status of jobseeker for a period of 120 days if inter alia he/she does not confirm within period of 90 days the eagerness to look for a job. Additional cases which causes lost of jobseeker status are as follows: a jobseeker has not attended meeting organized by Poviat Employment Office and has not informed the Office about justified reasons of the absence; he/she has not taken up or resign from taking part in individual plan of activation, trainings, etc.

As regards the definition of unemployed and jobseeker, there is an important difference. Definition of jobseeker covers also family members of EU citizens, whereas definition of unemployed does not cover family members of EU citizens.

In obtaining status of unemployed and jobseeker, that are no discriminatory rules between Polish citizens and EU citizens. If both categories of individuals fulfill requirements that are applicable to either unemployed or jobseeker, then all these categories of applicants shall be granted relevant status, irrespective of nationality.

According to the Act on promotion the jobseeker shall register his status in the poviat employment office (i.e. district job center, Art. 33.1). A jobseeker is registered after presenting documents indispensable to identify his status and rights. However, this registration is irrelevant from the perspective of registration of stay procedures before the Foreigner’s Affairs Units in relevant Provincial Offices that register stays of EU migrant citizens and members of their families).

No reference to the Antonissen case can be found neither in the law nor in the administrative guidelines.

As regards Act on promotion, the jobseeker shall react on all forms of support given by the poviat employment office. Otherwise, he will be deprived the status and none means of support to find a job will be available.

3. OTHER ISSUES OF CONCERN

A. In the last Report, the reference to the new Act of September 24, 2010 on evidence of people (ustawa o ewidencji ludności) has been made. The Act was planned to enter into force on January 1, 2013, but the date has been postponed and currently it shall enter into force on January 1, 2015.

The Act on evidence directly states in Art 74 that the obligation to register (within the meaning of ‘obowiązek meldunkowy’) will be deleted as from January 1, 2016.

Currently, the Act on evidence of people and registration documents of April 10, 1974 (ustawa o ewidencji ludności i dowodach osobistych) is in force. There is an obligation for EU citizens and members of their families to register their stay.

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8 Journal of Laws of 2010, no 217, item 1427.
The relevant provisions of the Act have been changed since last year Report with the effect as from December 31, 2012.

According to the new wording of the Act, EU citizens and members of their families are obliged to register their stay (within the meaning ‘obowiązek meldunkowy’) for permanent or temporary stay exceeding 3 months within 30 days upon arrival (Art. 24 of the Act). The previous wording of this Article required from EU citizens and members of their families to register their stay if the period of stay in Poland exceeds 3 days and they do not stay in a hotel, hospital or university premises.

What is important, the above amendment repealed the obligation to register the stay for EU citizens and members of their families when the period of stay does not exceed 3 months. Such an obligation does not apply also to Polish citizens, but still applies to other foreigners (other than EU citizens and members of their families). In the explanation to the draft, the aim of the amendment is to simplify and facilitate fulfilling formalities for EU citizens and members of their families in order to fulfill provision of Art. 18 of the Treaty which prohibits all forms of discrimination on basis of nationality. According to authors of the amendment, if there is no obligation to register for stays not exceeding 3 months for Polish citizens, such a provision shall also apply to EU citizens and members of their families.

B. The issue of free movement of workers is not on high political agenda in Poland. The main reason for such an approach is the minor scale of migration. Poland is not a popular destination country for migrating workers.

Below there are figures showing the scale of migration in 2012:

<table>
<thead>
<tr>
<th>NATIONALITY</th>
<th>Applications for registration of stay</th>
<th>Applications for registration of permanent stay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall 2012</td>
<td>7433</td>
<td>844</td>
</tr>
<tr>
<td>Including most popular:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GERMANY</td>
<td>2254 (30,32%)</td>
<td>172 (20,38%)</td>
</tr>
<tr>
<td>SPAIN</td>
<td>612 (8,23%)</td>
<td>18 (2,13%)</td>
</tr>
<tr>
<td>ITALY</td>
<td>608 (8,18%)</td>
<td>98 (11,61%)</td>
</tr>
<tr>
<td>GREAT BRITAIN</td>
<td>447 (6,01%)</td>
<td>83 (8,7%)</td>
</tr>
<tr>
<td>BULGARIA</td>
<td>356 (4,79%)</td>
<td>97 (11,49%)</td>
</tr>
<tr>
<td>FRANCE</td>
<td>545 (7,33%)</td>
<td>47 (5,57%)</td>
</tr>
</tbody>
</table>

In 2012, 153 (in comparison with 89 in 2011) applications for registration of stay were submitted by family members of EU citizens and 16 (in comparison with 3 in 2011) for registration of permanent stay.

In comparison, below there is a list of the most popular third country nationals who applied in 2011 for a stay for a temporary period in Poland:

<table>
<thead>
<tr>
<th>NATIONALITY</th>
<th>Applications</th>
<th>Permits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall</td>
<td>44145</td>
<td>34478</td>
</tr>
<tr>
<td>Including most popular</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UKRAINE</td>
<td>11 743</td>
<td>9906</td>
</tr>
<tr>
<td>VIETNAM</td>
<td>4819</td>
<td>3844</td>
</tr>
<tr>
<td>CHINA</td>
<td>3398</td>
<td>2813</td>
</tr>
<tr>
<td>BELARUS</td>
<td>2028</td>
<td>1856</td>
</tr>
</tbody>
</table>
4. **Free movement of Roma workers**

There is the Governmental Programme on Roma society in Poland. The Programme has been launched in 2003 and every year there is a new edition of the Programme. The last edition of the Programme has been executed in 2013. However, it does not mean that there will be no continuation of the Programme. The Polish government has prepared the new Programme covering years 2014-2020. The main aim to support Roma population in education, employment, health and accommodation. However, the Programme has not been formally implemented yet.

The current as well as the future Programme will be also executed by regional authorities in each voivodships in Poland. The aim of the Programme is to support Roma population in Poland mainly in education and health. Additionally, the aim of the Programme is to support Roma population to find a job in Poland. However, as there is a problem with unemployment between Polish citizens, there are no real practical effects of this support as regards Roma population.

The draft of future Programme for period 2014-2020 is available now. The vital problem addressed by authors of the draft is the fact that Roma population is quite isolated from Polish society in general, as some traditional Roma communities are very hermetic and they defend their independence.

Every year about 13,000,000 PLN (2,800,000 EUR) is devoted to execution of the Programme.

There is a joint Committee of Government and National and Ethnic Minorities where there is a special subcommittee devoted solely to Roma issues and which regularly meets (on monthly basis) to discuss the most important issues concerning Roma population in Poland.

The Roma community is regarded in Poland as one of national and ethnic minorities according to the Act of January 6, 2005 on National and Ethnic Minorities and Regional Language (ustawa o mniejszościach narodowych i etnicznych oraz o językach regionalnych). On basis of the Act, Poland shall give Roma community legal protection and assistance. Additionally, according to Art. 35.2 of the Constitution, national and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity.

Around 20,000 – 25,000 Roma people live in Poland. However, according to the national census that was done in 2011, Roma affiliation was declared by overall 16,000 respondents. 12,000 respondents declared such an affiliation upon first question, and additional 4,000 after explanations by the interviewers. The problem with estimations of Roma people are based on the fact that according to Polish law it is forbidden to process personal data such as ethnic origin. Therefore majority of figures are only estimated. It is also the reason why Polish authorities decided to execute the programme on regional and not central level, hoping that regional authorities with regional bodies such as schools, social welfare centers will be much more aware of real situation and needs of Roma population at their territory.

According to analysis of the Polish Ministry of Administration, the Roma population is the most isolated minority in Poland. Additionally there is a general distance of Polish population to Roma society.

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10 *Journal of Laws* of 2005, no 17, item 141.
Chapter II
Members of the Family

Main texts in force:
1) Act on entry of July 14, 2006
2) Act on civil acts of September 29, 1986

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

Art. 2 para 4 letters a-c of the Act on entry contains the definition of family members of EU citizens. Following group of beneficiaries shall be qualified as family members for the purposes of the Act (irrespective of their nationality):

a) spouse,
b) direct descendants of EU citizen or his spouse who are under the age of 21 or are dependants of EU citizen or his spouse,
c) direct ascendants of EU citizen or his spouse who are dependants of EU citizen or his spouse.

There is no recognition of registered partnerships either between same or different sex partners in Polish legal order. Therefore consequently no registered partnerships are recognized in the Act on entry as family members.

Due to political situation in Poland, there are no real chances for the act on registered partnerships to be introduced in this of next term of Polish parliament.

The Act on entry itself does not contain any provision that implements Art. 3.2 of the Directive on facilitation measures for other members of family, that are outside the scope of definition of family members (i.e. extended family members). Therefore this provision is not implemented at all. However, there are practical problems connected with application of this provision. During the reporting period the issue was within the sphere of interest of Administrative Court in Warsaw (twice), the Board Guard and the Helsinki Foundation of Human Rights.

In August 2012, the Polish Border Guard denied the right to entry for citizen of Dominican Republic, holding the status of partner of Polish citizen. Both of them were returning from United Kingdom to Poland. They have entered into a formal partnership which was recognized by British law. The applicant had valid passport and valid card for stay as a member of EU citizen family issued by British authorities on basis of the act implementing Directive 2004/38, but did not have visa. Consequently, the Border Guard denied entry the territory of Poland for the applicant referring to the fact that the applicant did not fulfill obligations listed in the Act on foreigners. The Border Guard did not apply none of provisions of the Act on entry, as the applicant could not be treated as member of family of migrating Polish citizen due to the fact that Poland does not recognize same sex partnerships. So the requirements enshrined in Art. 2 b of the Directive were not fulfilled. The Main Board Guard sustained the decision and the applicant made a complaint to the Court. He claimed he shall have been qualified as so called extended family member and Art. 3.2.b of the Directive 2004/38 shall have been applied.
The Administrative Court in Warsaw referred to Art. 3.2.b of the Directive and stated that as a consequence of not implementing this provision into the Act on entry, there is an obligation to apply this provision directly. Additionally, the Court referred to the obligation of European interpretation of national law. Consequently, although the Border Guard in conformity with Polish law did not recognize the status of family member of Polish citizen for the applicant on basis of Art. 3.1 of the Directive, he was obliged to analyse if requirements listed in Art. 3.2.b were fulfilled. According to this provision, he shall have first checked if applicant remained in the durable relationship with Polish citizen (as the condition of duly attested relationship due to the fact of having it formally registered in the UK had been fulfilled). Therefore the Court obliged the Border Guard to check once more before issuing any decision if there are any circumstances that shall be taken into account in the light of Art. 3.2.b of the Act.11

Moreover, similar case is also pending before the Administrative Court in Warsaw.12 As a consequence of this judgment, the Border Guard on June 18, 2013 informed the Helsinki Foundation of Human Rights, that the special circular on application of Art. 3.2 of the Directive has been created.13 According to the circular:

i. art. 3.2 of the Directive shall be directly applicable by representatives of the Border Guard

ii. there is the obligation to facilitate entry and stay for ‘any other family members’ as defined in Art. 3.2.a of Directive and partners being in durable and duly attested relationship.

iii. in situation when the EU citizen (including Polish citizen) makes use of EU free movement rights and his accompanied applicant qualifying to one of categories listed in Art. 3.2 of the Directive does not possess visa or other equivalent document entitling him to entry the territory of Poland, this applicant shall be granted visa valid for 15 days on basis of Regulation 810/2009.

iv. in order to prove fulfillment of Art. 3.2.b whenever applicable, it is necessary to take from applicant the declaration confirming the fact of having a durable relationship together with presenting the document (or its copy) formally attesting such a relationship.

v. it shall, however, be clear that a foreigner falling into one of categories of Art. 3.2 of the Directive is still third country national who does not have automatically the right to stay on basis of the Directive 2004/38 and the only obligation for Member State is to facilitate his entry and stay.

vi. whenever the decision denying entry territory of Poland is issued, it is enough to do it on a sample available in the Regulation 562/2006.

The judgment of the Administrative Court in Warsaw, although not having a precedence effect, has significantly changed the position of the Border Guard and clarified rules concerning practical interpretation of personal scope of Directive 2004/38.

12 File no. IV SA/Wa 2093/12.
13 The Foundation was a party to a proceeding before the Administrative Court – as it has made use of the right to join to the complaining Dominican citizen.
Reverse discrimination

The issue of reverse discrimination is not directly tackled in the Act on entry. However, the issue has been recognized by Polish courts in the light of principles of equality as one of main principle defined in Polish constitution.

From the last reporting period there have been no new judgments concerning reverse discrimination. However, the general rule is that reverse discrimination as contrary to the principle of equality (enshrined in Polish courts) shall be prohibited under Polish law.

In the judgment of Constitutional Tribunal on biofuels, that was announced on April 21, 2004, the Tribunal stated that the scope of the freedom enjoyed by the legislator in enacting regulations concerning restrictions on economic freedom, its delimitation and the interpretation of the notion of ‘important public reasons’, as contained in Article 22 of the Constitution, must be assessed in the light of Poland’s participation in the European Common Market.

This shall have particular consequences in relation to the constitutional assessment of reverse discrimination – understood as enacting restrictions on economic freedom which apply only to nationals, since their application to other EU citizens is prohibited by EU law. Whilst discrimination against national entities is irrelevant in the light of Community law, it is the constitutional duty of national authorities to protect against such discrimination. Therefore, although the issue of reverse discrimination is irrelevant from the perspective of EU law and even if the Act on entry does not contain provisions that prohibits the application of reverse discrimination, it does not mean that the possibility to apply the reverse discrimination is acceptable under Polish law.

The comprehensive analysis of the problem of reverse discrimination was done by the Supreme Administrative Court in judgment of November 24, 2008. Provisions on expulsion as stated in the Act of aliens and in the Act on entry were analysed, with special emphasis on the problem of expulsion of family members of Polish citizens. However, due to the factual background of the case, the Act on entry was not applicable. But it has not limited the Court to make a reference to provisions of the Act on entry. The analysis of the Act on entry leads to a conclusion that the Act is generally applicable to situations when there is a transnational factor.

However one remark shall be done – Art. 16.2.4 of the Act on entry states that the right to stay for a period longer than 3 months shall be given also to spouse of the Polish citizen. In such a situation there is no requirement for Polish citizen to exercise the right to move. Therefore in case when there is no situation of moving or residing in other Member State than that of which the beneficiary is a national, then the Act on entry may not be applicable and the wholly internal rules are applicable – therefore provisions of the Act on aliens shall apply. According to the Court such a situation shall not relieve the relevant national court to make a comparison between wholly internal provisions and EU provisions in order to assess whether the only differentiating factor is based on the use of free movement rights and whether in consequence an individual is treated in a worse manner solely because he has not made use of free movement rights.

There is a general obligation put on courts to combat against differing the situation of individuals who are in the same factual and legal position while the only factor that distin-
guishes them is the fact of (not) making use of free movement rights. Therefore whenever the court comes to a conclusion that such a situation takes place, irrespective of fact that the wholly internal rules treat in a less convenient way the applicant in comparison with EU rules that cannot be applicable in a given situation, then the court shall not apply rules that are less favourable.

In the analysed case, the factual position of the applicant was so peculiar that it was impossible to apply Act on entry even if the requirement of transnational factor would be fulfilled. But the Court clearly stated that assuming the factual position would be comparable, than without any doubts the position of the applicant under the Act of entry and the Act on aliens as regards expulsion possibilities is far more different. Under Art. 67 of the Act on entry the decision on expulsion concerning Union citizens or their family members without Union citizenship, who enjoy the right of permanent residence, may be taken in the case when their residence on the territory of the Republic of Poland constitutes a serious threat for defence policy or national security, as well as for public safety or public order. Additionally the Act on entry requires in the proceedings related to expulsion of EU citizen or his/her family member without Union citizenship, following factors to be taken into account:
1) how long the individual concerned has resided on the territory of the Republic of Poland;
2) his/her age and state of health;
3) family and economic situation;
4) social and cultural integration into the Republic of Poland; and
5) the extent of his/her links with the country of origin.

According to Art. 89 para 1 of the Act on aliens, no obligatory factors are needed to be assessed and the decision on expulsion may be taken when the individual constitutes not a serious but ‘normal’ threat for public security or defence. Surely regulation of Art. 67 of the Act on entry in comparison with Art. 89 of the Act of aliens is more favourable for beneficiaries of Art. 67 of the Act on entry.

In such a situation, according to the Supreme Administrative Court and according to the Constitutional Tribunal, the relevant national court shall not permit to make differentiation between foreigners and nationals when their factual and legal position are exactly the same and the only difference is the case of making use of free movement rights.16

2. ENTRY AND RESIDENCE RIGHTS

Entry and residence rights of family members of EU citizens, irrespective their nationality are regulated mainly in the Act on entry. No further amendments in comparison to last year Report have been implemented.

The provisions of the Act on entry regarding requirements to entry into territory of Poland for family members of EU citizens are compatible with Directive 2004/38.

Entry:

Family members who are EU citizens, may enter the territory of Poland on presence a valid travel document or other valid documents confirming their identity and citizenship. As regards non EU family members, they may enter the territory of Poland on presence a valid travel document and visa, unless respective provisions do not state otherwise. The obligation to have visa does not apply to a national against whom the visa obligation was lifted partially or in whole, according to Regulation 539/2001 or in cases when such an individual does posses valid document that is equivalent to residence card or permanent residence card or valid residence card issued on basis of Act on aliens.

Art. 7a of the Act on entry enables EU citizens and members of their families, irrespective of their nationality, in cases where it is impossible to present valid travel document or identity card, to prove their identities by other ways than showing official documents only if it is possible to confirm in other ways their identity and nationality without any doubts. As has been mentioned in this Chapter, there is an obligation, as from June 2013, to grant for extended family members visa for 15 days on basis of Regulation 810/2009 if applicants do not possess visa or other equivalent document entitling to entry territory of Poland.

According to Art. 10 of the Act on entry, non EU citizen shall be granted Schengen or domestic visa in order to enable such a person to join or stay with EU citizen in Poland. The refusal to grant such a visa is only admissible if their data are included in the special list of not welcomed individuals according to the Act on aliens and if their stay may possess a threat to the defense or security of Poland and public order or health. Art. 11 of the Act on entry state reasons when EU citizen and members of their families are refused to enter to Poland – except for reasons that are grounds for refusal of visa, also the fact of not having relevant identity documents and visa in case of third country nationals may cause such a decision. However, if the applicant may in this last situation, i.e. despite not having identity documents, prove without doubts that he/she is entitled to make use of free movement rights, he shall be entitled to enter Poland.

Moreover, according to art. 11a of the Act the decision on refusal of both granting visa and entry to Poland when the behavior of the applicant may pose a threat for public safety, public policy or public health shall be analysed always in the light of the proportionality test. Therefore only if an individual behaviour represents genuine, present and sufficiently serious threat affecting interests of society such a negative decision may be issued. Additionally, the earlier penalty of applicant cannot be the sole ground for issuance of such a decision as well as any economic reasons may not be base for such a decision. The respect for protecting family life shall be always taken into account. Therefore Polish authorities are obliged to make a balance between the obligation to protect family life according to obligation stemming from inter alia Art. 8 of the European Convention of Human Rights and obligation to protect safety of Polish society. As the obligation to protect family life is not absolute, then it may be under justifiable conditions restricted. According to Polish Administrative Supreme Court, the proportionality obligation requires to consider family and personal situation of the foreigner, including the length of stay of the applicant in Poland and possible hindrances for stay with family at home country.17

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17 Judgment of November 30, 2005, file no. II OSK 1706/06. Although this ruling was based on the Act on aliens and not on the Act on entry, the analysis is also valid as regards Act on entry,
According to information gathered by the rapporteur from national authorities there is a huge awareness that it is extremely difficult to lawfully expel the EU citizen or members of their families from Poland or restrict their entry to the territory of Poland. As a result in 2012 no such decision was taken against them, unlike TCN not having a status of family members where 32 138 decisions denying entrance, 967 decisions on expulsion and 5890 decisions obliging to leave Poland were taken.

Residence:

Family members (both EU and non EU) may reside in the territory of Poland for a period up to 3 months without the need to meet any requirements other than having a valid identity cards, passports and visas where applicable.

Unlike the situation as analysed in the last report, they are now also released while staying less than 3 months from the obligation to register their stay within the meaning of ‘obowiązek meldunkowy’. The Act on evidence of population and ID cards of April 10, 1974 (ustawa o ewidencji ludności dowodach osobistych)\(^\text{18}\) which made the obligation to register not later than on the 4th day upon arrival to Poland has been deleted (which shall be assessed positively in the light of obligations contained in the Directive 2004/38).

As regards residence rights for a period longer that 3 months for family members irrespective of their nationality, there is a distinction. Family members as defined in the Art. 2.4 of the Act on entry have a right to accompany EU citizen, who is either an employee, self-employed person in Poland.

However, as regards family members of migrating students or individuals covered by the general health insurance or entitled to health insurance and being in possession of enough funds to provide for them and himself enough funds in order not to ask for social insurance benefits, only spouses and dependent children are entitled to accompany them. It is in line with Art. 7.4 of the Directive 2004/38.

The right to accompany EU citizen by his/her family members does apply to family members of EU citizen who is no longer employed or does not undertake self-employment as a result of temporarily inability to work as the result of an illness or accident or in case of involuntary unemployment in accordance with the unemployment register kept by the Poviat Employment Office (when the period of engagement in gainful activity has amounted to less than one year, the Union citizen shall retain then the right to reside for period of 6 months from the date of registration in the Office). Lastly, the right to accompany by his family members applies to EU citizen who has decided to finish engagement in gainful activity in order to embark on educational or vocational training.

Moreover, members of family are entitled to retain the rights of residence in case of divorce, annulment of marriage or death or exit from the territory of Poland of EU citizen according to the same conditions as defined in Directive 2004/38 (Art. 13).

Additionally, according to Art. 19 a of the Act on entry there is a right to stay in Poland for studying children and their parents who have custody over them. The amendment to the Act that introduced in 2011 the new Art. 19a is a consequence of Ibrahim and Teixera case law (as was directly stated in the explanation to the amendment by the Polish legislator).

\(^{18}\) Journal of Laws of 2006, no. 139, item 993.
If the residence in the territory of Poland is longer than 3 months, than a family member who is not EU citizen shall be obliged to apply for residence card of EU family member. The right of permanent residence is certified by a document certifying the permanent residence right in case of EU citizen. In case of non EU citizen, he/she is obliged to apply for residence card.

Application for abovementioned cards are now free of charge, as a consequence of the fact that application for ID is now free of charge. It is compatible with obligation stated in Art. 25.2 of the Directive 2004/38.

Family members of EU citizens are entitled to be granted a right to permanent stay after five years of continuous and legal stay in Poland. If, according to the Act on entry (which provisions fully implement relevant provisions of Directive 2004/38), the EU citizens shall be granted a right to permanent stay before the general requested period of 5 years of legal stay in Poland, also consequently, their family members who reside with them in Poland shall acquire such a right.

It was possible to be granted a right to permanent stay for both EU citizens and members of their families before the elapse of 5 years of execution of the Act on entry provided that the applicant was staying legally in Poland for the given period.

Moreover, there is a possibility for family members to be granted a right to permanent stay, if such applicants retained the right to stay in case of divorce, annulment of marriage with EU citizen or his death and during this time of stay have fulfilled all obligations for legal stay. Art. 44 of the Act on entry directly refers to this case (as regulated in Art. 19 of the Act on entry).

3. **Implications of the Metock Judgment**

The Act on entry as regards family members of EU citizen does not demand any requirement to have previous lawful residence in Poland. Therefore, the Polish Act implements Art. 3 para 1 and Art. 2 point 2 of the Directive 2004/38 correctly. According to Art. 9 para 1 and 2 of the Act, Union citizen may enter the territory of Poland on the grounds of a valid travel document or other valid documents confirming their identity and citizenship. Family member who is not Union citizen may enter the territory of the Republic of Poland on the grounds of a valid travel document and visa (except for cases where visa is not required). Art. 10 para 1 of the Act on entry states that a family member who is not Union citizen shall be issued an entry visa for stay or to join a national of the Member State. The Act on entry does not require from a family member to previously lawfully reside in another Member State before entering Poland. Of course, the situation of illegal stay in previous Member State may be analysed while considering denial to enter the territory of Poland – however, such decision may be taken only when one of 3 situations take place as stated in Art. 11 of the Act on entry (i.e. when his personal data has been entered into the list or he does not have ID or visa where applicable or his stay may pose a threat for safety). Surely, the sole fact of previous illegal stay in other MS does not give the right to deny entry at the territory of Poland.

This situation has not changed since last reporting period. Moreover there have been no declared problems with the execution of the Act on entry in the light of Metock judgment.
4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCE AND FRAUD:

The Act on entry contains comprehensive regulations on sham marriages (marriages of convenience). Art. 25 of the Act has not changed since the last Report.

Art. 25 lists all factors which shall be taken into account while assessing if a marriage has been a marriage of convenience. These factors are as follows:
1) one of the spouses accepted a financial benefit in return for the consent for contracting a marriage, unless it results from a custom established in a given state or a social group;
2) the spouses do not fulfil the legal responsibilities arising from the marriage;
3) matrimonial cohabitation is not maintained;
4) the spouses have never met before their marriage;
5) the spouses do not speak a language understood by both;
6) the spouses are inconsistent about their respective personal details and about other important circumstances concerning them;
7) one or both of the spouses had contracted a marriage of convenience in the past

Following consequences shall be applicable when declaring a marriage as marriage for convenience according to the Act on entry:
1) refusal of granting residence card or a document certifying right for permanent residence for a non EU family member,
2) cancellation of residence card for the family member of Union citizen

It shall be mentioned that the Polish Penal Code penalises cases of marriages of convenience. A person who, in order to gain personal or property benefits, facilitates or enables third person stay in Poland unlawfully, is liable to penalty of imprisonment between 3 months to 5 years. This provision may also contain cases of marriage of convenience. Additionally such a person shall be liable for attestation of untruth which is punishable on conviction of fine, restriction of liberty or imprisonment between 3 month to 5 years. However, if no personal or property benefits are given to such a person, there is no possibility to punish such a person.

There are no statistics as to the scale of marriages of convenience entered solely in order to abuse the Directive 2004/38 itself. Some statistics done in Poland are more general – they contain the overall number of cases of marriages of convenience. In 2011 there were 128 of such cases according to data given by Border Guard. And it is claimed that around 10% of refusal decision to grant right of entry or right to stay is based on the fact that there has been a sham marriage.19

Similar provisions concerning marriages of convenience are included in the Act on foreigners and they are applicable to all those categories of foreigners, who cannot be beneficiaries of the Act on entry. According to the Act on foreigners, following circumstances may to lead to a conclusion that a given marriage is taken for convenience (art. 55.1.1-7):
1) one of the spouses has accepted material profit in return for expressing a consent to conclude the marriage unless it is an established custom in the state or social group concerned;

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19 Report on abusing right to family reunion prepared by the National Migration Contact Point in Poland, April 2012.
2) there is the lack of an appropriate contribution to the responsibilities arising from the marriage;
3) the spouses do not maintain matrimonial cohabitation;
4) the spouses have never met before their marriage;
5) the spouses do not speak a language understood by both;
6) the spouses are inconsistent about their respective personal data and other important personal information concerning them;
7) the past history of one or both of the spouses contains evidence of previous marriage of convenience.

The existing judgments concerning marriages of convenience are based on the Act on foreigners, and not on the Act on entry. It shall be mentioned that according to courts in order to declare marriage as taken for convenience, thorough investigation shall be taken. For example, according to the judgment of the Administrative Supreme Court, situation when spouses do not agree to personal data and other relevant factors that affect them is not enough to assess that marriage was concluded in order to circumvent the rules on granting a residence permit for a fixed period, but only qualifies for a procedure allowing to determine whether the marriage was contracted for this purpose.²⁰

The similar position has been taken by the Administrative Court in Warsaw, which claimed that finding of one of the circumstances mentioned in Art. Paragraph 55. 1 Section 1-7, requires the awarding authority to conduct proceedings to determine whether the marriage was concluded convenience. However, this does not automatically leads to a conclusion that the marriage is a sham marriage.²¹

5. ACCESS TO WORK

Family members of EU citizen according to Act on promotion employment and labour institutions of April 20, 2004 (ustawa o promocji zatrudnienia i instytucjach rynku pracy)²² shall be treated in the same way as regards access to work in Poland as EU citizens.

Although Art. 87 of the Act has been changed since the last Report, it has not been changed in respect to family members of EU citizens.

They are not obliged to receive work permit in order to take up employment in Poland. The scope of family members that are entitled to take up employment without previous permission is in line with definition of family member contained in Directive 2004/38.

Therefore family members, irrespective of their nationality, benefit from privileged status in comparison with other third country nationals. In general as regards access to work they shall have the same status as Polish citizens.

As regards family members of Polish citizens, their spouses and descendants (and not ascendants) shall have a right to take up employment if they have permission to stay in Poland for a given period (Art. 87.2.2 and Art. 87.2.3 of the Act). Taking into account provision of Art. 16.1.4 of the Act on entry which entitles spouse of Polish citizen to have a right of stay at territory of Poland for period longer than 3 months, conclusion is that such a spouse shall

²⁰ File no. II OSK 1142/05, judgment of April 27, 2006.
have a general right to take up employment without permission. As regards descendants, the obligation to have a permission to stay shall be analysed in the light of the issue of reverse discrimination as analysed in this Chapter.

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

No provisions of job seekers and members of their families are directly defined in the Act on entry.

However, the Act on promotion of employment and labour institutions defines the legal status of both EU citizens and members of their families that are job seekers.

Art. 2.1.22 of the Act defines the notion of ‘job-seeker’. It covers, unlike the definition of unemployed, also family members of EU citizens. Also as a job-seeker shall be qualified a foreigner – member of family of Polish citizen. However, the analysis of definition of family members as stated in Art. 2.8 of the Act on promotion leads to a conclusion that ascendants are not qualified as members of family, so consequently they are not entitled to benefit from status of job seekers.

The support for jobseekers does not cover material support for neither Polish nor EU citizens and members of their families. If someone possesses the status of jobseeker than he is entitled to be granted following benefits: right to help to find a job, right to attend specialized trainings or seminars, workshops and vocational trainings.

7. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES)

Although the below problem is not directly connected with social and tax advantages, according to the rapporteur it shall be mentioned as the problem is currently under high agenda in Polish mass media.

There are reported situations that Polish citizens who are eager to enter into same sex marriage or partnership abroad cannot obtain a certificate to enter into marriage/partnership. According to Art. 71.1. on the Act on civil status, Polish citizen and foreigner residing in Poland who plan to enter into marriage abroad may be granted the certificate that they are entitled to enter into marriage in conformity with Polish law. The application form contains a special field where the applicant is obliged to enter name of future partner. The specimen of the certificate is regulated by the Regulation of the Minister of Administration and Internal Affairs of October 26, 1998.23

The practice in relevant authorities is to deny granting such certificate if the applicant declares in the application form (which is mandatory to be filled in) that he would like to enter into same sex partnership abroad. The reasoning is as follows: taking into account that Art. 71 of the Act on civil status directly provides that a certificate may be granted if an applicant fulfills requirements to enter into marriage under Polish law, so consequently no certificate shall be granted if a given future relationship cannot be lawfully executed in Poland.

Such a provision in the opinion of rapporteur unjustifiably restricts the possibility for Polish citizens to make use of provisions of other EU legislations in the sphere of family law and to enter into same sex partnership abroad. In June this year there was a case widely

commented in media that two Polish citizens residing in France wanted to enter into partnership in France. They were only obliged to present in France a certificate that they are not married. However, Polish official refused to issue such a certificate due to the fact that applicants declared the future partner/spouse. The official explained that due to the fact that they wanted to enter in same sex relationship, taking into account provisions of Polish constitution according to which a marriage is a relationship between man and woman, it was not possible to issue such a certificate. Art 18 of the Polish Constitution states that marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.

However, this problem was analysed by Administrative Court in Gdańsk 5 years ago. The factual background was almost identical as the abovementioned, since Polish citizen wanted to enter into same sex partnership in Germany. The Court clearly stated that the aim of the applicant to have such a certificate cannot be analysed by relevant authorities. Art. 71 of the Act on civil status (ustawa prawo o aktach stanu cywilnego) does not entitle to examine with whom, when and where the applicant plans to enter into marriage or other form of relation. The only competence is to check if the applicant is entitled to enter into marriage under Polish law (i.e. to check age, civil status). Additionally it is not necessary for the applicant to be eager to enter into marriage, the intention to be granted such a certificate is also irrelevant. The Court explained that different interpretation would lead to awkward situation when officials would be entitled to examine the most intimate plans and intentions of citizens which is absolutely contrary to art. 2 of Polish Constitution which contains the basic rule that Poland is a democratic state ruled by law.

This judgment is, however, still not recognized by relevant authorities which consequentially deny such a right for Polish citizens.

Two years ago, the Polish Minister of Administration declared to change the specimen of the application form. However, until now the application form has not been changed.

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Chapter III
Access to Employment

Most important texts in force:
1) Labour Code of June 26, 1974,
2) Act of April 20, 2004 on promotion of employment and labour institutions,
3) Act of November 21, 2008 on civil service,
4) Act of November 21, 2008 on self-government employees,
5) Chart on Teacher of January 26, 1982,
6) Act of September 7, 1991 on education system
7) Act of March 18, 2008 on the rules governing recognition of the professional qualifications obtained in EU Member States,

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

1.1. Equal treatment in access to employment (e.g. assistance of employment agencies).

The Act on promotion of employment and labour institutions regulates rules and conditions of taking up employment in Poland. It applies to both Polish citizens and EU citizens and members of their families.

EU citizens can make full use of all institutions provided in the Act on promotion to find a job, as well as to have support from employment agencies. There is a general prohibition to discriminate on basis of nationality and moreover on grounds of sex, age, disability, race, ethnic origin, sexual orientation, political views, trade union membership or religion persuasion. In addition to activities offered by employment agencies, EU citizens may also take part in various trainings, including vocational trainings that aim at facilitation of finding a job in Poland. Such a assistance is generally for free and in cases where it shall be paid, amount of payments are the same regardless if they apply to Polish or EU citizens.

These provisions prohibiting discrimination complement antidiscrimination provisions that are listed in the Labour Code. Therefore the rule of equal treatment for EU citizens and members of their families shall apply not only when they have been employed in Poland, but also on an earlier stage – i.e. when they are looking for a job and take part in various activities that aim at facilitation to find a job by them.

EU nationals (and members of their families) do not need to obtain work permit in order to take up employment in Poland. Art. 87 of the Act directly releases from such an obligation both EU nationals and their family members.

As from 17 January 2007 this rule applies to all EU citizens (earlier, Poland made use of reciprocal measures), including citizens from Bulgaria, Romania and Croatia. The same rule applies to member of their families. Croatian citizens are released from such an obligation as from July 1, 2013 due to decision of Council of Ministers. Due to information from the Minister of Labour, there is no threat of flow of Croatia migrants to Poland, as in 2012 only 365 work permits were issued for Croatian residents and according to Croatian statistical bureau, as from 2009 there has been a negative migration balance in Croatia. Therefore nationals of all 28 Member States have free access to work in Poland.
1.2. Language requirements

As regards employment in private sector in some professions knowledge of Polish language is required.

According to Art 30.1.2 of the Banking Act of August 29, 1997 (Ustawa Prawo Bankowe), there is a language requirement as regards members of management board. In order to establish a bank in Poland, at least two members of management board shall prove their knowledge of Polish language. However, it is possible that Komisja Nadzoru Finansowego (the Polish Financial Supervision Authority – the supervisory institution) in the form of decision issued at request of the founders, will depart from the requirement concerning proven knowledge of Polish language provided it is not necessary for prudential supervision, taking into account in a particular level of permissible risk or the scope of the activity of bank. The same rule applies to appointment of two members of management board, including president during the normal activities of functioning bank (i.e. not at the time of founding a bank).

This requirement applies irrespective if the Bank is private or public entity.

In practice, the applicant is not obliged to pass any formal exam, but to make a conversation with representatives of the Commission who assess the level of knowledge of Polish language. Practice shows that the Commission is not very strict while assessing language competences. Before passing such an exam, the Commission may issue a conditional decision accepting a relevant foreigner for a given post in Bank under condition of proving knowledge of Polish language within a prescribed period.

Very similar rules apply to members of management board of national insurance institutions according to Act on insurance activity of May 22, 2003 (Ustawa o działalności ubezpieczeniowej), also including the possibility to depart from such an obligation. Also it is the Polish Financial Supervision Authority that makes final decisions in this respect. Therefore all remarks done as regards banks shall be applicable to insurance agencies as well.

As mentioned above, the Financial Authority may depart a foreigner from the requirement to prove knowledge of Polish language. This rule applies equally to banks and insurance institutions. There is no difference between conditions to apply such an exemption basing on the nationality of the candidate.

The Polish Administrative Court explained that the possibility to exempt from the obligation to prove knowledge of Polish language shall not be treated as an exemption but shall be applied whenever the risk exposure is not serious. Moreover, according to the Court, the smaller insurance institution the less strict criteria shall be used while assessing the necessity to know Polish language. Although both Acts do not make a difference as regards nationality of potential candidate (EU or non-EU) and the only decisive factor shall be the objective assessment on the risk exposure and not the origin of the potential candidate, the Administrative Court in Warsaw stated that the requirement to prove knowledge of Polish language has been treated as an exception from the general rule of free movement of workers as stated in the TFEU. Therefore according to the Court, the possibility to release from such an obligation shall be analysed in the light of EU provisions of free movement of persons. The Court ruled that in the light of proportionality test, only reasons of public security, public
order or public health may explain lack of departure from such an obligation for EU citizen.  

However, the Supreme Administrative Court in Warsaw in its judgment, has taken a slightly different approach in comparison with the Administrative Court in Warsaw. The issue of requirement to prove Polish language by EU citizen was analysed by the Supreme Administrative Court in 2006 on the basis of the Act of insurance activity. One of the insurance agencies tried to declare the obligation to prove knowledge of Polish language by Austrian citizen as incompatible with EU free movement rights. However, the Polish court ruled (in the opinion of rapporteur in a correct way) that posing such a requirement is fully compatible with EU law in the light of Art. 3 of the Regulation 1612/68 according to which it is acceptable and compatible with EU law to apply requirements as regards linguistic knowledge required by reason of the nature of the post to be filled.  

In the opinion of rapporteur, the position of the latter Court is more adequate in the light of Regulation 492/2011, according to which it is generally acceptable to apply conditions relating to linguistic knowledge required by reason of the nature of the post to be filled. 

There is no direct requirement for foreign teachers to have a knowledge of Polish language. However, taking into account provisions of the Act of October 7, 1999 on Polish language (Ustawa o języku polskim), the teacher other than foreign language teacher shall have the sufficient knowledge of Polish language in order to be able to communicate with students. Art. 9 of the Act states that the Polish language is a working language in all educational entities either public or private. 

Moreover, Article 11a of the Act on Polish language provides a possibility to certify the knowledge of Polish language before a state exam commission. Such a possibility is opened to foreigners or Polish citizens permanently residing outside territory of Poland. On basis of this provision, Minister of Education and Sport has issued on October 15, 2003 the Regulation on exams on Polish language as a foreign language (Rozporządzenie w sprawie egzaminów z języka polskiego jako obcego). However, in order to be compatible with EU law this Art. 11 a shall not be understood as stating the only way of proving knowledge of Polish language for categories of individuals listed in the Act. 

New Act on nurses and midwives has been introduced since the last reporting period. Consequently, new Regulation of July 9, 2012 concerning required level of knowledge of Polish language has been issued. However, in comparison with previous Regulation, there are no significant changes. Both nurses and midwives are not obliged to present any language certificate. They shall only prove that their knowledge of Polish language is enough for the communication with patients and to understand written text as well as ability to write in Polish. The Regulation makes the distinction between the level of knowledge of Polish language as regards competences between nurses and midwives. It lists the medical spheres in which nurse and midwife shall be able to communicate. The regulation on midwives and nurses applies only to EU/EEA and Swiss Confederation citizens. 

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29 File no. VI SA/Wa 1760/05 of 7 December 2005R.
30 File no. II GSK 62/06.
31 Journal of Laws of 1999, no. 90, item 999.
33 Regulation of Ministry of Health of July 9, 2012 on the level of knowledge of Polish language written and orally, necessary to carry out a profession of a nurse and midwife (Rozporządzenie Ministra Zdrowia w sprawie szczegółowego zakresu znajomości języka polskiego w mowie i w piśmie, niezbędnego do wykonywania zawodu pielęgniarki i położnej, Journal of Laws of 2012, no. 817).
However, both the Act and the Regulation do not contain acceptable ways of proving knowledge of Polish language. Therefore all methods are acceptable.

No changes have been made in the Regulation concerning level of knowledge of Polish language for doctors. According to the Regulation, third country nationals are obliged to pass a special language exam that is organized by the Polish Medical Council. No such obligation is applicable to EU citizens. They can prove sufficient knowledge (not only a fluent knowledge) in all possible ways (even in a form of conversation with an employer).

As regards pharmacists the same regulation is applicable like in last reporting period. There is an obligation to pass language exam before Polish Pharmacy Council. However, this requirement applies to foreigners. The definition of a foreigner is explained in the Act on Pharmacy Councils and it excluded EU nationals. Therefore EU nationals may prove knowledge of Polish language in every possible way, just like doctors.

As regards barber-surgeon, the Act of July, 20 1950 on barber-surgeon (Ustawa z dnia 20 lipca 1950 o felczerach) in Art. 1.3 states that for EU citizens it is enough to make a statement confirming knowledge of Polish language. Exams are only required for third country nationals. The Act has not been changed since last reporting period.

The same rules as described last year shall apply to veterinary doctors – ways of proving by EU citizens knowledge of Polish language are not listed, therefore all possible ways are acceptable.

There are also several statutory provisions that regulates certain professions that do not require having Polish citizenship. Instead, requirement to know Polish language is necessary. Such an obligation refers inter alia to certified auditors and patent counsels.

According to Act on Polish language, in general in relations with consumers as well as in case of employment matters, the Polish language shall be used. However, labour contract may be prepared and signed in foreign language, on application of a foreign employee (but...
not employer), if such an employee has been previously informed about the possibility to prepare such a contract in Polish.

All these remarks shall be equally applicable to both private and public sector.

No cases of any problems regarding access to abovementioned posts due to insufficient knowledge of Polish language have been reported.

2. **ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR**

Please see the Commission Staff Document and the reports by Prof Ziller and lay emphasis on developments which are not covered by these reports.

The general right to access on equal footing to employment in the public sector is guaranteed by Polish constitution solely to Polish nationals (art. 60). However, it does not mean in Poland it is not possible for foreigners to be employed in public sector (see point 2.1 below). The constitution has not been changed in this respect after Poland’s accession to EU in 2004.

In general, EU citizens when they have access to public sector, must be treated without any discrimination on grounds of nationality in comparison with Polish citizens. The Labour Code of June 26, 1974 (ustawa Kodeks pracy)\(^\text{39}\) is the main act that regulates rights and duties of all employees in Poland, irrespective of their nationality. Therefore when employed in Poland, EU citizens shall benefit from all provisions that are contained in the Code. Moreover the Labour Code contains an ample of provisions that additionally aim to protect inter alia EU citizens as foreigners in comparison with Polish citizens. Art. 18 3a para 1 of the Labour Code prohibits any discrimination on grounds of inter alia nationality as regards not only working conditions but also as regards access to employment. Indirect discrimination is also prohibited according to 18 3a para 4 of the Labour Code.

Nothing has changed in the position of teachers in Poland. The analysis of regulations concerning teachers (other than academic teachers) leads to a conclusion that there is inconsistency between provisions of the Teacher’s Chart of January 26, 1982 (ustawa Kodeks Pracy)\(^\text{40}\) (that forms a lex specialis to Labour Code) and the Act of September 7, 1991 on the education system (ustawa o systemie oświaty).\(^\text{41}\) It shall be mentioned that these acts apply generally to teachers irrespective of the sector they work for – i.e. they apply to both public and private sectors (with some exceptions as regards private sector). In the Teacher’ Charter, there is a provision that directly excludes the requirement to possess Polish nationality for EU citizens (however no reference is made to members of their family), unlike other foreigners. Art. 10 para 5 states that employment contract with a teacher may be entered if the applicant possess Polish citizenship, except for situation when applicants are EU or EEA or Swiss Confederation nationals.

However, the Act on the education system in Art. 95 states that the relevant minister shall issue the regulation in which conditions regarding access for applicants not holding Polish citizenship to posts of teacher shall be clarified. The Regulation on principles and conditions on hiring teachers who are not Polish citizens in public schools and entities (rozporządzenie Ministra Edukacji Narodowej w sprawie zasad i warunków zatrudniania w szkołach i placówkach publicznych nauczycieli niebędących obywatelami polskimi) entered

\(^{39}\) _Journal of Laws_ of 1998, no. 21, item 94.

\(^{40}\) _Journal of Laws_ of 2006, no. 97, item 674.

\(^{41}\) _Journal of Laws_ of 2004, no. 256, item 2572.
According to the Regulation, there is a possibility to hire foreign teachers if there is an organizational need of a given school, especially as regards foreign languages teachers (para. 2). Employment of such a teacher shall be previously accepted by the entity that supervises a school or kindergarten.

Therefore the Regulation states the principle of the preference for Polish citizens over EU citizens in employment. However, such a principle is incompatible not only with the Teacher’s Chart, which directly excludes EU citizens from the prohibition to become a teacher in Poland, but also with the Act on promotion of employment and mostly with the prohibition of discrimination on grounds of nationality as protected by TFEU.

The Regulation was issued in 1992 and has not been changed since this time, also after accession Poland to EU. The problem of this provision is twofold – from the point of view of Polish and European perspective. From the point of Polish law, according to the constitutional hierarchy of Polish legal acts, regulation cannot be contrary to the act (statute). The Regulation of 1992 is contrary to the Teacher’s Chart, which directly makes it possible to apply for posts for EU citizens. Secondly there is an incompatibility between two acts – Act on Teacher’s Chart and Act on educational system, as the latter act lists certain requirements to be met for foreigners (including EU citizens) to become a teacher. From the point of EU law, the provision contained in Act on educational system together with the Regulation of 1992, is contrary to EU rule prohibiting direct discrimination on grounds of nationality.

Taking, however, into account the rule of precedence of the European law over national law, the interpretation shall lead to a conclusion that no restrictions shall be applicable to teachers of EU nationality.

However, no cases of problems with access to teacher’s posts by EU nationals have been reported in Poland in 2012.

The Act of July 27, 2005 on higher education (ustawa prawo o szkolnictwie wyższym) does not contain any requirement as regards nationality of academic teachers. Polish nationals and EU nationals and also third country nationals shall have a right to be employed in higher schools or universities without any differences or preferences. No previous consent issued by relevant university bodies is required. Moreover, Art. 109 para 4 of the Act clearly states that foreign academic teachers shall be treated in the same way as Polish researches in the sphere of all social security benefits and other conditions of work.

Therefore there is no distinction between rules on access for Polish and foreign applicants.

As regards access to certain medical posts, such as doctors, midwives, nurses, veterinary doctors, they shall, irrespective if they apply to public or private entity, be treated on an equal footing as Polish applicants. However, they shall prove knowledge of Polish language.

The same remark shall be done to certified auditors and patent counselors.

2.1. **Nationality condition for access to positions in the public sector**

The situation in this sphere has not changed as from the last year Report. There are two main acts: the Act of November 21, 2008 on civil service (ustawa o służbie cywilnej) and the Act of November 21, 2008 on self-government authorities’ employees (ustawa o pracownikach

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42 *Journal of Laws* of 1992, no. 85, item 432.
43 *Journal of Laws* of 2012, no. 572.
These two acts contain identical prerequisites as regards access for EU nationals and other foreigners to public posts.

EU citizens as well as other foreigners (only those who on basis of either international agreements or EU law have the right to take up employment⁴⁵) are entitled to apply for posts that are not connected with exercising directly or indirectly public powers or that are connected with protection of fundamental states interests (art. 5 of the Act). They must additionally prove knowledge of Polish language according to special rules that are defined in the relevant Regulation. The General Director of the Civil Service Office after being granted approval from the President of the Civil Service or the director of the relevant self-government authority decide which posts fulfill abovementioned requirements.

Permanent (year-to-year) analysis of the practice in this sector leads to conclusion that the access to public posts in civil service is, however, fictitious. There is an official updated list of accessible posts for both Polish and foreign nationals in civil service (on the website of the Civil Service, www.dsc.kprm.gov.pl). Currently (as of July 2013) on 235 posts 21 are opened for foreigners (in comparison to July 2012 the balance was 214 to 12). As regards the access to self-governing authorities, there is no general list of accessible posts, every single regional office has its own website where it publishes the current work offers. Therefore in practice it is not possible to analyse the practical application of Art. 11 of the Act on self-governing authorities.

However, the analysis of the Report of the President of the Civil Service for 2012 (similar to Report for 2011) leads to a conclusion that the President of the Civil Service put emphasis on the issue of the possibility to apply for posts in civil service for foreigners. According to the Report, the number of posts that are open for foreigners has been constantly growing over the years. In 2010 there were 88 announcements, in 2011-129 and in 2012 – 378. In 2012 the President of the Civil Service accepted 340 posts to be opened to foreigners (which constituted 59% of the overall requests).

However, there is a low interest in applying for such posts among foreigners. In 2012 only 5 offers were lodged by foreigners, and only 2 fulfilled formal requirements. In 2012 finally 1 foreigner have been employed.

These rules on access to public posts apply equally to EU citizens and members of their families, irrespective of their nationality, what makes these regulations (at least formally, since practice is rather different, as has been pointed out above) compatible with art. 23 of the Directive 2004/38 which entitles members of family to take up employment in Member State of residence of EU citizens.

Moreover, in the Act of September 16, 1982 of public authorities employees (ustawa o pracownikach urzędów państwowych)⁴⁶ there is a nationality requirement, without any exceptions. According to Art. 3 of the Act, only Polish citizens have access to these posts. According to the Act, public authorities employees are employed in such institutions as Presidency of Seym, Senat, President of Poland, the Supreme Court (but only in administration and not in jurisdiction posts), in the Bureau of Consitutional Tribunal, Ombudsman, Child Ombudsman, National Elections Bureau, etc. The act applies to all clerks employed in these offices, irrespective of the character of executed activities in the particular post. Such a strict

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⁴⁵ This provision is compatible with provisions of the Act of promotion of employment and labour institutions which in Art. 87 para. 1 point 9 states that such third country nationals shall have a right to be employed in Poland without the necessity to obtain work permit
regulation, without making any differentiation as to the scope of activities in the light of Art. 45(4) TFUE is questionable under EU law. The Act has not changed since the reporting period.

The requirement to possess Polish citizenship applies also to military forces and law enforcement agencies, such as Army, the Police, Prison Guard, Border Guard, Customs Officers, as well as Internal Security Agency and Central Anti-Corruption Office and Commune Guards. The requirement of possessing Polish nationality also applies to prosecutors and judges.47

Still there is the requirement to possess Polish nationality for notaries, unlike legal counselors and advocates.

2.2. Language requirements

As regards groups of employees in the public medical sector, such as doctors, nurses, midwives no differences as regards requirement to prove knowledge of Polish language are applicable. Therefore all remarks contained in point 1.2 above shall be applicable.

However, as regards access to civil service and to self-government administration, still the same rules as mentioned in the last Report concerning knowledge of Polish language are still applicable.

They apply without any distinction to both EU nationals and other foreigners (unlike for instance requirements that are applicable for doctors, pharmacist, etc.). The Regulation of the Prime Minister of April 23, 2009 lists documents which are enough to prove sufficient knowledge of Polish language by foreigners,48 which releases from the obligation to pass an exam before a state commission. These documents are as following:

1) Certificate of knowledge Polish language on intermediate level issued by the State Commission Proving Knowledge of Polish Language as Foreign Language or
2) Document proving completion of higher education in Polish language or
3) Maturity certificate awarded in Polish education system or
4) Certificate of certified translator issued by Minister of Justice

Therefore, according to the Regulation, any other certificate, especially the one granted outside Poland is insufficient to prove Polish language while applying for posts in civil service or self-government institutions. This provision, according rapporteur is too strict in the light of CJEU jurisprudence, with special emphasis on the proportionality principle.

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

Rules regarding recognition of professional experience for access to the public sector have not changed since last reporting period.

In general, length of service (seniority) is an applicable indicator of professional experience. In public offices a length of service may be a prerequisite for a promotion to a higher

47 Unlike administrative employees of courts and prosecutors offices to which the Act on courts and prosecutors employees offices applies and in which there is no requirement to possess Polish nationality, Journal of Laws of 1998, no. 162, item 1125).
48 Journal of Laws of 1009, no. 64, item 539.
post or raise of a salary. Additionally, the Labour Code determines the length of paid leave on basis of length of employment. This indicator shall also be taken into account while counting number of free days for the employee. These rules apply equally to employment in public and private sector.

As regards recognition for professional experience in the recruitment procedure, if there are certain requirements as to the length of such experience (such as for instance in case of employment in public employment agencies) in order to apply for certain posts, than in general periods of employment in other Member States shall be taken into account for counting these required periods of previous employment.

This rule is based on a general prohibition of direct and indirect discrimination that is included in the Labour Code. Moreover, the Act on promotion of employment and labour institutions applies to employment in public and private sector without any distinction. Art. 86 of the Act clearly states that periods of previous employment abroad (irrespective if the employer has been placed in EU Member State) shall be taken into account while granting certain employment grants that are conditional upon employment seniority. As the Art. 86 does not make any differentiation as to beneficiaries, the subjective scope of the Act shall be taken into account. Therefore the rule enshrined in Art. 86 shall equally apply to Polish nationals working abroad and to EU nationals and members of their families working abroad. Art. 86 of the Act complements art. 113 of the Labour Code which prohibits direct and indirect discrimination in employment. Refusal to recognize previous employment on basis of place of stay would surely fall under indirect discrimination prohibition.

There are specific regulations issued by Prime Minister or relevant ministers that regulate the necessity to prove a particular experience for particular posts. Moreover, there is also a general Regulation of Prime Minister of December 16, 2009 on the way to conduct qualification procedure in civil service (Rozporządzenie Prezesa Rady Ministrów w sprawie przeprowadzania postępowania kwalifikacyjnego w służbie cywilnej). These rules shall apply without any difference for Polish and EU citizens (of course under condition that a particular post has been opened also for EU citizens).

Additionally, recognition of professional experience in civil service is regulated in the Regulation of Prime Minister of December 12, 2009 on description of civil service posts, required professional qualifications, level of civil service grades, multipliers for salary levels and particular rules on granting other benefits for civil service corpus, which has not changed in comparison with the last Report (rozporządzenie Prezesa Rady Ministrów w sprawie określenia stanowisk urzędniczych, wymaganych kwalifikacji zawodowych, stopni służbowych urzędników służby cywilnej, mnożników do ustalania wynagrodzenia oraz szczegółowych zasad ustalania i wypłacania innych świadczeń przyszłych członków korpusu służby cywilnej). Analysis of the Regulation leads to a conclusion that periods of work in comparable public (civil) services in other Member States shall be taken into account for the purpose of establishing employment rights.

As regards recognition of qualifications, the Act of March 18, 2008 on the rules governing the recognition of the professional qualifications obtained in EU Member States (ustawa o zasadach uznawania kwalifikacji zawodowych nabytych w państwach członkowskich Unii Europejskiej) for the pursuit of the regulated professions implements provisions of Directive 2005/36. As a rule diplomas or certificates concerning qualifications to carry out regulated

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50 Journal of Laws of 2009, no. 211, item 1630.
professions should be recognized in Poland on the same principles as regards diplomas and qualification obtained in Poland. Admission to some professions can depend upon probationary period or on passing an aptitude test. There are numerous enacting regulations issued by the relevant ministers. This Act complies with EU law.

3. **OTHER ASPECTS OF ACCESS TO EMPLOYMENT**

On 26 April 2011, the Council of Ministers adopted the National Reform Programme as a part of implementation of the Programme Europe 2020. The purpose of the National Reform Programme is to build solid foundations for economic growth and to combine EU objectives with national priorities. Within the Programme action 3.1.7 is to be implemented, i.e. ‘Immigration ensuring the needs of the influx of foreigners in the labor market.’ The aim of such a policy is to inter alia respond to demographic challenges, of which in the coming years will face the Polish labor market. However, as has been emphasized in the Report, Poland due to mainly economics conditions is still not a popular destination country for EU citizens (unlike for third country nationals).

Additionally, according to the Act of freedom of economic activity of July 2, 2004 (ustawa o swobodzie działalności gospodarczej), EU citizens and members of their families (according to definition of the Directive 2004/38) are free to run up their own business in Poland without any restrictions.\(^{52}\) Therefore they may make use of free movement of rights as self-employed persons, which is compatible additionally with provisions of the Act on entry, which lists also self-employed EU citizens and members of their families as group entitled to have rights on basis of the Act.

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\(^{52}\) *Journal of Laws* of 2013, no. 672.
Chapter IV
Equality of Treatment on the Basis of Nationality

Main texts in force:
1) Labour Code of June 26, 1974,
2) Act of April 20, 2004 on promotion of employment and labour institutions,
3) Act of November 21, 2008 on civil service,
4) Act of November 21, 2008 on self-government employees,
5) Act of May 23, 1991 on Trade Unions,
6) Act of March 4, 1994 on the company benefit fund,
7) Act of July 26, 1991 on personal income tax

1. Working Conditions – Direct and Indirect Discrimination

Specific issue: Working conditions in the public sector.

The Polish Labour Code directly prohibits discrimination in all aspects of employment on basis of inter alia nationality. Art. 18 of the Labour Code contains general prohibition of discrimination. There are no reported cases as regards direct or indirect discrimination in public sector.

As a rule, professional experience gained in other Member States shall be taken into account for the purpose of additional financial benefits to basic salary if a relevant professional experience gained in Poland is taken into account in order to be entitled to such benefits.

Allowance for long term employment and jubilee prize shall be awarded to those public service or self-government employees who has a respective professional experience. The length of employment in other Member States shall be taken into account on a same basis as time of employment in Poland. This rule states that to periods of entitlement to certain allowances any previously completed periods of employment and other periods, if relevant regulations state that such periods of employment shall be qualified as periods of employment entitling for employee’s rights, shall be included. The same rules are applicable to those workers who are employed in public sector other than civil service or self-governmental institutions.

However, due to the fact, that the scale of employment of EU citizens in public service is very low (see Chapter III) that practical use of these rule is very rare.

As regards teachers (irrespective if they are employed in public or in private sector), the Regulation of Ministry of Education and Sport of October 30, 2001 on detailed rules of counting periods of employment and other periods that entitle teachers for jubilee award (w sprawie szczegółowych zasad ustalania okresów pracy i innych okresów uprawniających nauczyciela do nagrody jubileuszowej oraz szczegółowych zasad jej obliczania i wypłacania) defines that all finished periods of employment shall be taken into account while establishing the right and the amount of such an award. Therefore also the length of service abroad in schools shall be taken into account for the purpose to qualify for a jubilee awards in education.

The right to associate in trade unions is established in Polish constitution. Art. 59 of Constitution lists the scope of rights of trade unions. Inter alia they, together with employers and their organizations, shall have a right to bargain, particularly for the purpose of resolving collective disputes and to conclude collective labour agreements and other agreements. The scope of freedom of association in trade unions may only be subjected to such statutory limitations as are permissible in accordance with international agreements to which Poland is a party.

As regards equal treatment in trade union rights, the Act on Trade Unions of May 23, 1991\(^{54}\) (ustawa o związkach zawodowych) the rule of equal treatment is still fully applicable. It applies to both public and private sector. The right to create trade union and to become its member is not conditional upon nationality.

In the reporting period there have been no reported cases as regards cases of unequal treatment of Polish and EU citizens as regards recognition of professional experience for the purpose of determining working conditions in public sector or other cases of unequal treatment of EU citizens in comparison with Polish citizens.

2. **SOCIAL AND TAX ADVANTAGES**

2.1. **General situation as laid down in Art. 7 (2) Regulation 492/2011.**

According to Art. 18\(^{3c}\) of the Labour Code all employees shall have the right to equal remuneration for the same work or work of the same value (irrespective not only on sex, but also on nationality). Remuneration shall not be limited solely to basic salary, but also all possible employment-related benefits (not only financial ones), which are also covered by the definition of social and tax advantages as defined in Regulation 492/2011.

The work of the same value shall be understood as work which requires comparable professional qualifications, certified by appropriate documents or practice and professional experience and similar level of responsibility and effort.

However, still there are in some acts residence clauses in order to be granted social advantages.

Study grants for migrant workers and members of their families shall have been granted on the same basis as are granted for Polish citizens, however, additional condition is required. In the Act on Higher Education there is a distinction between EU workers together with members of their families on the one hand and other categories of migrating EU citizens on the other hand. The first group in order to be entitled to equal treatment, including rights to financial benefits, shall have a place of residence in Poland. As regards the second categories of beneficiaries, they shall have a right of permanent stay in Poland.

Analysis of the Act on Higher Education leads to a conclusion that there is a missing regulation concerning economic active migrants other than workers. As regards especially entrepreneurs and members of their families, they are not listed in the Act. However, taking into account the obligation of European interpretation of national law, they shall be qualified as migrating workers. However, in the reporting period, no cases concerning this group of beneficiaries have been reported.

Also as regards family benefits\(^{55}\) and social assistance benefits\(^{56}\) the residence clause is still applicable. Only those EU citizens shall benefit from specific financial benefits if they have a place of residence in Poland.\(^{57}\) The definition of place of residence in the light of entitlement to financial benefits has been analysed by the Administrative Court in Gdańsk.\(^{58}\) According to the Court, the obligation to have a place of residence in Poland does not exclude the possibility to move to another Member State for the purpose of studies. Another interpretation would be contrary to the fundamental right of free movement, as established in the TFEU. The same position was taken in 2010 by the Administrative Court in Poznań.\(^{59}\)

As regards the residence clause contained in the Act of June 27, 2003 on the social assistance benefit (ustawa o rencie socjalnej), the problem was analysed by the Polish Supreme Court. The Court of Appeal claimed that the residence clause is contrary to art. 21 of the TFEU. However, the Supreme Court as a result of cassation appeal declared that the residence clause as stated in the Act on social assistance benefits is not contrary with EU law. According to the Court, the social assistance benefit shall be qualified as social assistance and be subjected to the regulation on coordination of social security benefits. According to the Supreme Court, Art. 21.1. TFEU is not unconditional, therefore there may exist provisions of secondary law that restricts this right. According to the Court, the social assistance benefit is listed in the attachment II a of the Regulation 1408/71 (as amended by the Regulation 629/2006) and consequently to this benefit rules of transfer of this benefit in case of change of place of residence shall not be applicable. Consequently, the Regulation 1408/71 provides for departure from the general prohibition of the residence clause. The Supreme Court referred to the judgment of the Court of Justice in case C 154/05 J. J. Kersbergen-Lap, D. Dams-Schipper v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen, according to which, the benefit provided in the relevant Act in the Netherlands for disabled young people, which is similar to Polish social assistance benefit shall be qualified as one of benefit as listed in the Art. 4 ust. 2a of the Regulation 1408/71. Consequently, as compliant with EU law was declared the obligation to have a place of residence in the Netherlands for the whole period of having the benefit and ceasing the right after having left the territory of the country by the beneficiary. However, at the same time the Supreme Court emphasized that there may be a problem with conformity with constitutional principle of equal treatment since there is a differentiation between beneficiaries who both have a right to this benefit and who reside or not reside in Poland (in the latter case who move to another Member State for the purpose of studies).\(^{60}\)

Moreover the Act of March 4, 1994 on the company benefit fund (ustawa o zakładowym funduszu świadczeń socjalnych) is still applicable.\(^{61}\) Employers that hire at least 20 employees (based on full-time posts) are obliged to create a company fund, which can be a source for financial benefits for employees (such as holiday allowances or financing of sport

\(^{55}\) Journal of Laws of 2003, no. 228, item 2255.


\(^{57}\) See, however, the judgment of the Supreme Court of September 20, 2011, file no. I UK 59/11 in which the Supreme Court qualified the social rent as one of benefits listed in former regulation 1408/71 and claimed that in such a situation the requirement of having a place of residence is compatible with EU law. However, the Appeal Court claimed contrary, referring in its judgment to Nerkowska ruling. The Supreme Court has not interpreted Polish legislation in such a way as to take account, in particular, of the fact if the applicant in question has maintained all of his economic and social links to the Member State of origin.

\(^{58}\) Administrative Court in Gdańsk of January 11, 2011, file no. II SA/Gd 523/10.

\(^{59}\) Administrative Court in Poznan of October 28, 2010, file no. II SA/Po 455/10.

\(^{60}\) The judgment of September 20, 2011, file no. I UK 59/11.

carts, etc). There shall be special rules (in the form of internal regulation) of distribution of money collected in the fund. The Act on the company benefit does not make any differentiation between beneficiaries as to their citizenship. It therefore applies to EU migrant workers on the same footing as to Polish workers. The only condition is that potential beneficiary shall be hired as employer. The Constitutional Tribunal declared that making above benefits conditional upon using them solely for holidays or other eligible activities which are only located in Poland is contrary to Polish Constitution.62

The Act of October 26, 1995 on support of certain forms of housing (ustawa o niektórych formach popierania budownictwa mieszkalnego)63 provides a possibility for individuals with a low income and those not possessing the legal right to any other housing, to apply for a lease of a flat. This Act addresses the requirement listed in Polish Constitution according to which (art. 75 para 1) public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen. This constitutional provision only deals with Polish nationals.

The Act, however, makes no difference as to the nationality of possible applicant, provided that above conditions are to be met. No practice concerning EU citizens has been reported so far.

As regards tax advantages, the Act of July 26, 1991 on personal income tax (ustawa o podatku dochodowym od osób fizycznych)64 is applicable. According to Article 3 of the Act the unlimited tax obligation is applicable to those taxpayers he/she has established at the territory of Poland centre of personal or economic interests (‘centre of live interests’) or he/she stays at the territory of Poland longer that 183 days during a fiscal year.

Individuals who do not have their place of residence in Poland are subjected to limited tax liability, which means that they are liable to pay taxes only on income gained at the territory of Poland. Other rules may be subject to international agreements on elimination of double taxation. Poland has entered in plenty of such international agreements. The list of countries with which it has international taxation agreements can be found on the website of Ministry of Finance.

Additionally there is a possibility for spouses to be subjected to common income tax. They shall be in a marital relationship and community of property for an entire fiscal year. However, such a possibility is not restricted to solely Polish nationals. Such a possibility applies also to cases where spouses:

1) who have place of residence for tax purposes in any Member State, EEA or Switzerland,
2) if one of spouse is subjected to unlimited income tax Poland and the other has a place of residence for tax purposes not in Poland but in another Member State, EEA or Switzerland

and provided in both abovementioned situations (1-2) that they have earned incomes subjected to tax at the territory of Poland that constitute at least 75% of the overall income of both spouses in the relevant fiscal year and they documented they place of residence for tax purposes by a certificate of residence.

2.1. **Specific issue: the situation of jobseekers**

No jobseekers allowances in the form of financial support are available neither for Polish citizens nor for foreigners, including EU citizens and members of their families. Jobseeker according to Polish legislation cannot be treated as a worker within the meaning of the Act on entry. According to the Act on promotion of employment and labour institutions only these jobseekers who worked out a certain period and afterwards they have lost the job and would like to find a new job again, may be entitled to unemployment benefits. This regulation applies irrespective if the applicant is of Polish or of another Member State nationality.

Therefore there are no such practical problems as were analysed in Ioannidis, Collins or Vatsouras cases. Also as regards Ioannidis there are no such provisions that make certain benefits applicable conditional upon completing secondary education in another Member States.

Rights of jobseekers, who cannot be qualified as unemployed, because they have not worked out a certain period are inter alia as follows: support of centres of information and planning careers, attending in various activisation activities, making use of employment agencies which aim is to provide services of job brokerage, personnel consultancy and occupational guidance, participate in various workshops and vocational trainings organized by training institutions. Additionally, poviat employment offices may prepare for jobseekers individual action plan which aim at facilitation of finding employment for them. Those forms of support are available for jobseekers from other Member States on the same footing as for Polish citizens.
Chapter V
Other Obstacles to Free Movement of Workers

No other obstacles to free movement rights than mentioned in previous parts of Reports shall been reported.

In reference to the remark made in last year Report, there is still a growing progress as regards the level of knowledge of foreign languages of officials who have direct relations with foreigners, including EU citizens and members of their families. In regional offices for foreigners, many of officials are able to communicate in English language. Moreover, the rapporteur has noticed than in the regional offices of foreign relations there are many information leaflets in different languages.
Chapter VI
Specific Issues

Main texts in force:
1) Act of November 28, 2003 on family benefits,
2) Act of March 12, 2004 on social assistance,
3) Act of November 9, 2000 on maritime safety,
4) Act of November 18, 2001 on Maritime Code,
5) Act of May 23, 1991 on work at maritime commercial vessels,
6) Act on Higher Education July 27, 2005,
7) School Education Act of November 19, 2004,
8) Act of July 17, 1998 on students loans and credits,
9) Act of October 13, 1998 on Social Security System,

1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES),

There are no separate provisions concerning frontier workers in Polish legislation. Additionally no additional formalities are required for frontier workers to stay in Poland. The same concerns members of their families. Therefore according to the Act on entry they shall be treated in the same way as other migrating workers.

However, as there is a residence clause in some acts providing financial benefits, these provisions may influence the position of frontier workers.

According to Act of November 28, 2003 on family benefits (ustawa o świadczeniach rodzinnych) following financial support may be granted: family benefits and attachments to family benefits, custody benefits: nursing benefits and nursing allowances; commune benefits and one-off benefits for a newly born child. However, in order to be entitled to these benefits, applicants including EU citizens must reside in Poland during the period of receiving entitlement unless relevant provisions on coordination of social security or bilateral international agreement modifies this requirement. The right to obtain benefit shall not be excluded when the applicant temporary leaves Poland, while still having a center of his interests in Poland (for instance for the purpose of studying abroad).

Additionally, Act of March 12, 2004 on social assistance (ustawa o pomocy społecznej) may also influence the situation of frontier workers. The act applies in cases where listed beneficiaries are in need and are unable to overcome this situation without external (i.e. state) support. The Act provides material and non-material benefits. According to Art. 7 of the Act, the social assistance shall be granted inter alia in cases of poverty, homelessness, unemployment, orphanhood, disability, long-term illness, alcoholism, violence in the family, fortuitous events, natural disaster, etc. The main criteria of applicability is income per capita.

The Act applies to inter alia EU citizens and members of their families who have place of residence in Poland and who stay in Poland and have a right to stay or to permanent stay

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65 Journal of Laws of 2003, no. 228, item 2255.
67 Journal of Laws of 2009, no. 175, item. 1362.
(the Act does not make a differentiation between certain categories of EU citizens as regards the necessity to have a right to stay or right to permanent stay, like the Act on higher education does). The obligation to both have place of residence and factually stay in Poland applies equally to Polish citizens, foreigners and EU citizens and members of their families.\footnote{Judgment of Voivode Administrative Court in Wroclaw of November 5, 2009, no. of files IV SA/Wr 283/09.}

The Administrative Court in Warsaw in 2006 analysed one of benefits available under this Act – i.e. financial support for foster family and decided that as far as it cannot be treated as a family benefit within the Community meaning and it falls under the scope of social assistance as stated in Art. 4.4 of the Regulation 1409/71, than the requirement of residence in Poland is in line with EU law.\footnote{Judgment of Voivode Administrative Court in Warsaw of November 20, 2006, file no. I SA/Wa 1569/06.} Moreover, the issue of the necessity to reside in Poland while taking benefits according to social assistance was analysed by the Autonome Appeal Board (Samorządowe Kolegium Odwoławcze) that declared that a short period of absence in Poland for a known and defined period for the purpose to pursue education by the child and a foster parent who has custody over him, shall not deprive his foster family to be entitled to certain benefits on basis of this Act.\footnote{Decision of January 6, 2009, file no. 4314/22/08/09.}

It shall be emphasized that in order to be eligible to benefits granted by the Act on social assistance, it is not enough to prove that the place of stay is located in Poland (for instance as a registered place within the meaning of ‘obowiązek meldunkowy’ as described in Chapter I). The applicant shall not only factually stay in Poland (except in cases as stated above when he leaves Poland for educational purposes) but also Poland shall be place where his center of vital interests is located.\footnote{Judgment of Voivode Administrative Court in Wrocław of November 5, 2009, file no. IV SA/Wr 283/09.}

According to Art. 43 para 2 point 4 of the Act on higher education, the right to enroll on and follow education or training courses as well as participate in research and development work pursuant to the rules applicable to Polish citizens applies to migrant workers who are EU nationals and members of their families if they reside in Poland and to other EU citizens and members of their families (who are not economically active) if they have a right for permanent stay. Therefore the residence requirement is applicable. However, Art. 43 para 5 additionally gives a right for non economically active EU citizens and members of their families to pursue studies on the same footing as it is possible for Polish citizens, but with one exception – without the right to have any financial benefits. This provision does not require any residence condition. Therefore the analysis of the Act on higher education leads to a conclusion that frontier workers and members of their families shall have at least a right to pursue studies as non economically active EU citizens are entitled, however, the problem may occur as regards the right to financial benefits in the light of residence clause requirement. However, there have been no reported cases on any problems with access to studies, including entitlement to financial benefits for frontier workers and members of their families in the reporting period. Additionally no judgments have been issued on this matter.

Finally the Act on income tax for individuals the unlimited tax obligation applies to those individuals (irrespective of nationality) who reside in Poland for a period of more than 183 days during a tax year.

The abovementioned acts have not changed substantially during the reporting period.
2. **SPORTSMEN / SPORTSWOMEN:**

Generally no home grown players rule is applicable.

**Football**

As regards football, the binding act is the Resolution of Polish Football Union Board number III/39 of July 14, 2006 on the status of the Polish football players and the change of the club membership (which has been amended several times since that time). Generally there is a possibility for each team to have unrestricted number of foreigner players (both EU and non-EU), also in cup and championship matches. Art. 63.8 of the Resolution requires that in each club there must be at least 8 confirmed and entitled to play football players that have Polish citizenship. Therefore nationality condition applies in this respect. There are no quotas on non-EU players, they may be engaged without restrictions after fulfilling all requirements concerning legality of enter the territory of Poland and stay there, but as stated above professional football teams may at least hire 8 nationals.

Additionally, there may be levy on transfer fees. According to the Resolution III/39, the club in which the transferred player has been trained may require a transfer fee from the new club. The exact amount on transfer fee is not regulated neither by statutory acts nor by internal acts of the Polish Football Association. However, when there is no consensus between these two football clubs, the exact amount of the transfer fee shall by established by relevant regional authority of the Football Association. The club receiving transfer fee is obliged to pay 3% of the fee while there is an international transfer and 2% of the fee while there is a domestic transfer for the home football association. In case of transfer a player to Polish Extra, I or II League, the home club is additionally obliged to pay 3% of this amount to Polish Football Association for developing junior trainings. And the club receiving the player is additionally obliged to pay 2% of the transfer fee for relevant football association which the club is a member (Art. 68-69).

It is the Football Association and not the Polish state that defines rules on transfer and play in Polish football clubs.

**Handball**

As regards handball, the rules for the season 2011/2012 put restrictions as to the permissible number of foreign players – in the superleague up to 3, in 1st league up to 2, in 2nd league up to 1. However, these limits do not apply to EU and EEA players as well as players having nationality of those states who entered into accession treaty with EU. Therefore they are treated as Polish players and no limitations apply to them.

Additionally, there is no restriction as to the maximum number of foreign players in each team (including EU and non EU citizens).

In case of transfers of players to foreign clubs, the rules on transfer, including transfer fees are established in international regulations of IHF and EHF. Equivalent for training may be required only during the transfer procedure (at the latest while issuing the transfer certificate).

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Volleyball
There are also limits of foreign players that may play during the match. Depending on the type of competition, between 3 till 5 players shall be of Polish citizenship.

Basketball
According to Regulation of Polish Association of Basketball there are limits of participation in certain basketball competitions of foreign players. During a match at any time there must be at least 2 players with Polish citizenship. Additionally in the game protocol there must be 6 players of Polish citizenship (in case of teams not taking part in European competitions) and 5 players of Polish citizenship (in case of teams taking part in European competitions). If the number of players in the game protocol is less than respectively 6 and 5 players, than the team must lose game by default.

Ice-hockey
According to hockey regulations in one team during competitions in the 1st League, there may be 3 foreign players, and the goalkeeper shall be counted also as 1 player (unlike in 2012 where the rule was that the goalkeeper shall be counted as 2 players). There are no such restrictions as regards 2nd League and in Women’s League.

There are transfer fees for training a transferring players. Part of transfer fee shall be given to Polish Ice Hockey Association.

Rugby
According to rugby (which is very unpopular sport in Poland) regulations for season 2012/13, in the competition protocol 3 foreigners may be submitted. Additionally, foreign players may participate in the final phase of competition if they have participated in at least 3 games in regular season (such a requirement does not apply to Polish citizens).

Waterpolo
According to the waterpolo regulations, there may be 2 foreigners in each team during one competition. There is no distinction between EU and non EU players. Rules concerning waterpolo shall equally apply to Polish and foreign players.

3. THE MARITIME SECTOR:

As regards general rules that apply to maritime sector in Poland, there are 3 main acts: the Act of August 18, 2011 on maritime safety that entirely repealed previous act of the same title,73 the Act of November 18, 2001 on Maritime Code (Ustawa Kodeks morski),74 the Act of May 23, 1991 on work at maritime commercial vessels (Ustawa o pracy na morskich statkach handlowych).75 According to the last Act, the act shall not be applicable if international agreement concerning rules of employment relations at vessels contain more favourable treatment for employers, however, if the act is more favourable for employees, the act shall prevail.

73 Journal of Laws of 2011, no. 228, item 1368. It has implemented several EU directives that constitute so called ‘Erika III’ package as well as IMO and ILO agreements,
75 Journal of Laws of 1991, no. 61, item 258.
The abovementioned rule has not changed since last reporting period.

According to the Act, a foreign employee is an employee who permanently resides outside Poland. Therefore the differentiation between foreigners and domestic employees is based not on nationality, but on place of residence. Consequently, there is a possibility that Polish citizen will be treated as foreigner according to the Act and foreigner as domestic employee basing on the place of residence. Such a foreign employee may be employed if he/she possesses a document issued by other state and certifying its identity and hitherto experience on vessels. The Act does not make any difference in ways of treatment between EU and non-EU citizens, including access to work, rules of taking into account hitherto experience.

The Maritime Code regulates the status of captain of a ship, as well as his rights and duties. Additionally tasks of captain of a ship are regulated in the Act on work at maritime commercial vessels. This issue is regulated in Title III of the Code (art. 53 – 72).

There is no nationality requirement in neither of aforementioned Acts, therefore nationals of Member States are in a position to occupy such a post (in case of commercial vessels). However, the captain of vessel does have some public authority competences such as: right to arrest at the vessel an individual who represents a threat for the vessel, the duty to register birth and death at vessel and to make certain tasks while there has been a crime committed at the vessel. Even these duties that are connected with exercising public power are not blocked only for Polish citizens.

4. **RESEARCHERS/ARTISTS**

EU researchers and artists have the same legal status as national ones. There are no cases of infringement of equal treatment rules. As regards artists, there are no separate provisions concerning rules on exercising their activities. Consequently Labour Code or Civil Code (when there is no employment contract) are fully applicable.

There are no separate provisions devoted solely to researchers/artists and this situation has not changed since last reporting period.

As regards researchers (within the meaning of academic teachers), the Act on Higher Education makes it entirely possible to hire a non-national (either EU citizen or third country national) at higher education institution. No previous permission from an employment authority is required. There is no distinction between EU and non Eu applicants.

Non-national, including EU citizen, shall be subjected to compulsory social security and health insurance, and shall be eligible for entitlements provided for in the Act on Higher Education on the same rules that apply to Polish nationals.

A direct obligation to treat non-nationals in the same way as regards entitlement to all employment benefits is put in Art. 109 para 4 of the Act.

As regards EU researchers that are enrolled at Polish universities as PhD students, they are also entitled to certain social benefits according to the Regulation of Minister of Science and Higher Education of July 19, 2011 on doctoral scholarships (Rozporządzenie Ministra Nauki i Szkolnictwa Wyższego w sprawie warunków przyznawania stypendiów osobom, którym wszczęto przewód doktorski). In comparison with the last Report this Regulation

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has been entirely changed. Previous regulation of 2005 made it possible to apply also for postdoctoral scholarships. The new Regulation excludes such a possibility.

However, still the possibility to obtain such a scholarship is not limited to Polish nationals. Also EU citizens or other foreigners who fulfill requirements listed in the Regulation are entitled to such a financial benefit.

There are no separate provisions regarding other group of researches or artists, therefore general rules shall be applicable.

5. ACCESS TO STUDY GRANTS

See also analysis contained in this Chapter in the part devoted to frontier workers.

The access to study grants is granted to migrant workers and members of their families on non-discrimination basis according to the Act on Higher Education. The right to enroll and pursue higher studies, PhD studies and other forms of education as well the right to participate in development and research studies according to the same rules as apply to Polish citizens, shall apply also to: migrant workers who are EU and EEA or Swiss nationals as well as members of their families, if they both reside at the territory of Poland and to EU and EEA and Swiss nationals (not being workers) and members of their families if they both have a right for permanent stay Poland.

A residence clause in case of migrant workers and members of their families is applicable. As regards other categories of EU migrating citizens, the obligation to have permanent stay is applicable in order to study on the same basis as Polish nationals and to have access to study grants.

Moreover, EU citizens and members of their families who are economically inactive, but who possess sufficient financial resources for maintenance during studies (and before period entitling to have a right for permanent stay) shall also have a right to study in Poland according to the same rules that apply to Polish citizens with, however, there is an important exception. These economically inactive citizens and members of their families are not entitled to receive following forms of financial support such as: maintenance grants, special grants for disabled persons and aid payments.

Art. 43 para 5 of the Act has been changed since the last reporting period. As from October 1, 2011, non-economically active individuals cannot benefit from 3 kinds of social benefits, as mentioned above. Before the amendment, they also could benefit from accommodation and meals grant. There currently they shall be entitled to accommodation and meals aid.

No university entrance fees are applicable for EU nationals and members of their family.

It is questionable if the obligation to reside in Poland in order to be entitled to equal treatment as regards access to studies in Poland is in conformity with EU free movement rights. The provision of the Act on Higher Education therefore excludes the rule of equal treatment if an EU citizen would like to study in Poland but would not reside here (it is especially important in case of frontier workers or for those students who live near Polish border and would like to study only in Poland without moving from their home country).

77 Art. 43 para 2 point 4 AHE.
78 Art. 43 para 2 point 7 AHE.
79 Journal of Laws of 2011, no. 84, item 455.
The similar rules as in the Act on Higher Education are applicable in the Act of July 17, 1998 on students loans and credits (Ustawa o pożyczkach i kredytach studenckich).\textsuperscript{80} Migrating workers and members of their families who reside in Poland as well as other categories of migrating EU citizens together with their family members who have a right for permanent stay in Poland are entitled to apply for students loans on the same footing as may Polish students. In case of these loans, except from the very beneficial interest rate, there is a possibility of partial or even entire remittance of credit is possible in case of difficult life situation (illness, accident) or permanent loss of eligibility to pay obligations (disability). Therefore the residence clause is applicable.

The number of foreigners studying in Poland has increased almost five times since 1989. The number, however, does not exceed currently 20,000. The proportion of foreigners studying in Poland does not exceed 1% of the overall amount of students. Consequently, Poland is one of the last locations within the European Union as regards influx of foreign students. Polish authorities have noticed the problem and make efforts (mainly by providing information campaigns) to make Poland an attractive destination place for students.

6. **Young Workers**

The definition of young person is contained in Art. 190 of the Labour Code. According to this provision, a young person is a person of at least 16 years of age and less than 18 years of age. It is in line with Art. 63 para 3 of the Constitution which states that the permanent employment of children under 16 years of age shall be prohibited.

It shall be prohibited to employ a person of less than 18 years of age. There will be a change of definition of young person that will enter into force on September 1, 2018. A young person will have a meaning of a person of at least 15 years of age but less than 18 years of age. Therefore there will be need to amend Constitution respectively.

There is no nationality and residence criteria. Consequently, special rules that apply to this category of workers aim at protecting their health, provide them with sufficient rest time and holiday as well as to enable them to continue education where applicable.

Only such young persons may be employed who have completed at least basic secondary school and who present a medical certificate stating that work of a given type does not present a hazard to their health. A young person without vocational qualifications may only be employed in order to receive vocational training.

There is also additional incentive for employers to engage into economic activity young workers, not only up to 18 years old but also older. According to Art. 6.4 of the Act of October 13, 1998 on Social Security System (ustawa o systemie ubezpieczeń społecznych)\textsuperscript{81} pupils of gymnasia and other schools as well as students up to 26 years old are exempted from obligation to pay pension and annuity contributions provided that they exercise their work on basis on not employment contract (since such a contract is not exempted from obligation to pay above mentioned contributions), but agency or mandatory agreement. This provision make hiring students very attractive to the employer. Such a right is not conditional upon nationality or residence requirement.

\textsuperscript{80} *Journal of Laws* of 1998, no 108, item 685 with further amendments.

\textsuperscript{81} *Journal of Laws* of 1998, no. 137, item 887.
This provision has not been changed since the last reporting period. There is a general prohibition to employ young workers under 18 years of age on commercial vessels for other reasons than for vocational training.
Chapter VII
Application of Transitional Measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS

Poland opened its labour market for nationals of EU8 as from the day of their accession to the EU.

Reciprocal measures were applied until January 17, 2007 towards nationals of the EU15 Member States as long as they applied restrictions for Polish nationals. Therefore as from 17 January 2007 citizens from Austria, Belgium, Denmark, France the Netherlands, Lichtenstein, Luxembourg, Germany, Norway, Switzerland were entitled to take up employment without work permit. Therefore as from January 17, 2007 following foreigners may take up employment without work permit: EU nationals, EEA nationals, non EU and non EEA nationals, who may benefit from free movement rights on basis of international agreements concluded between countries of their origin and EU and EU Member States (as well as members of their families, irrespective of nationality). There were special regulations of the Minister of Economy and Labour and then of the Minister of Labour and Social Security that applied reciprocal measures to those nationals of Member States whose countries imposed restrictions as regards access for Polish citizens to their labour markets.82

According to the judgment of Supreme Administrative Court of April 26, 2006, the principle contained in former Art. 39 EC Treaty should not have been applicable to nationals from these Member States to which Poland applied reciprocal measures restricting access to Polish labour market.83

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA AND CROATIA

No transitional measures have been imposed on workers from Bulgaria and Romania as well as Croatia. The Polish labour market was opened to nationals from these Member States as from the day of accession to EU. Therefore Polish labour market is unconditionally opened for nationals from all 28 Member States.

There have been no reported cases as regards infringing the free movement rights for EU 8.

Additionally due to the fact that Croatia joined EU at the beginning of July, the period is too short for any reported problems with executing free movement rights by Croatian citizens.


83 File no. II GSK 62/06.
POLAND
Chapter VIII
Miscellaneous

Main texts in force:
1) Act of October 13, 1998 on Social Security System,
2) Act of August 27, 2004 on health care benefits financed from the public sources,
3) Act of June 23, 2003 on social pension,
4) Act of November 28, 2003 in family benefits,
5) Act of March 12, 2004 on social assistance,
6) Act of April 20, 2004 on promotion of employment and labour institutions,
7) Act of May 29, 1974 on provision for war and military invalids and their families,
8) Act of May 31, 1996 on financial benefits for individuals deported to forced labour and imprisoned at labour camps by the Third Reich and USSR,
9) Act of November 16, 2006 on financial benefits and rights for civil, blind war victims,
10) Act of June 13, 2003 on aliens,

1. RELATIONSHIP BETWEEN REGULATION 883/04 AND ART 45 TFUE AND REGULATION 492/2011

There are no specific provisions on relationship between provisions of Regulation 883/04 and Article 45 TFEU and Regulation 492/2011.

Nothing has changed in this aspect since last reporting period.

There are very limited number of judgments either in civil or in administrative courts that deal with the relationship between these legal provisions.

In the judgment of the Supreme Court of September 20, 2011 the Supreme Court qualified the social pension as one of benefits listed in the former Regulation 1408/71 and claimed that in such a situation the requirement of having a place of residence in order to qualify for such a benefit is compatible with EU law. However, the Appeal Court (the lower chamber) claimed contrary, referring in its judgment to Nerkowska ruling. The Supreme Court has not interpreted Polish legislation in such a way as to take account, in particular the fact if the applicant in question has maintained all of his economic and social links to the Member State of origin. This matter was entirely disregarded by the Court. It is the latest judgment concerning application of certain financial benefits in the light of place of residence requirement.

However, courts are not consistent with their analysis of the residence requirement as regards social pension. It has to be stressed that courts are in general not obliged to follow judgment of the Supreme Court, although practice leads to a conclusion that in vast majority cases they do so. In the judgment of the Court of Appeal in Lublin of 13 May 2010, the court claimed that after 1 May 2004 Polish citizens as EU citizens have the right to move and reside freely within the territory of the Member States. Consequently, make the payment of social pension conditional upon having place of residence in Poland, a Polish citizen is discriminated by provisions of Polish law which limits his rights to make use of free movement rights. Therefore, Art. 2.1 of the Act of 27 June 2003 on social pensions making the right to

84 File no. I UK 59/11.
payment of the benefit conditional upon living and reside in the territory of Poland constitutes a violation of the principles of freedom and discriminate those persons who have been granted the right to freedom of movement.85

The rule is that the contributory benefits which are in general financed by contributions paid by employees and/or employers as a rule are covered by EU coordination provisions. Social advantages in the meaning of art. 7(2) of Regulation 492/2011 cover a very broad range of various benefits. They can be provided both by employers or state institutions. Usually such advantages are financed by public funds, without prior contributions of potential beneficiaries.

Social advantages that are described in Art. 7 para 2 of the Regulation 492/2011 cover variety of benefits of financial and non-financial dimension. Therefore the group of social advantages will be in most cases financed by public funds, without contributions of potential or future beneficiaries. However, to social advantages in the meaning of Art. 7 para 2 of the Regulation shall also be qualified such advantages as the possibility to recognize prior employment periods in order to gain additional benefits, certificates proving knowledge of Polish language awarded in different Member State that Poland, etc...These latter benefits are in general recognized by Polish legislator, as have been analysed in previous Chapters of the Report.

As regards financial benefits that could be analysed in the light of Art. 7 para 2 of the Regulation 492/2011 following acts are worth mentioning: the Act of June 23, 2003 on social pension 86 (ustawa o rencie socjalnej), Act of November 28, 2003 on family benefits (Ustawa o świadczeniach rodzinnych), 87 Act of March 12, 2004 on social assistance (ustawa o pomocy społecznej). 88 It shall be mentioned that as regards the Act on social assistance and the Act on social pension, there are rules entitling to receive non-contributory benefits (where no prior economic activity and paying contributions are obligatory). Both Polish and EU citizens (not restricted to workers) are entitled to receive such non-contributory benefits.

The Act on social pension provides financial assistance for individuals who have been completely unable to work before 18 or 25 and it applies not only to Polish citizens that reside at the territory of Poland, but also to residing at the territory of Poland EU/EEA and Swiss citizens and members of their families who have a right for stay or permanent stay. The Act provides also for a funeral assistance in case of death of person entitled to social pension. EU nationals and members of their families in order to be granted this kind of benefit shall have their place of residence at the territory of Poland and they have to possess right of residence or permanent residence.

Social pension is a non-contributory benefit for persons who became incapable to work before reaching maturity or graduating studies or doctorate studies.

Should the beneficiary carry out an economic activity, ‘renta socjalna’ can be suspended (art. 10 of the Act on social pension).

The Act on family benefits in Art. 2 provides for family benefits and attachments to family benefits, custody benefits; nursing benefits and nursing allowances; commune benefits and one-off benefits for a newly born child. These benefits may be granted to Polish citizens and EU citizens who are covered by social security coordination schemes and provided that

87 Journal of Laws of 2006, no. 139, item 992.
88 Journal of Laws of 2004, no. 64, item 593.
these two groups of individuals reside at the territory of Poland, unless coordination system or relevant international agreements provides otherwise.

The Act on social assistance provides benefits for persons who are in need (as a consequence poverty, homelessness, long-term unemployed) and are unable to overcome the situation without external help. The right for such a help is granted inter alia to Polish citizens who reside at the territory of Poland and EU/EEA, Swiss citizens and their family members who reside at the territory of Poland and have a right for stay or permanent stay.

As regards benefit for incapacity to work as a war consequences, the Law of May 29, 1974 on provision for war and military invalids and their families (Ustawa o zaopatrzeniu inwalidów wojennych i wojskowych oraz ich rodzin) does not contain the requirement for the applicant to have a residence place in Poland (as a result of Nerkowska ruling). Additionally, in the Law of May 31, 1996 on financial benefits for individuals deported to forced labour and imprisoned at labour camps by the Third Reich and USSR (ustawa o świadczeniu pieniężnym przysługującym osobom deportowanym do pracy przymusowej oraz osadzonym w obozach pracy przez III Rzeszę i Związek Socjalistycznych Republik Radzieckich) also residence clause has been deleted.

Still the Act of November 16, 2006 on financial benefits and rights for civil, blind war victims (Ustawa o świadczeniu pieniężnym i uprawnieniach przysługujących cywilnym nie-widomym ofiarom działań wojennych) that applies to Polish citizens require to have a permanent residence at the territory of Poland.

Therefore nothing has changed in this aspect in comparison with last reporting period.

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS

The Act on entry does not have special provisions regarding frontier workers. Therefore they benefit from the same rights and are subjected to the same duties as regular workers according to the Act on entry. However, there are specific provisions concerning entitlement of financial and non-financial benefits which contain residence requirement and consequently may influence the situation of frontier workers – such as the Act on family benefits or the Act on social assistance and Act on higher education, Act on loans and credits.

No direct reference to frontier workers is done neither in the Act on entry nor in the Act on promotion of employment and labour institutions.

Nothing has changed since last Report.

90 The residence requirement was included in Art. 5 of the Act. However, even when it was in force, the Polish Supreme Court on December 8, 2009 ruled that it is forbidden to suspend such benefits as listed in the Act as a consequence that the applicant does not have a permanent residence in Poland, but resides in EU Member State – file no. I BU 6/09.
3. **EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS**

3.1. **Integration measures**

No special programmes for EU nationals are provided.

3.2. **Immigration policies for third-country nationals and the Union preference principle**

*Immigration policies for third-country nationals*

Unlike the situation as regards EU nationals, Polish authorities put a special emphasis on situation of third country nationals in Poland.

First of all, the ‘Migration policy for Poland’ which is a governmental programme dedicated mainly to third country nationals and which was announced in April 2011, is still the main document regarding the taken policy and approach towards third country nationals. One of the aim of the Policy is to enhance and help foreigners to integrate with Polish society. The general aim of the document is to define future steps to create Poland as friendly and worth coming country.

Secondly, as mentioned in last year Report, in 2012 the abolition policy for third country nationals has been introduced. The programme has been widely announced in order to enable third country nationals to make a full use of it.

Moreover, the vast majority of programmes conducted by NGOs which aim is to support foreigners staying in Poland is focused on third country nationals, refugees and not EU citizens and members of their families. The reason for such an approach can be explained two-fold. Firstly, the scale of migration of EU citizens and members of their families in comparison with other group of foreigners is relatively small. Secondly, as in general there are no reported cases as regards problems with stay in Poland for such a group of migrants, the effort is put on a group of migrants that is in real need. The best example of such an approach is the programme conducted by the Helsinki Foundation for Human Rights Programme. The Programme called Legal Assistance to Refugees and Migrants has was established in 1992. The Program’s fundamental activity is to provide cost-free legal advice and assistance to foreigners turning to the Foundation and to undertake litigation actions. The scope of the Program’s activity also includes monitoring of the observance of the Constitution of the Republic of Poland, the provisions of the Geneva Convention of 1951 regarding Refugee Status, the European Convention on Human Rights and Fundamental Liberties and Polish legislation by Polish authorities in cases of foreigners. Therefore as can be seen, the Programme is devoted to migrants but rather not EU citizens, but TCN (additionally not having a status of family members of EU citizens).

*Union preference principle*

There is no direct provision on Union preference principle in Polish legislation. According to the Act on promotion of employment and labour market, the priority in taking up employment shall be given to Polish nationals, EU nationals and members of their families and to those third country nationals, other than family members of EU who are released from the obligation to have a work permit.
A regional voivode relevant for place of residence or place of stay of future employer is entitled to issue an employment permit for foreign applicant. However, as a rule such a permit shall be given only if the starost confirms that basing on the records of unemployed and seeking work there is no other candidate that does not need to have a permit for work or there has been a recruitment procedure for a given employer that has not been finished successfully.

But one must be aware that in the Act on promotion in Art. 87 there is a wide list of foreigners that are released from obligation to obtain a work permit. This group covers inter alia foreigners, who have received a settlement permit or a residence permit for a long-term EC resident in the territory of Poland or have a refugee status, a tolerated residence permit or is subject to temporary protection in Poland. Together with members of their families. Additional group is covered by individuals holding a Charter of Polish National according to Act of September 7, 2007 on the Charter of Polish National (Ustawa o Karcie Polaka).\(^2\) In general the Act covers individuals who live within a territory of ex – Soviet Union, who has Polish origin and who lost Polish citizenship due to events connected with World War II and post – war period.

As regards lack of direct Union preference principle, nothing has changed since last Report.

### 3.3. Return of nationals to new EU Member States

The final report on national census that was conducted in 2011 was published in July 2012. But the report on migration was published just recently, in June 2013. According to the final results of the census, as of 31 March 2011, overall 2 017 501 of Polish citizens were abroad for a period longer than 3 months. The vast majority of migrants are long term ones, as 1 564 580 are those who stay for a period longer than 12 month (in comparison with 452 921 of those staying between 3 and 12 months).

In comparison to last census that was done in 2002, the amount of migrating citizens is considerable higher. In 2002 there were 786 000 of migrating Polish citizens. Among these 1 940 000 more than two third were staying outside territory of Poland for more than 12 months. The most popular destinations for Polish citizens are as follows: Great Britain (30,2%), Germany (21,6%), United States (11,4%), Ireland (6,5%), the Netherlands (4,6%).\(^3\)

Surely this significant increase in number of migrating Polish citizens is caused by accession to EU.

There have been no figures and analysis on the scale of returning Polish citizens yet. There were scheduled to be available until the end of 2012, but they are still not available.

The official governmental programme called ‘Powroty’ (‘Returns’) is still ongoing. The main part of the programme is based on the website [http://powroty.gov.pl](http://powroty.gov.pl) which contains plenty of useful information not only legal (such as tax, social security, registration issues) but also practical.

The authors of the programme very significantly emphasize that their aim is not to enhance Polish citizens to turn back to Poland.

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\(^2\) Journal of Laws of 2007, no. 180, item. 1280

However, there is also a trend, according to the thesis of the existence of a ‘trap migration’ of Polish citizens who decided to return to the Polish, that after some time they decide to re-emigration. This may be related to the loss of social networks in the home country or depreciation of human capital as a result of their work far below qualifications.94

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED

The situation in this respect has not considerably changed since last two Reports 2011. The same institutions shall be mentioned to which formally or informally complaints for violation of Community law can be launched

a) Rzecznik Praw Obywatelskich (Ombudsman) – www.rpo.gov.pl
b) Fundacja Uniwersyteckich Poradni Prawnych (Legal Clinics Foundation) – www.fupp.org.pl
c) Poradnia Prawna dla Cudzoziemców (Legal Bureaux for Aliens) – www.diplomacy.pl
d) Helsińska Fundacja Praw Człowieka (Helsinki Foundation for Human Rights) – www.hfhrpolwaw.pl
e) Instytut Spraw Publicznych (Institute for Public Affairs) – www.isp.org.pl
f) Związek Biur Porad Obywatelskich (Union of Citizens Advice Bureaux) – www.zbpo.org.pl
g) Forum Migracyjne (Foundation of Polish Migration Forum) – www.forummigracyjne.org
h) Stowarzyszenie Interwencji Prawnej (Association of Legal Intervention) – www.interwencjaprawna.pl
i) Stowarzyszenie Małżeństw Polaków z Obcokrajowcami (Association of Marriages with Foreigners) – www.obcokrajowcy.republika.pl

There is a rule in the court administrative procedure, that it is possible for so called social organizations (organizacja społeczna) to join to the party of the relevant proceeding in the both administrative and judicial phase of proceedings in order to support applicants (provided that in their internal regulations such activity is listed as one of their rights and duties). The most active in this regards is the Helsinki Foundation for Human Rights. This Foundation not only actively supports foreigners during proceedings with Polish authorities, but also actively intervenes in relevant Polish authorities and calls for changes in the law and in the practice whenever it has noticed infringements. The best example of this active approach of the Foundation has been the engagement in case concerning refusal to entry Poland for TCN partner of Polish returning citizen (as widely described in the Chapter II point 1 of the Report). The Foundation not only supported Dominican Republic citizen during court proceedings, but also prepared official request to Border Guard which resulted in issuing a circular on treatment extended family members by these authorities.

Still, for Polish authorities it is very important to provide foreigners with ample of information in regional Foreigner Service Centers that are located in each of 16 provinces of

Poland. The special programme upgrading competences of regional authorities in order to be effective, helpful and be able to communicate with foreigners in at least English language is still pending, like last year. The rapporteur for the purpose of this Report has checked how in practice the customer service in relevant offices look like. In Krakow the foreigner will receive comprehensive information in English and full support in order to make all necessary formalities.

5. SEMINARS, REPORTS AND ARTICLES

There have been few seminars and publications on free movement issues in 2012.

As regards seminars following shall be mentioned:


b) Polish citizens on the Netherlands labour market – October 24, 2012 Warsaw

c) Migrating workers in the housing services sector - November 20, 2012 Warsaw

d) Escape from seniority? Consequences of migration of Polish citizens in the light of aging of Polish community - April 15, 2013 Warsaw

Publications

Agnieszka Frąckowiak-Adamska – Obywatelstwo Unii – świadczenia przyznawane cywilnym ofiarom wojny lub represji – uzależnienie wypłaty od wymogu zamieszkania na terytorium państwa członkowskiego – naruszenie art. 18 ust. 1 TWE (obecnie art. 21 ust. 1 TFUE) – nieproporcjonalność – Europejski Przegląd Sądowy 2013 (7) (Comments on Nerkowska judgment)

Renata Kopczyk, Zakaz dyskryminacji w sporcie w prawie Unii Europejskiej, Warszawa 2103 (Prohibition of discrimination in sport in EU Law)

Jakub Kocubiński, Usługi socjalne świadczone w interesie ogólnym – prawne aspekty europeizacji państwa dobrobytu, Europejski Przegląd Sądowy 2013 (6) (Social services provided in general interest)

Agnieszka Frąckowiak-Adamska, Obywatelstwo Unii – prawo pobytu. Głos o orzeczeniu C-408/03 Komisja Wspólnot Europejskich przeciwko Królestwu Belgii ( EU citizenship – right of stay, comments on C 408/03 judgment)

Dorota Dziensiuik, Uwzględnienie okresów ubezpieczenia osiągniętych w państwach członkowskich w emerytalnym kapitale początkowym – uwagi na tle wyroku C-440/09 ZUS v. Stanisława Tomaszewskiego, Europejski Przegląd Sądowy 2012 (9) (Periods of insurance in the light of C 440/09 judgment)

Biuletyn Migracyjny wydawany przez Urząd ds. Cudzoziemców (Migration Newsletter issued by the Office for Foreigners).


Duszczyk Maciej. 2012. Polska polityka migracyjna o rynek pracy, Warszawa 2012 (Polish migration policy in the context of labour market)


Rządowa Rada Ludnościowa, *Założenia polityki ludnościowej Polski, projekt* (Aims of the population policy in Poland, draft), Warsaw 2013