REPORT
on the Free Movement of Workers
in Austria in 2009-2010

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Introduction

Free Movement of Workers isn't a 'priority topic' in Austria, neither in politics nor in science. Of course there are political discussions about foreigners – but they do not concern Union citizens or their family members. The discussion focuses on asylum seekers and unqualified immigrants. Even the fact, that Germans are the largest group of foreign workers in Austria, was hardly mentioned (or even discussed).

There was no discussion about the prolongation of the transitional periods. At the end of April 2009, there was a short note in the newspapers about the fact that the Austrian Minister for Labour notified the prolongation to the Commission; but obviously there was no need for discussion. Not on political level because all Austrian Parties (except the Greens) are voting for prolongation (and mainly base that on labour market-reasons under the specific situation of the current economic crisis); the economy as well as the trade unions favour the prolongation.

There have been amendments to the Austrian Immigration Law but they only concern third-country nationals.

Chapter I
The Worker: Entry, Residence, Departure and Remedies

The Austrian Immigration Law is codified in the Austrian Police Act 2005 ('Fremdenpolizeigesetz' [FPG]; Federal Law Gazette I 100/2005; in the following quoted as 'APA 2005'), the Settlement and Residence Act 2005 ('Niederlassungs- und Aufenthaltsgesetz' [NAG]; Federal Law Gazette I 100/2005; in the following quoted as 'SRA') and the Asylum Act 2005 ('AsylG'; Federal Law Gazette I 100/2005); these Acts have been supplemented by implementation orders: 'Fremdenpolzei-Durchführungsverordnung' (Federal Law Gazette II 450/2005; in the following quoted as 'APA-IO') and 'Niederlassungs- und Aufenthaltsgesetz-Durchführungsverordnung' (Federal Law Gazette II 451/2005; in the following quoted as 'SRA-IO').

The Immigration Acts have been amended ('Fremdenrechtsänderungsgesetz 2009' [FrÄG 2009]; Federal Law Gazette I 122/2009); becoming effective on the 4.12.2009. Regarding the residence permit 'Daueraufenthalt – EG' (Sect. 45 SRA) it is now possible to apply for extension after expiry (Sect. 20 § 3 SRA) which equates to Art. 9 § 6 of Directive 2003/109/EC. For aliens entitled to an establishment half the time of their legal residence is to be taken into account for the reach of the five-year-period to acquire the residence permit „Daueraufenthalt – EG' (Sect. 45 § 1a SRA). This ensures – concerning aliens possessing a residence permit for students[1] – the implementation of Art. 4 § 2 of Directive 2003/109/EC. Sect. 45 § 6 SRA provides a simplified procedure for the recovery of the position of a long-term residence status according to Art. 9 § 5 of Directive 2003/109/EC and in terms of the legal practice of the Administrative Court (24.2.2009, 2008/22/0087 to 0090). Some amendments considered the impacts of the ECJ-Metock and Sahin decisions. The legislative body took into account the ECJ-judgments Metock (C-127/08) and Sahin (C-551/07). On the one hand the impacts of this jurisdiction are absorbed. On the other hand the potential to control and to aggravation that are contents of Directive 2004/38/EC are transposed into national law for the first time. In particular there is a distinction between residence permits for stays exceeding three months and the right to permanent residence. The last one is generally acquired by a permanent and legal residence of five years (Sect. 53a SRA). Furthermore there are obligations of notification about modified circumstances that have impact on the residence permit. Authorities can control the continuance of the residence permit (Sect. 55 SRA). Finally it is asserted that marriages and adoptions of convenience are not in the scope of EC-law. None of the spouses can refer to this marriage to get or retain the right of residence (Sect. 30a SRA).

As far as I found out, there is no English translation for the APA 2005 or the SRA available. You'll find the German version of the APA 2005 and the SRA on the Federal Minister for Interior Affairs' homepage (http://www.bmi.gv.at/gesetzesvorlagen/) or in the Republic's online law resource http://www.ris.bka.gv.at. The Federal Ministry for the Interior removed the English version of the SRA from its homepage.

1 The Federal Ministry for the Interior published a 'Guide to entry and residence requirements for foreign students'; available at: http://www.bmi.gv.at/cms/BMI_Niederlassung/allg_Infos_neu/guide_entry_students.pdf .

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

The Commission is interested in the implementation of Art. 7 (1a), 7 (3a-d), 8 (3a), 14 (4a-b), 17 and 24 (2) Directive 2004/38. The situation in Austria seems to be as follows: Art. 7 § 1/a has the same wording as Sect. 51 pt. 1 SRA and the legislative materials to Sect. 51 SRA[2] explicitly refer to Art. 7 § 1. But it seems that there is no equivalent for Art. 7 § 3. Art. 8 § 3 is implemented by Sect. 53 § 2 SRA but there is no national provision transposing Art. 14 § 4. The implementation of Art. 17 is missing as well as an explicit provision about Art. 24 § 2.

2. SITUATION OF JOBSEEKERS

Union citizens who look for a job in Austria have to register within three days if they take a residence. Probably this is not in line with ECJ C-265/88, Messner: a three-days-period for registering is too short. According to that, union citizens, who have to register in Austria for the first time, do not violate Sect. 3 Registration Act ('Meldegesetz', Federal Law Gazette 9/1992 as amended by I 135/2009) if they need a little bit more than three days for registering.

According to Art. 69 Regulation 1408/71 the foreign unemployment benefit can be exported to Austria (for three months maximum) if the jobseeker applies for export before he comes to Austria. The foreigner has to have the E303-formular. Since the export of the benefit is handled by the State's employment agencies, the foreigner has to register there within seven days even if he/she does not use the agencies' services (- the concrete procedure is stipulated by EC-Regulation 574/72 and internal 'procedural guidelines').

If foreigners without foreign unemployment benefits look for a job with the help of the State's employment agencies, they have to register there and will receive job offers.

If the foreign jobseeker is not entitled to a foreign unemployment benefit, he/she usually is not entitled to an Austrian (financial) unemployment benefit. But the same counts for Austrians: If they are no more entitled to unemployment payments, they can apply for 'Notstandshilfe', which is only granted when there was a claim on unemployment payments before. If the Austrian wasn't entitled to an unemployment payment, he/she is not entitled to 'Notstandshilfe' afterwards. He/she has to apply for 'social welfare'-payments which are within the responsibility of the provinces. These payments do (usually) not depend on citizenship. But then we have the problem of 'being self-maintaining' as a prerequisite of free movement of union citizens.

Third-country nationals are not allowed to immigrate to look for a job. The only way to immigrate for work is to be a 'key worker'; prerequisites for that are a concrete offer of em-

2 Sect. 51 SRA reads as follows:
EEA nationals who are entitled to free movement under EU law and who reside in the federal territory for longer then three months, shall have the right to settle if 1. they are Austrian nationals or self-employed, or 2. they have sufficient sickness insurance for themselves and for their family, and disposes of enough means to support themselves and the members if their family, without recourse to the social assistance system or 3. they complete an education from a legal accredited public or private school or educational institution and meet the requirements under Point 2.

ployment, a special training or know-how and skills in demand on the Austrian labour market, prior job experience, a minimum remuneration of 2.466 Euro gross salary per month).[3]

3. OTHER ISSUES OF CONCERN

There is no specific case law dealing with the above mentioned articles. The Administrative Court's judgments mainly refer to the Directive's provisions when the term 'family member' is in dispute. And the Administrative Court (17.12.2009, 2008/22/0925) mentioned that Turkish workers and Union citizens have to be treated equally as regards residence bans; Sect. 86 § 1 APA, which implements Directive 2004/38 and stipulates the prerequisites for that measure, is applicable to both groups.

3 The Federal Ministry for the Interior publish an 'Information Leaflet for Key Workers'; available at http://www.bmi.gv.at/cms/BMI_Niederlassung/Folder_Schlsselkrfte_Feb_2010_englisch.pdf .

Chapter II
Members of the Worker's Family

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

The Administrative Court (10.12.2009, 2008/09/0040) had to deal with the definition 'children': A woman from Serbia, daughter of an Austrian citizen, applied for a work permit exemption certificate according to Sect. 15 § 1 sub. 3 Aliens Employment Act. The application was dismissed because she has reached the age of eighteen. With respect to Art. 23 of Directive 2004/38/EC there is no doubt that in the transposition of this directive 'children' in the exemption clause of Sect. 1 § 2 sub. m Aliens Employment Act are understood to be direct descendants. There is no reservation for unmarried and minor children. That differs from Sect. 2 § 1/9 SRA which relays to 'unmarried and minor children'.

2. ENTRY AND RESIDENCE RIGHTS

As mentioned in the last years report, the Administrative Court (2008/18/0507) asked the Constitutional Court to revoke some words in Sect. 57 SRA as unconstitutional. The dubious words are 'sofern sie ihr Recht auf Freizügigkeit in Anspruch genommen haben' ('provided that they made use of their right in free movement'). The application is mainly based on '*Metock*'-arguments. As to the facts: A citizen from India applied for asylum in December 2000; in July 2003 his application was dismissed. In April 2004 he married an Austrian woman and applied for a residence permit as favoured third-country national. The authority denied because his wife wasn't a 'free movement'-using Union citizen. In April 2008 the authority enacted an expulsion. Contrary to that the complainant argued that his wife participated at a 'turtle-project' in Greece for seven months in 2006. The Administrative Court stated that the complainant lives in his wife's country of origin and therefore the *Metock*-case (Union citizen doesn't live in the country of origin but in another Member State) is not applicable. The *Carpenter*-principles (ECJ, C-60/00) aren't applicable too. So there is no doubt that there isn't a transboundary issue in the sense of Art. 18 and 39 EC Treaty. But on the other hand, the *Metock*-decision causes doubts: is it justified to differentiate between Austrians making use of their right on free movement and Austrians not doing so? For the latter, this would cause a discriminatory situation because their family members would be treated worse. Without doubt, the *Metock*-judgment refers to transboundary issues. This would be given if the foreigner marries a German living in Austria – even if the German is born in Austria and never moved to another Member State. But then it depends on the citizenship of the family member whether or not a foreigner is able to require the status 'favoured third-country national': If he marries a German (born in Austria), he is entitled, if he marries an Austrian living in Austria, he is not entitled. That leads to the conclusion that the requirement 'making use of the right on free movement' is not justified; it excludes foreigners from benefits just because of the 'wrong citizenship' of their husbands/wives.

The Constitutional Court referred to the problematic wording twice: The Constitutional Court (16.12.2009. G244/09) pointed at the ECJ-decisions *Metock* and *Sahin*. If there exists

a family relationship between a third-country national and an EEA national or Swiss citizen, the third-country national can rely on Directive 2004/38/EC and is entitled to a residence permit in Austria pursuant to Sect. 51 to Sect. 57 SRA. It does neither matter how the third-country national entered Austria and when the family relation was founded nor plays a role if the EEA national or Swiss citizen made use of his right to free movement by being born in Austria or living here or if he has resided there only later. But if there is a family relation between a third-country national and an Austrian it is decisive if the Austrian made use of one of the rights arising from Art. 18 and Art. 39ff EC in the EEA-region out of Austria. If he has made use of it, his relative has a right to reside in Austria – no matter how he entered the territory or when the family relation was founded. If the Austrian did not realise a free movement-fact the third-country relative can only achieve a permit to stay according to the general conditions of Sect. 47 § 2 SRA. The Court stated that this provision is not unbalanced. It is optional for the legislator to differentiate between facts that are linked with EC-law and those without a connection. The Court found that the distinction is justified in objective facts.

A few months earlier, the application of the Administrative Court to suspend the wording 'as long as they made use of their right to free movement' in Sect. 57 SRA was rejected. The Constitutional Court (20.6.2009, G125/08) decided: When the alien police authority has to evaluate whether the requirements for an expulsion order according to Sect. 53 § 1 APA are met because of the alien's illegal stay in Austria, it only has to prove if the right to residence according to EC-law is documented. For this documentation the 'residence-authority' is competent. Whereas the alien police authority must not prove if the alien is really entitled to stay according to Sect. 54 as well as Sect. 57 SRA. Thus it is not possible that the Administrative Court applies Sect. 57 SRA in his decision if the alien police authority has imposed the expulsion order lawfully.

The Administrative Court (18.2.2010, 2009/22/0336) decided in accordance with the Constitutional Court: A Nigerian came to Austria and married an Austrian woman. His initial application for the residence permit 'family relative' according to Sect. 19 § 1 and § 21 SRA was dismissed in 2006. According to Sect. 57 SRA the regulations about the residence permit for non-EU citizens and their relatives are also applicable for relatives of Austrian citizens, as long as they made use of their right to free movement. This is regulated in Directive 2004/38/EC. According to its Art. 3 § 1 it is sufficient that a Union citizen stays in a different Member State as the one of his citizenship. If the sponsor has the citizenship of the host Member State, another cross-border affair according to Art. 18 and 39ff EC is necessary.

2.1 Situation of family members of jobseekers

There are no specific provisions on family members of jobseekers. If the jobseeker is Union citizen, he/she is entitled to come to Austria to look for a job. His/her third-country family members are allowed to stay for three months but have to apply for a visa (Sect. 85 APA). If they want to stay for a longer period, they have to apply for a residence permit. But it is to notice that this preferred treatment of family members depends on the fact, that the Union citizen is 'entitled to free movement'. That points on sufficient financial means. Therefore it is doubtful whether or not a family member of a jobseeker benefits from that provision. But it has to be stated, that – although the Germans are by now the largest group of foreign em-

ployees – there have no cases been reported as regards EC-jobseekers or their family members. Neither in the academic literature nor in the media.

Third-country family members of a non-EC-jobseeker have to apply for a residence permit by themselves. They are treated as a foreigner who wants to come to Austria; therefore he/she has to meet the requirements of SRA. That leads – inter alia – to the fact, that their application has to meet the quotas fixed for specific issues (family member, employment, …).

3. APPLICATION OF *METOCK*-JUDGMENT

There have been amendments to the Austrian Immigration Law in the context of Aliens Act Amendment ('Fremdenrechtsänderungsgesetz 2009' [FrÄG 2009]; Federal Law Gazette I 122/2009) becoming effective on the 4.12.2009 (see Chapter I.).

The Administrative Court proceeded with case law quoting the *Metock*-judgment (C-127/08).

Administrative Court 18.3.2010, 2008/22/0427: The application from an Armenian citizen for an initial residence permit for the purpose 'favoured third-country national' was dismissed. The complainant stated that every residence in another Member State is to be valued as use of the right to free movement. The complainant didn't submit that his wife has made use of this right. The Administrative Court cited ECJ case C-127/08, Metock, which says that the regulations about free movement are not applicable on activities that don't concern facts on which EC-law is to be applied and which don't have a relevant cross-border dimension. So the submit that the complainant's wife who resides in Austria as part of the European Union cannot be valued as use of her right to free movement.

Administrative Court 25.2.2010, 2007/09/0311: The application of a Georgian citizen who is married to a Greek woman for a confirmation pursuant to Sect. 3 § 8 Aliens Employment Act that he is excluded from the scope of this law was dismissed according to Sect. 1 § 2 sub. l and Sect. 3 § 8. The authority stated that it could only be issued if he has the right to stay according to the SRA but this was dismissed in 2007. At the moment the complainant doesn't have a residence permit. In the decision the Administrative Court cited C-551/07, *Sahin* and C-127/08, *Metock*. Art. 3 § 1, 6 § 2 as well as 7 § 1 sub. d and § 2 of Directive 2004/38/EC also include persons that entered a state independent from their family member and then acquired the status of a relative. The mentioned articles are directly applicable in case of their lacking transposition. Thinking of Art. 3 § 1, the complainant – as a husband of a Greek citizen that has made use of her right to free movement – can rely on the exemption clause of Sect. 1 § 2 sub. l Aliens Employment Act anyway.

Administrative Court 25.2.2010, 2008/09/0181: In 2007 a Nigerian who is married to a woman from Italy applied for a confirmation according to Sect. 3 § 8 Aliens Employment Act but it was dismissed. According to the Court the complainant can refer to C-551/07, *Sahin* and C-127/08, *Metock*.

Administrative Court 27.1.2010, 2009/21/0379: A ten-year residence ban was imposed against a Nigerian citizen who is married to a German according to Sect. 62 § 1 and 2 as well as Sect. 60 § 2 sub. 1 and Sect. 63 § 1 APA. The Administrative Court stated that the ECJ-decisions *Metock* and *Sahin* are applicable.

Administrative Court 25.11.2009, 2008/01/0178: A man from Gambia applied for asylum in 2002. In 2005 he married an Austrian-British citizen. His application for asylum was

dismissed in 2006 and he was expelled. There was also imposed a prohibition of returning because of his drug delinquency. The Court stated that the *Metock*-judgment is applicable but case-related it adverted to Chapter IV of Directive 2004/38/EC for the further procedure.

Administrative Court 24.11.2009, 2008/21/0436: A woman from Russia married a German citizen in 2005. They lived with their common daughter in Germany where she had a temporary (German) residence authorization until the 31.8.2008. On 1.2.2008 she went to Austria with her husband and acted as a dancer in a disco. She went to the administrative authority to clarify whether she is permitted to work which was negated. Thereafter she was expelled and immediately left for Germany. An administrative sanction was enacted with the justification that she intentionally went to Austria to temporarily work there. She didn't have a residence authorization from an Austrian authority which is necessary for a temporary employment. The Court stated that the ECJ-*Metock*-judgment is applicable.

Administrative Court 10.11.2009, 2008/22/0733: A man from Bosnia-Herzegovina married a woman from Slovenia who lives in Slovenia with their common daughter (born in 2007). According to the Court, he is entitled to refer to the ECJ-*Metock*-judgment.

Administrative Court 24.9.2009, 2007/18/0347: A man from Palestine married an Austrian citizen who did a two weeks' language study in another Member State. The Administrative Court stated that the *Metock*-judgment is not applicable. The Palestinian stays in the country of origin of his wife and not in a host Member State in that his wife went according to Art. 2 sub. 3 Directive 2004/38/EC to exercise her right to free movement. The free movement facts are not met because he didn't join her when she moved to the other Member State. The Carpenter-principles (ECJ, C-60/00) aren't applicable either.

Administrative Court 22.9.2009, 2008/22/0297: A citizen from Burkina Faso came to Austria and married a woman from Austria. He claimed that his wife has exercised her right to free movement. The defendant didn't observe whether this really happened or not. If it is true, the *Metock*- and *Sahin*-case are applicable.

Administrative Court 6.8.2009, 2009/22/0024: A third-country national came to Austria and married a British woman, who exercised her right to free movement. The criteria for applying the *Metock*-judgment are met.

Administrative Court 18.6.2009, 2008/22/0595: A fifteen-year long exclusion order was imposed on a Turkish citizen. The Court stated that an unlimited exclusion order is illegitimate and in case of a limitation it must not exceed ten years. Regarding the injunction of Art. 32 of Directive 2004/38/EC about the temporal effects of an exclusion order these provisions would infringe Community law.

Administrative Court 4.6.2009, 2008/18/0278: After expiration of her visa, a woman from Serbia remained in Austria and was banished because of lack of means. Her stepfather has the German and Danish citizenship and provided her with monthly support payments. According to the Court, she is entitled to refer to the ECJ-*Metock*-judgment.

Administrative Court 14.5.2009, 2009/22/0028: In 2006 a man from Nigeria married an Austrian woman and applied for a permanent residence card. His application was dismissed because he had a provisional residence permit 'pursuant to Asylum Act' since 2002 and according to Sect. 1 § 2 sub. 1 SRA the SRA was not applicable on him. In the scope of Directive 2004/38/EC this legal norm is invalidated. The *Metock*- and *Sahin*-judgment are applicable if the wife made use of her right to free movement. But this has to be ascertained.

The Constitutional Court (16.12.2009, U 957/09) also referred to the *Metock*-judgment: A man from Nigeria came to Austria and married a Czech woman who lives in Austria. They have a common child. Referring to ECJ-*Metock* and ECJ-*Sahin*, Directive 2004/38/EC is

directly applicable. An expulsion measure is only possible if the prerequisites of Art. 27 § 2 are met. Since the Asylum Court applied contradicting domestic law (Sect. 8 § 2 Asylum Act 1997), there is a violation of the constitutionally guaranteed right to equality of aliens among themselves.

4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCE AND FRAUD

According to Sect. 60 § 1 APA, a residence prohibition can be enacted when there are specific reasons to assume that the foreigner's stay endangers public order or security or violates other public interests in the sense of Art. 8 § 2 ECHR. As a 'specific reason' has to be taken the fact that a foreigner enters into a marriage or refers on a marriage for the issuing of a residence title or a working permit, when the foreigner never had a common family life in the sense of Art. 8 ECHR (Sect. 60 § 2/9 APA). It is not necessary that the spouse receives benefits or payments. For family members of Union citizens, Swiss citizens or Austrians, Sect. 86 and 87 APA state, that a residence prohibition is justified if their personal behaviour endangers public order or security. In constant jurisprudence the Administrative Court uses Sect. 60 § 2 APA as benchmark. In cases of Union citizens as a spouse of an Austrian, the Administrative Court is more generous: Since Union citizens have an independent right to stay in other Member States, it is not to worry that they enter into a marriage for residence reasons.

Sect. 60 § 2/9 APA does not require that the marriage is declared null and avoid by authorities or courts (constant case law).

The Administrative Court referred to Directive 2004/38 a few times: It stated that a marriage of convenience is – even on EC law-standards – a condemned behaviour justifying a residence ban because Sect. 87 and 86 § 1 APA are results of Directive 2004/38/EC that provides measures to combat marriages of convenience in its Art. 35 (23.3.2010, 2007/18/0369; 23.3.2010, 2008/18/0305, 21.1.2010, 2007/18/0733, 21.1.2010, 2009/18/0506). The question, whether or not the marriage of a Union citizen and the complainant is a marriage of convenience, is without relevance for deciding which authority or court is competent (15.12.2009, 2007/18/0734; 15.12.2009, 2008/18/0637).

The Administrative Court (24.11.2009, 2007/21/0011) also declared that the imposition of an expulsion measure because of a marriage of convenience is at any rate permitted. That is equally valid if the marriage of convenience exists not until the issuing of a residence authorization. This becomes apparent from Sect. 55 SRA. The approaching regularized in Sect. 55 SRA and Sect. 86 APA does not dissent Art. 35 Directive 2004/38. According to that provision, Member States can enact measures to avoid and revoke abuse of rights that are assigned in this directive.

An expulsion measure was also imposed against an Indian citizen who married an Austrian woman but only for convenience (Administrative Court 25.9.2009, 2009/18/0278).

One decision was about the question if somebody can refer to his status as family member if his sponsor has a marriage of convenience. In the underlying case (Administrative Court 18.6.2009, 2008/22/0612) a man from Serbia and Montenegro was expelled in 1994 because his father contracted a marriage of convenience in 2005. On the basis of Art. 27 § 1 and Art. 35 of Directive 2004/38 there are no legal concerns to impose a residence ban against a third-country national beneficiary. The EC-law doesn't hinder an expulsion that is based on the lack of requirements for acquisition of rights, namely properly and not unlaw-

fully acquired status of family. According to settled case-law (ECJ-judgment Suat Kol v Land Berlin C-285/95) a favourable treatment under Community law cannot be obtained fraudulently. Art. 27 § 2 of Directive 2004/38/EC only directs at the personal behavior. The endangerment of public policy is not imputable to the son if he didn't commit the abuse of rights himself. But somebody who infers a right to stay from his unreasonably obtained status of family member (even if it is not aspired from him) can be expelled.

5. ACCESS TO WORK

The Aliens Employment Act was amended by Federal Law Gazette I 135/2009. According to Sect. 1 § 2/l and § 2/m, husbands/wives and unmarried minors of EEA citizens or Austrians have free access to the labour market. They do not have to apply for a working permit. But that is not true for family members of EU8-citizens, Romanians and Bulgarians; Sect. 32a § 1 Aliens Employment Act takes them back into the jurisdiction of that Act; at the same time Sect. 32a § 2 and § 3 stipulate the right to access to the labour market for some EU8- and EU2-citizens (e.g. those, who have been legally employed already) and their family members.

6. THE SITUATION OF FAMILY MEMBERS OF JOBSEEKERS

As regards the residence rights of third-country family members of job seekers you have to separate: Family members of job seeking Union citizens have a better position than family members of a third-country jobseeker (see above 1.1). As regards other issues, it has to be stated, that 'claims' usually do not depend on being a family member but on being entitled by meeting some prerequisites. In that aspect, no problems have been discussed in the academic literature or in the media.

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

According to information given by social law experts and tax law experts as well as to the observation of the academic literature and the newspapers, there is nothing to report.

Chapter III:
Access to Employment: a) Private sector and b) Public sector

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

a.1. Equal treatment in access to employment (e.g. assistance of employment agencies)

Sect. 1 § 2 lit l of the Aliens Employment Act (Federal Law Gazette 218/1975 as amended by I 135/2009) stipulates, that EEA citizens do not have to apply for a working permit.[4] But according to the transitional arrangements for EU8 and Bulgaria and Romania, this doesn't count for that group (see Chapter VII).

The Equal Treatment Act (Federal Law Gazette I 66/2004) has a specific provision about non-discrimination in the field of employment. According to Sect. 17 § 1/1 nobody is to be discriminated, especially as regards access to an employment. And Sect. 18 stipulates non-discrimination as regards access to careers guidance, vocational training, further training or retraining. Nevertheless it has to be kept in mind that the mentioned provisions refer to discrimination on ethnical reasons, religion, age or sexual orientation and not on nationality.

The Act on the State's employment agencies ('Arbeitsmarktservicegesetz', Federal Law Gazette 313/1994 as amended by I 104/2007) has no specific provision about non-discrimination. Sect. 29 and 31 stipulate the guidelines for the assistance.[5] [6]

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4 Sect . 1 § 2 and 3 Aliens Employment Act read as follows:
§ 2 Die Bestimmungen dieses Bundesgesetzes sind nicht anzuwenden auf …
l) Freizügigkeitsberechtigte EWR-Bürger, deren drittstaatsangehörige Ehegatten und Kinder (einschließlich Adoptiv- und Stiefkinder), die noch nicht 21 Jahre alt sind oder denen der EWR-Bürger oder der Ehegatte Unterhalt gewährt, sowie drittstaatsangehörige Eltern des EWR-Bürgers und seines Ehegatten, denen der EWR-Bürger oder der Ehegatte Unterhalt gewährt, sofern sie zur Niederlassung nach dem Niederlassungs- und Aufenthaltsgesetz (NAG), BGBl. I Nr. 100/2005 berechtigt sind;
m) EWR-Bürger, die ihr Recht auf Freizügigkeit nicht in Anspruch nehmen, deren drittstaatsangehörige Ehegatten und Kinder (einschließlich Adoptiv- und Stiefkinder) sowie die drittstaatsangehörigen Ehegatten und Kinder österreichischer Staatsbürger, sofern der Ehegatte bzw. das Kind zur Niederlassung nach dem NAG berechtigt ist.
§ 3 Zwischenstaatliche Vereinbarungen über die Beschäftigung von Ausländern werden durch die Bestimmungen dieses Bundesgesetzes nicht berührt.

5 Sect. 29 Act on the State's employment agencies reads as follows:
§ 1 Ziel des Arbeitsmarktservice ist, im Rahmen der Vollbeschäftigungspolitik der Bundesregierung zur Verhütung und Beseitigung von Arbeitslosigkeit unter Wahrung sozialer und ökonomischer Grundsätze im Sinne einer aktiven Arbeitsmarktpolitik auf ein möglichst vollständiges, wirtschaftlich sinnvolles und nachhaltiges Zusammenführen von Arbeitskräfteangebot und -nachfrage hinzuwirken, und dadurch die Versorgung der Wirtschaft mit Arbeitskräften und die Beschäftigung aller Personen, die dem österreichischen Arbeitsmarkt zur Verfügung stehen, bestmöglich zu sichern. Dies schließt die Sicherung der wirtschaftlichen Existenz während der Arbeitslosigkeit im Rahmen der gesetzlichen Bestimmungen ein.
§ 2 Das Arbeitsmarktservice hat zur Erreichung dieses Zieles im Rahmen der gesetzlichen Bestimmungen Leistungen zu erbringen, die darauf gerichtet sind, 1. auf effiziente Weise die Vermittlung von geeigneten Arbeitskräften auf Arbeitsplätze herbeizuführen, die möglichst eine den Vermittlungswünschen des Arbeitsuchenden entsprechende Beschäftigung bieten, 2. die Auswirkungen von Umständen, die eine unmittelbare Vermittlung im Sinne der Z 1 behindern, überwinden zu helfen, 3. der Unübersichtlichkeit des Arbeitsmarktes entgegenzuwirken, 4. quantitative oder qualitative Ungleichgewichte zwischen Arbeitskräfteangebot und Arbeitskräftenachfrage zu verringern, 5. die Erhaltung von Arbeitsplätzen, wenn sie im Sinne des Abs. 1 sinnvoll ist, zu ermöglichen und 6. die wirtschaftliche Existenz der Arbeitslosen zu sichern.
The core contents of this provision: The main goal of the employment agencies is to bring together 'supply and demand'. It should be ensured that the economy finds employees, that all persons available on the Austrian labour market get employed and that there are subsidies for the time of unemployment. Therefore the agencies should 1. find jobs according to the qualification of the job seekers, 2. reduce obstacles to placements, 3. simplify the labour
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a.2. Language requirements

There are no specific provisions about language requirements. There haven't been reported any problems.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

There haven't been any reforms concerning applicable rules in the field of public sector.

b.1. Nationality condition for access to positions in the public sector

The situation is the same as in the last years: According to Sect. 4 and Sect. 42a Civil Servants Act ('Beamten-Dienstrechtsgesetz'; Federal Law Gazette 333/1979) the applicant has to be Austrian citizen if he/she applies for a job reserved to Austrians or to 'a citizen of a state, who has – due to an international treaty within the scope of European integration – to get an equal legal position in access to an employment than Austrian have'. Sect. 42 Civil Servants Act defines which jobs are reserved to Austrians: jobs requiring a special solidarity with Austria, especially those using state power for general purposes. The same applies to contractual employees for civil services (Sect. 3 and Sect. 6c Contractual Employed Civil Servants Act ('Vertragsbedienstetengesetz'; Federal Law Gazette 86/1948). But there is a

market, 4. reduce the unbalance of jobseekers and job offers, 5. contribute to the securing of jobs and 6. secure the existence of unemployed people.

6 Sect. 31 Act on the State's employment agencies reads as follows:
§ 1 Die Leistungen des Arbeitsmarktservice, die nicht im behördlichen Verfahren erbracht werden, kann jedermann bei allen Geschäftsstellen und Einrichtungen des Arbeitsmarktservice in Anspruch nehmen, die diese Leistungen anbieten, sofern dem die in Abs. 5 genannten Grundsätze nicht entgegenstehen.
§ 2 Sofern auf Leistungen des Arbeitsmarktservice kein Rechtsanspruch besteht, haben sich Wahl, Art und erforderlichenfalls Kombination der eingesetzten Leistungen nach den Erfordernissen des Einzelfalles unter dem Gesichtspunkt zu richten, dass sie dem in § 29 genannten Ziel bestmöglich entsprechen. Bei Erfüllung seiner Aufgaben hat das Arbeitsmarktservice auf einen angemessenen Ausgleich der Interessen der Arbeitgeber und der Arbeitnehmer zu achten.
§ 3 Für Personen, die entweder wegen ihrer persönlichen Verhältnisse oder ihrer Zugehörigkeit zu einer auf dem Arbeitsmarkt benachteiligten Gruppe bei der Erlangung oder Erhaltung eines Arbeitsplatzes besondere Schwierigkeiten haben, sind die Leistungen des Arbeitsmarktservice im Sinn des Abs. 2 so zu gestalten und erforderlichenfalls so verstärkt einzusetzen, dass eine weitestmögliche Chancengleichheit mit anderen Arbeitskräften hergestellt wird. Insbesondere ist durch einen entsprechenden Einsatz der Leistungen der geschlechtsspezifischen Teilung des Arbeitsmarktes sowie der Diskriminierung der Frauen auf dem Arbeitsmarkt entgegenzuwirken.
§ 4 Die Tätigkeit des Arbeitsmarktservice ist, soweit es die Sicherstellung der Beachtung und Umsetzung der Arbeitsmarktpolitik der Bundesregierung, die Gleichbehandlung gleichartiger Angelegenheiten, die notwendige Einheitlichkeit des Vorgehens und die Erreichung höchstmöglicher Effizienz und Zweckmäßigkeit der Leistungserbringung erlauben, dezentral durchzuführen. Die Leistungen des Arbeitsmarktservice sind, soweit nicht ausdrücklich etwas anderes bestimmt ist, durch die regionalen Organisationen zu erbringen.
§ 5 Bei allen Tätigkeiten hat das Arbeitsmarktservice auf die Grundsätze der Sparsamkeit, Wirtschaftlichkeit und Zweckmäßigkeit unter dem Gesichtspunkt der bestmöglichen Erreichung des in § 29 genannten Zieles Bedacht zu nehmen. Zur Bewertung der Effizienz der Tätigkeit des Arbeitsmarktservice ist ein internes Controlling einzurichten.
The core contents of this provision: Everybody can make use of the agencies' services (§ 1). According to § 2, the services depend on the affords of the single case in the light of Sect. 29. Members of a disadvantaged group should receive specific help (§ 3). The agencies are decentralized (§ 4). According to § 5, the agencies have to work in an economic and effective way, taking into account the goals of Sect. 29.

specific exception regarding citizenship: Sect. 3 § 2 states that if there is no Austrian applicant for the job, the employer can refrain from citizenship in justified cases).

That means that in principle civil service is restricted to Austrian citizens and those who have an equal position according to EC Law.

b.2. Language requirement

As regards language skills, Sect. 4 § 1a Civil Servants Act / Sect. 3 § 1a Contractual Employed Civil Servants Act asks for 'good command in word and writing; if the job requires less, an adequate command has to be shown'.

b.3. Recognition of professional experience for access to the public sector

For becoming an employee within the public sector, you have to meet the appointment requirements (see above Sect. 4 § 1/3, § 2 and § 3 Civil Servants Act or Sect. 3 § 1/3 Contractual Employed Civil Servants Act). According to the job description, professional experience might be required (and therefore is a condition for application or a bonus for the appointment [- see e.g. Sect. 4 § 3 Civil Servants Act: the best candidate has to be appointed]) but there is no need for 'Austrian experience'.

b.4. Other aspects of access to employment

There are no other specific aspects to be reported.

2. WORKING CONDITIONS

Civil servants and contractual employees to public service receive an automatic salary increase all two years. The exact date is fixed by the so called 'Vorrückungsstichtag'. This date is ascertained in a complicate procedure which is laid down in Sect. 12 Gehaltsgesetz (Salary Act for Civil Servants; Federal Law Gazette 54/1956). Specific times in other jobs are counted (e.g. military service or scientific work). The similar provision is Sect. 26 Contractual Employed Civil Servants Act.[7] § 2f of these provisions deal with employment abroad. Following the ECJ-judgment C-195/98, Österreichischer Gewerkschaftsbund, these provisions have been amended (Federal Law Gazette I 165/2005). But limitations regarding working periods in Turkey or in Switzerland remained unchanged. The provision regarding Swit-

7 According to ECJ 18.6.2009, C-88/08, Huetter, it is a discrimination if working periods prior the age of 18 are not taken into account. Therefore Sect. 26 Contractual Employed Civil Servants Act has to be amended. According to newspapers, about 50.000 civil servants asked for a new fixing of the 'Vorrückungsstichtag'. There are a few articles about the ECJ's decision and its consequences: *Reissner*, Der ältere Arbeitnehmer – Altersbezogene Schutzbestimmungen im Lichte des Antidiskriminierungsrechts, DRdA 2010, 32; *Ziehensack*, Jugenddiskriminierung bei Vertragsbediensteten des Staates, DRdA 2010, 89; *Gerhartl*, Altersdiskriminierung bei Vordienstzeiten, ASoK 2010, 32. According to the literature, there are a lot of similar provisions in collective bargaining agreements.

zerland has been modified in 2007 (Federal Law Gazette I 53/2007); additionally prior periods of employment within EU-institutions are taken into account now. The question of Turkish working periods is still unsolved;[8] there have been 6 amendments to the Salary Act in 2009 and 2010 (Federal Law Gazette I 52/2009, I 73/2009, I 76/2009, 135/2009, 153/2009, I 6/2010) but not one of them concerned Sect. 12 § 2f.

In May 2007 the Administrative Court started a preliminary ruling procedure as regards Swiss working periods under Sect. 12 Salary Act and the direct effect of Art. 9 Free Movement Agreement EC-Switzerland (see ECJ C-332/07). But in February 2008 the procedure was withdrawn because Sect. 12 § 2f Salary Act was amended by Federal Law Gazette I 53/2007 (the limitation 'after 1st June 2002' was abolished).

A few decisions concerned a former employment abroad: The High Court of Justice had to deal with an employment in Hungary (15.12.2009, 9ObA85/09d). The complainant is employed at the municipality of Vienna as a contractual employed civil servant and asked for taking into account her employment as a nurse in Hungary (1981 – 1991). She justified that claim with the Hungarian accession. The High Court of Justice enunciated that the non-equal treatment of periods of employment at a territorial entity within a Member State in comparison to the domestic ones according to Sect. 14 Civil Servants Act For Vienna is qualified as indirect discrimination and violates Art. 39 EC-Treaty und Art. 7 Regulation 1612/68. It must not be applied in the instant case. Comparable periods of employment completed in other Member States are to be taken into account completely. A similar judgment was rendered concerning a Polish nurse (19.11.2009, 8ObA10/09t) and a nurse that has been working in the former CSSR respectively in Slovakia (30.9.2009, 9ObA19/09y).

Sect. 50a § 4 Salary Act for Civil Servants ('Gehaltsgesetz') regarding the special benefit for university professors after 15 years was modified by Federal Law Gazette I 53/2007. As regards employment times as a professor within the EEA, the limitation of 'after 7th November 1968' was eliminated; as regards times in Switzerland or in Turkey, the problematic limitation has been left unchanged.[9] Non of the amendments since 2007 refer to Sect. 50a Salary Act.

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8 Sect. 12 Salary Act for Civil Servants / Sect. 26 Contractual Employed Civil Servants Act:
(2f) Soweit Abs. 2 die Berücksichtigung von Dienstzeiten oder Zeiten im Lehrberuf von der Zurücklegung bei einer inländischen Gebietskörperschaft, einer inländischen Schule oder sonst genannten inländischen Einrichtung abhängig macht, sind diese Zeiten auch dann zur Gänze für den Vorrückungsstichtag zu berücksichtigen, wenn sie
1. bei einer vergleichbaren Einrichtung eines Staates zurückgelegt worden sind, der oder dessen Rechtsnachfolger nunmehr Mitgliedstaat des Europäischen Wirtschaftsraumes oder der Europäischen Union ist, oder
2. nach dem 31. Dezember 1979 bei einer vergleichbaren Einrichtung des Staates zurückgelegt worden sind, mit dem das Assoziierungsabkommen vom 29. 12. 1964, 1229/1964, geschlossen worden ist, oder
3. bei einer vergleichbaren Einrichtung der Schweiz (Abkommen zwischen der Europäischen Gemeinschaft und ihren Mitgliedstaaten einerseits und der Schweizerischen Eidgenossenschaft andererseits über die Freizügigkeit, BGBl. III Nr. 133/2002) zurückgelegt worden sind,
4. bei einer Einrichtung der Europäischen Union oder bei einer sonstigen zwischenstaatlichen Einrichtung, der Österreich angehört, zurückgelegt worden sind.

9 Sect. 50a Salary Act:
(1) Einem Universitätsprofessor, der eine fünfzehnjährige Dienstzeit in dieser Verwendungsgruppe im Dienststand an österreichischen Universitäten aufweist und vier Jahre im Dienststand im Bezug der Dienstalterszulage gemäß § 50 Abs. 4 gestanden ist, gebührt ab dem Zusammentreffen beider Voraussetzungen eine ruhegenussfähige besondere Dienstalterszulage in der Höhe der Dienstalterszulage gemäß § 50 Abs. 4.
(2) § 48 Abs. 3 und 5 ist auf die besondere Dienstalterszulage nicht anzuwenden.

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In December 2008, the Administrative Court started a new preliminary procedure as regards the benefits for (foreign) university professors: The ECJ (C-542/08) is asked to decide about a statutory period of limitation of three years for that claim (or for periods before 30th September 2003 [ECJ-decision Köbler (C-224/01)]). The ECJ (15.4.2010, C-542/08, Barth) decided that the Austrian provision is in line with EC-law.

The Constitutional Court had to decide about career steps: A retired civil servant asked for taking into account his employment in other Member States. He claimed that the improvement of his legal salary position was refused and justified that claim with Art. 39 EC-Treaty, Regulation 1612/68 and ECJ-case C-195/98 (Österreichischer Gewerkschaftsbund). The Constitutional Court (22.9.2009, A14/08) stated: The new fixation of the effective date of being promoted to the next level of employment (1.7.1967 instead of 1.7.1969) cannot lead to an improvement of the legal salary position of the appellant. A retrospective advancement of the career respectively the calculation of an optimal model for the employer is neither envisioned according to Austrian law nor to EC-treaty or Regulation 1612/68.

There is no information available whether or not these Salary Act-rules are applied in practice in a discriminatory way for other Union citizens.

(3) Mit dem Anfall dieser besonderen Dienstalterszulage vermindert sich eine gemäß § 52 Abs. 1 Z 2 in der bis 28. Februar 1998 geltenden Fassung zuerkannte Kollegiengeldabgeltung um den siebenfachen Betrag der besonderen Dienstalterszulage, höchstens jedoch auf die gemäß den §§ 51 und 51a gebührende Kollegiengeldabgeltung.

(4) Bei der Berechnung der fünfzehnjährigen Dienstzeit gemäß Abs. 1 sind auch Zeiten heranzuziehen, die 1. in einer vergleichbaren Verwendung an einer Universität eines Staates, der oder dessen Rechtsnachfolger nunmehr Mitgliedstaat des Europäischen Wirtschaftsraumes ist oder 2. nach dem 31. Dezember 1979 in einer vergleichbaren Verwendung an einer Universität des Staates, mit dem das Assoziierungsabkommen vom 29. Dezember 1964, 1229/1964, geschlossen worden ist oder 3. nach dem 1. Juni 2002 in einer vergleichbaren Verwendung an einer Universität der Schweiz (Abkommen zwischen der Europäischen Gemeinschaft und ihren Mitgliedstaaten einerseits und der Schweizerischen Eidgenossenschaft andererseits über die Freizügigkeit, BGBl III 133/2002) zurückgelegt worden sind.

Chapter IV
Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS (DIRECT, INDIRECT DISCRIMINATION)

Working conditions are no topic in the academic literature, the case law or the media. Only one decision was published: The Administrative Court (14.05.2009, 2006/11/0039) had to deal with a case of discrimination concerning a Turkish citizen. His request to be qualified as a disabled person according to Disabled Persons Employment Act was refused. The reasons were – inter alia – dismissal restraints. In the decision the Administrative Court (14.5.2009, 2006/11/0039) quoted ECJ C-171/01, Wählergruppe Gemeinsam. According to that decision the Disabled Persons Employment Act is applicable for Turkish workers who meet the pre-requisites of Art. 10 § 1 Decision 1/80. The Court stated that the term 'other conditions of work' according to Art. 39 EC Treaty is to be interpreted according to Art. 7 Regulation 1612/68. Regarding a dismissal, Turkish citizens must not be discriminated compared to citizens of EU-Member States.

Specific issue: Working conditions in the public sector

There is no information available that there is discrimination as regards working conditions in the public sector.

2. SOCIAL AND TAX ADVANTAGES

There are no hints on discrimination in the recent literature as regards social or tax advantages. This was confirmed by labour law experts and social law experts who have been consulted by the rapporteur.

Chapter V
Other Obstacles to Free Movement

There is no public debate – neither in the academic literature nor in the media – about any obstacles (aside the transitional agreements).

Chapter VI
Specific Issues

1. FRONTIER WORKERS

Frontier workers haven't been a topic in academic discussion or in the media. As regards a residence clause there are three bilateral agreements which entitle the frontier worker to unemployment benefits in the country of residence: Austria-Germany (Federal Law Gazette 392/1979); Austria-Switzerland (Federal Law Gazette 515/1979); Austria-Liechtenstein (Federal Law Gazette 76/1982).

And there are double-tax-agreements with Germany, Czech Republic, Hungary, Slovenia and Switzerland. E.g. in the Austria-Germany-agreement you find a provision about frontier workers: Employees who work near the border and live near the border have to pay taxes in their residence state if the person returns back daily.

There also exist some regulations relating to social insurance within these agreements. But this is mainly tackled by Regulation 1408/71. But according to information given by officials of the employment agencies, there are nearly no requests concerning job seeking or residence rights; in most cases it is about health insurance and pensions. But this is subject to Regulation 1408/71 (and its successor Regulation 883/2004). And there the main problem is the separation of frontier workers in the sense of Art. 1 lit. b ('real frontier workers'), 'unreal frontier workers' (Art. 71; see ECJ Reibold (216/89), Aubin (227/81), Knoch (102/91)) and 'untypical frontier workers' (see ECJ Miethe (1/85)).

But as mentioned at the beginning: There are no problems reported; neither the academic discussion nor the media focussed on frontier workers within the last few years. Perhaps this will change, when unlimited free movement of workers is granted to the citizens of the Czech Republic, Slovakia, Hungary and Slovenia in May 2011 – but today it is no topic. As far as I was told by civil servants of employment agencies, there are no specific administrative or legal schemes available and there are no agreements promoting frontier work.

2. SPORTSMEN/SPORTSWOMEN

Football: At the Austrian Football Association's homepage (ÖFB) http://www.bundesliga.at/blinfo it is possible to download the 'Durchführungsbestimmungen' for 'official matches within the Austrian leagues'. This document includes a 'fee for training' (§ 9) and subsidies for using Austrian players (§§ 10 and 11). § 9 does not refer to nationality but to age, division and number of matches. On the other hand, §§ 10 and 11 are means to promote Austrian players. A second-division-club is entitled to receive ÖFB's money if it nominates at least 13 players allowed to play for the Austrian national team or being Austrian citizen or being equally treated according to ÖFB-rules but younger than 21. A first-division-club has to nominate 12 Austrian citizens per match to be entitled. This system might be a factual discrimination as regards the first division: any club in need of these subsidies is forced to restrict the number of non-Austrian EEA-citizens – or the other way round: 'poor' clubs are forced to have interest in Austrian players. With other words: Only very rich clubs are able to have a team with a majority of non-Austrians. Therefore the

labour market for EEA nationals is restricted (see e.g. *Resch*, Spielerbewertungssysteme zur Herstellung von Chancengleichheit, in: *Grundei/Karollus* (Hrsg), Berufssportrecht I (2008), pp. 137-151).

Basketball: *Karollus* (*Karollus*, Ausländerklauseln im Sport und Drittstaatsangehörige, WBl 2005, pp. 497-505) stated a violation of EC law as regards basketball (Sect. 4.4.2 Transfer- und Meldeordnung; available at http://www.oebl.at), fistball and tennis (Sect. 8 Staatsliga and Sect. 8 Herren-Superliga; available at http://www.oetv.at).

Volleyball and Handball: The provisions concerning volleyball and handball are in accordance with EC law.

Ice-hockey: There are new rules applicable since September 2007 (see http://www.eishockey.at). The new regime works with 'points'. Every club is allowed to nominate 22 players for a match. These players represent a specific number of points: up to 22 years old = 1 point; 23 years old = 1.5 points; 24 years old = 2 points, transfer card player = 4 points. With this system young players are promoted. And this is a legitimate goal according to the ECJ (case Bosmans). *Resch*, Spielerbewertungssysteme zur Herstellung von Chancengleichheit, in: *Grundei/Karollus* (Hrsg), Berufssportrecht I (2008), pp. 137-151) attests EC law conformity.

3. THE MARITIME SECTOR

Working conditions in the maritime sector are not relevant for Austria.

4. RESEARCHERS/ARTISTS

Besides immigration law, foreign EU nationals are treated equally as national researchers or artists. The Aliens Employment Act is not applicable to them (Sect. 1 § 2 Aliens Employment Act). At the Universities and other research units, the conditions do not depend on nationality; there are no reservations for Austrians or restrictions to foreign EU researchers. Cases like ECJ C-276/07, Delay, haven't been reported until now.

Researchers are entitled to temporary limited stay permits only ('stay permit – researcher' [Sect. 67 SRA]); since 2005 they are no more entitled to residence permits (Sect. 62 SRA). Family members have free access to the labour market since the beginning of 2008 (if they are entitled to stay in Austria). According to the amendment in Federal Law Gazette I 122/2009 researchers can receive a two-years-stay permit, one year longer than so far. Following they can apply for an unlimited residence permit ('Niederlassungsbewilligung – unbeschränkt)'.

5. ACCESS TO STUDY GRANTS

EEA citizens are equated with Austrians as regards access to study grants (Sect. 4 Study Grants Act ('Studienförderungsgesetz'), Federal Law Gazette 305/1992 as amended by I 46/2007).

Study grants are given to Austrians for doing studies at Austrian universities (there are specific programmes for studying abroad). The requirements are stipulated in Sect. 6 Studies

Grants Act: need of subsidies, no completed studies, good success, younger than 30 (with exceptions). But there are no residence conditions – neither for Austrians nor for EEA citizens.

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

There haven't been any public discussions about postponing the end of the transitional measures. And at the end of April 2009, there was another short note in the newspapers about the fact that the Austrian Minister for Labour notified the prolongation until 30.4.2011. Austria argued that nearly half of its territory is bordering EU8. Therefore it would be interesting (and easy) for EU8-citizens to work in Austria. Additionally it should be kept in mind that Austria has a high percentage of foreign population and that the labour market for foreigners is exceptional difficult. Obviously there was no need for discussion. Even the message, that Poland is thinking about taking Austria to the ECJ didn't cause public debate. There is consent among the Austrian political parties (except the Greens) about prolongation; and even the economy as well as the trade unions favour the prolongation.

The Austrian labour market is not absolutely closed for EU8 citizens. There is the so called 'Fachkräfte-Bundeshöchstzahlenüberziehungsverordnung' (an order about granting access for skilled workers, Federal Law Gazette II 350/2007 as amended by II 395/2008). This order enumerates 65 professions with a shortage of workers; these professions (e.g. bricklayer, paver, data engineer, airport staff or payroll clerk) are open for the new Union citizens. Since the list of professions is that long and includes 'classical jobs for migrants' (e.g. in the building sector) as well as jobs for highly educated migrants (e.g. data engineer) it seems that postponing the transitional measures is 'only for the public'. Foreign workers will get a job if they apply in sectors with shortages; and workers without specific knowledge or skills will not find a job at all. And that does not differ for EU citizens nor for third-country nationals. Additionally it has to be mentioned that there is another sector with possibilities for the new Union citizens: As mentioned in former reports, Austria is looking for health care professionals and for carers; the 'Bundeshöchstzahlenüberziehungsverordnung' (Federal Law Gazette 278/1995 as amended by II 55/2006) is the relevant order.

But like in the last years there have been a few decisions concerning the specific status of EU8 citizens: The Administrative Court (9.11.2009, 2009/09/0201) had to deal with six Polish citizens and one Hungarian citizen who worked for an Austrian enterprise without the necessary authorizations. The company claimed that they were self-employed but it was only a disguised employment. Sect. 32a Aliens Employment Act states that employed workers from Poland and Hungary are subject to the provisions of the Aliens Employment Act and they are only accredited to work under the provisions of this law. There is no self-employed occupation in the sense of ECJ-case C-161/07 (Commission/Austria). If an inspection detects an illegal occupation the imposition of administrative sanctions doesn't violate EC-law. ECJ-judgment C-113/89 (Rush Portuguesa Ldª/Office national d'immigration) is not applicable because the instant case deals with two Austrian companies and there is no cross-border relation. And there are similar cases concerning different EU8-citizens (e.g. 25.2.2010, 2010/09/0024; 25.2.2010, 2009/09/0294; 9.11.2009, 2009/09/0201; 15.10.2009, 2009/09/0168; 16.9.2009, 2009/09/0171; 9.9.2009, 2007/08/0335; 31.7.2009, 2008/09/0261). The Administrative Court referred to EC law in a very detailed way in earlier decision

(15.5.2009, 2006/09/0157): In the course of a control in 2006 several Slovakian workers were detected as they worked for an Austrian company. Hereupon the company announced the posting of workers from the Slovakian subsidiary to provide services. The acknowledgement of receipts was dismissed because according to the authority it is about an employment of leased personnel. Therefore a license is required. The Administrative Court pointed on the case law of the ECJ. Thus an employer according to Art. 39 EC Treaty is every person who undertakes work that is genuine and effective and not so infinitesimal as to be disregarded. In the present case it is to assume that it is not about work of posted workers of a foreign enterprise but about employment of personnel. It was solely to evaluate whether the cross-border occupation was lawful or not. The Court cited ECJ-case Rush Portuguesa (C- 113/89) concerning the relation between the freedom to provide services according to Art. 49f EC Treaty and the permitted exceptions of the free movement of workers. Subparagraph 2 of Act of Accession of Slovakia matches Art. 216 of Accession Treaty of Portugal in content. From this follows that it is allowed to maintain the restrictions for the employment of leased personnel from abroad for the new Member States.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

For Romania and Bulgaria, Austria is applying the transitional measures as well. The Austrian labour market is not absolutely closed for Bulgarian or Romanian citizens. There is the so called 'Fachkräfte-Bundeshöchstzahlenüberziehungsverordnung' (an order about granting access for skilled workers, Federal Law Gazette II 350/2007 as amended by II 395/2008). This order enumerates 65 professions with a shortage of workers; these professions (e.g. bricklayer, paver, data engineer, airport staff or payroll clerk) are open for the new Union citizens. Since the list of professions is that long and includes 'classical jobs for migrants' (e.g. in the building sector) as well as jobs for highly educated migrants (e.g. data engineer) it seems that postponing the transitional measures is 'only for the public'. Foreign workers will get a job if they apply in sectors with shortages; and workers without specific knowledge or skills will not find a job at all. And that does not differ for EU citizens nor for third-country nationals. Additionally it has to be mentioned that there is another sector with possibilities for the new Union citizens: As mentioned in former reports, Austria is looking for health care professionals and for carers; the 'Bundeshöchstzahlenüberziehungsverordnung' (Federal Law Gazette 278/1995 as amended by II 55/2006) is the relevant order.

The Administrative Court was engaged with a few cases concerning Romanian and Bulgarian citizens. For example Administrative Court 16.9.2009, 2007/09/0212: A Romanian citizen applied for a certificate of his free movement according to Sect. 32a § 2 and 3 Aliens Employment Act. His application was dismissed because of the lack of preconditions. Notwithstanding Art. 1 to 6 Regulation 1612/68 there are transitional measures to regulate the access of Romanian citizens to the job market (Sect. 32a § 10 Aliens Employment Act). If the Romanian leaves the Austrian labour market, he looses the right of free access to the labour market.

The Administrative Court had to deal with a case where a Bulgarian citizen was expelled because she had no means of subsistence to finance her residence in Austria (4.6.2009, 2008/18/0763). Besides it is to be regarded that she couldn't pay for benefits she would re-

ceive in case of illness though she was working as a wage earner for a corporation. After accession of Bulgaria to the European Union a Bulgarian citizen still needs an allowance according to the Aliens Employment Act because of a transitional measure that is still effective. So she is not entitled to acquire a right to remain according to Sect. 51 sub. 1 SRA. This provision is intended to implement Art. 7 § 1 of Directive 2004/38/EC. The right of residence of workers in the host Member State is inextricably linked with the fundamental freedom of free movement in accordance with Art. 39 EC-Treaty. The right to free movement is constricted for – inter alia – Bulgarian citizens because of transitional measures. This being said the Bulgarian woman can only refer to a right of residence according to Sect. 51 sub. 1 SRA if the employment at her company is consistent with the provisions of the Aliens Employment Act that apply because of Sect. 32a § 10 Aliens Employment Act.

Chapter VIII
Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFEU AND REGULATION 1612/68

According to information given by social law experts as well as to the observation of the academic literature and the newspapers and data base research, there aren't any new developments to be report.

The Administrative Court (27.11.2008, 2008/08/0189) released a decision implementing ECJ-judgment C-228/07, Petersen. In accordance with the ECJ, the Court decided that the benefit in question is an 'unemployment benefit' in the sense of Art. 4 Regulation 1408/71; Art. 39 EC Treaty prohibits residence clauses for that benefit.

A few decisions concerned a former employment abroad: The High Court of Justice had to deal with an employment in Hungary (15.12.2009, 9ObA85/09d). The complainant is employed at the municipality of Vienna as a contractual employed civil servant and asked for taking into account her employment as a nurse in Hungary (1981 – 1991). She justified that claim with the Hungarian accession. The High Court of Justice enunciated that the non-equal treatment of periods of employment at a territorial entity within a Member State in comparison to the domestic ones according to Sect. 14 Civil Servants Act For Vienna is qualified as indirect discrimination and violates Art. 39 EC-Treaty und Art. 7 Regulation 1612/68. It must not be applied in the instant case. Comparable periods of employment completed in other Member States are to be taken into account completely. A similar judgment was rendered concerning a Polish nurse (19.11.2009, 8ObA10/09t) and a nurse that has been working in the former CSSR respectively in Slovakia (30.9.2009, 9ObA19/09y).

A retired civil servant asked for taking into account his employment in other Member States. He claimed that the improvement of his legal salary position was refused and justified that claim with Art. 39 EC-Treaty, Regulation 1612/68 and ECJ-case C-195/98 (Österreichischer Gewerkschaftsbund). The Constitutional Court (22.9.2009, A14/08) stated: The new fixation of the effective date of being promoted to the next level of employment (1.7.1967 instead of 1.7.1969) cannot lead to an improvement of the legal salary position of the appellant. A retrospective advancement of the career respectively the calculation of an optimal model for the employer is neither envisioned according to Austrian law nor to EC-treaty or Regulation 1612/68.

Administrative Court 9.9.2009, 2007/08/0335: The application of a Polish citizen for unemployment benefit was dismissed because she was only employed in the context of quotas according to Sect. 5 Aliens Employment Act. The authority declared that after termination of her job she was not available for the job market and her residence was unjustified. The Administrative Court enunciated that the right of residence of workers according to Art. 7 § 1 sub. a of Directive 2004/38/EC is inextricably linked with the right to free movement according to Art. 39 EC Treaty. It states – inter alia – the right to residence in a Member State and to work there pursuant to the local legal and administrative regulations. Differing from Art. 1 to 6 of Regulation 1612/68 the Member States provided for transitional measures for citizens of the new Member States to regulate their access to the labour market. Austria benefited

from this right by creating the EU-Enlargement Adaption Act and Sect. 32a Aliens Employment Act.

The ECJ's *Slanina*-decision (26.11.2009, C-363/08) was part of a lot of Austrian decisions. Romana Slanina, mother of a daughter born in 1991 resided and obtained family allowances until 1997. She then got divorced and moved to Greece. She received family allowance but it was reclaimed. The Austrian Administrative Court asked the ECJ whether the fact that Ms. Slanina took up employment in Greece affected her entitlement to family allowances in Austria. The ECJ replied that Art. 73 Regulation 1408/71 must be interpreted as meaning that a divorced person who was paid family allowances by the competent institution of the Member State in which she was living and where her ex-husband continues to live and work maintains in respect of her child, provided that child is recognized as a 'member of the family' of the ex-husband within the meaning of Art. 1(f)(i) of that regulation, entitlement to such allowances even though she leaves that State and settles with her child in another Member State, where she does not work, and even though her ex-husband could receive those allowances in his Member State of residence. The fact that a person in a situation such as that of the applicant in the main proceedings is in employment in her Member State of residence, giving entitlement to family allowances, has, under Art. 76 Regulation 1408/71, the effect of suspending entitlement to family allowances payable under the legislation of the Member State in whose territory her ex-husband is in employment, up to the sum provided for by the legislation of her Member State of residence. Meanwhile the Administrative Court has declared the reclamation of the family allowance as unlawful (2.2.2010, 2009/15/0204). He stated that the child is family member of the divorced husband of the appellant in the sense of Regulation 1408/71 and therefore the regulation is applicable. As long as the appellant is not employed in Greece, she has maintained the entitlement to family allowances. As soon she has been working, the existence and the amount depend on the fact whether she is entitled to family allowance pursuant to Greek law.

The ECJ-judgment found its way into a lot of Administrative Court judgments:

Administrative Court 24.2.2010, 2009/13/0243: A Greek citizen who works and lives in Austria applied for marginal payment of family allowance from May 2004 to December 2005 for his four children that live in Hungary with his divorced wife. The Administrative Court stated that from national law aspects Sect. 2 § 2 sent. 2 Family Transfer Payments Act ('Familienlastenausgleichsgesetz, FLAG') is applicable. Thus a person to whose household the child doesn't belong but who predominantly accepts child support is entitled to family allowance if no other person is entitled. On that account it is decisive if the complainant mainly bears the costs for his children. The Court stated that the *Slanina*-judgment does not stand in the way because it concerns the reclamation of family allowance in a case where the mother moved to another Member State and the father didn't support her with alimony.

Administrative Court 24.2.2010, 2009/13/0240: The appellant applied for family allowance for her son who attends school in Poland but it was dismissed. The Court found that there is neither a detection nor did the appellant claim that the father had a residence in Austria earlier and therefore acquired family allowance and then went to Poland (and hence would have maintained the entitlement to family allowance according to ECJ-*Slanina*). As in the present case no other person than the appellant received family allowance it is essential if she has accepted the main costs for the child.

Administrative Court 24.2.2010, 2009/13/0241: A Hungarian citizen who works and lives in Austria applied for marginal payment of family allowance for his son. He is divorced since 1989. His ex-wife lives in Hungary, receives income out of employment and exercises

sole parental authority. The complainant has to pay monthly child supports and visits his son regularly. His application was dismissed because of the lack of the joint household with his son. The Administrative Court pointed on the *Slanina* case and stated that the entitlement to family allowance depends on the fact whether the complainant has predominantly bared the alimony for his son. It is relevant if the complainant provides support in the form of money. It does not matter that the mother delivers care.

Administrative Court 23.2.2010, 2009/15/0205: The application for family allowance from a father for his three children was dismissed because they are neither members of his household anymore nor does he provide for their support. According to national law the mother, who lives with the children in Switzerland, is not entitled to family allowance. Sect. 2 § 8 Family Transfer Payments Act stands in the way because it regulates that only persons that have their centre of interests in Austria are entitled to family allowance. From the perspective of national law Sect. 2 § 2 sent. 2 is to be applied. Thus a person who predominantly accepts the costs but does not stay in a household with the child, is entitled to family allowance if no other person is entitled to it.

Administrative Court 2.2.2010, 2009/15/0206: The complainant's application for family allowance for his daughter, being of full age and who is studying in Madrid was dismissed in 2007. The reason was that the complainant is divorced and has his main residence in Austria and no family residence in Madrid. Taking the *Slanina*-decision into account, the Court stated that the entitlement depends on whether the father is bearing the major part of the costs.

Administrative Court 2.2.2010, 2009/15/0208: The application of a teacher who works and resides in Austria for family allowance for his son who studies and lives in Germany with his mother, who receives child support in Germany, was dismissed. Due to the equalities to the *Slanina*-case, the Administrative Court decided that the complaint is unfounded.

Administrative Court 2.2.2010, 2009/15/0209: An Austrian citizen who lived and was employed in Austria during the dispute applied for family allowance for her two daughters. Her husband and father of the children lived in Italy. The application was dismissed because the daughters attended school in Italy and resided there with their father who didn't apply for similar benefits. The criteria for applying the *Slanina*-judgment were met.

Administrative Court 20.1.2010, 2009/13/0242: A Hungarian citizen who works and lives in Austria applied for marginal payment or family allowance for his two minor sons as of 2004. After his divorce in 2002 the sons lived with their mother at their Hungarian family residence. In 2005 they moved to Vienna where they attend school. The application was dismissed. The Administrative Court that the current case is similar to the *Slanina*-case and for the reasons set out there the complaint was unfounded.

Administrative Court 16.12.2009, 2009/15/0207: The complainant applied for family allowance for his two children that live with their mother in France. He bears nearly hundred percent of the costs for the children and no other person is entitled to benefits according to Sect. 2 § 2 Family Transfer Payments Act 1967. The application was dismissed because the children don't belong to their father's household but their mother is entitled to family allowance. When he appealed the defendant followed his appeal and nullified the dismissal. The present proceeding was stated in the light of ECJ-decision *Slanina*. Considering this decision the Administrative Court declared that family accordance can only be claimed once a month (Sect. 10 § 4). In a situation such as that in the main proceedings only the remaining parent is entitled to family allowance when he accepts the main expenses according to Sect. 2 § 2. *Slanina* does not stand in the way because it concerned the case where the family allowance

was reclaimed from mother who runs the household and the father didn't fulfil his obligation to alimony. Thus it is legitimate that the defendant has nullified the dismissal.

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

There are no hints on problems regarding the relationship between Directive 2004/38 and Regulation 1612/68 in the recent literature.

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

The Federal Ministry for Interior Affairs is working on a 'national action plan for integration'. While the Commission is working on a 'Blue Card' for skilled workers, Austria is working on a 'Red-White-Red-Card' for immigrants. One of the topics is knowledge of the German language (certificate on A1-level before coming to Austria).

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

The Austrian immigration policy for third-country nationals is quite easy: Austria is looking only for key personnel. That is the only legal way to immigrate for work. But most of the third-country nationals immigrating do that as family members. Nevertheless, the Union preference principle is not touched at all.

3.3 Return of nationals to the new EU Member States

Since Austria didn't open its labour market for the new EU Member States, there was no great incoming. And therefore there is no 'exodus' – e.g. based on the economic crisis – to be mentioned.

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

There are a few NGOs working in the field of immigration; they also deal with the violation of EC law but most of them as regards asylum law. But they do not have the position of an ombudsman (or something similar) but only work as representatives of the complainant. To name a few of them: Amnesty International – Austria (www.amnesty.at); Caritas Österreich (www.caritas.at); Helping Hands (www.helpinghands.at).

5. SEMINARS, REPORTS AND ARTICLES

There are a few articles to be mentioned:

Schroeder/Lechner/Müller, EU-Übergangsmaßnahmen für die Freizügigkeit in den Beitrittsverträgen, *Zeitschrfit für öffentliches Recht* 2009, pp. 85-114, deals in great detail with the transitional measures from the EC-law perspective.

Scharnreitner, Beschäftigungsbedingungen für Bürger der MOE-Staaten in Österreich, *Juristische Ausbildung und Praxisvorbereitung* 2009/2010, pp. 98-101, is about the Aliens Employment Act provisions concerning EU8- and especially EU2-citizens.

Ecker/Einwallner, Europarechtliche Freizügigkeit, *juridikum* 2009, pp. 99-103, discuss the consequences of the ECJ's Metock-decision.

Obwexer, Diskriminierungsverbot und Unionsbürgerschaft, in Eilamnsberger/Herzig (ed.), *Jahrbuch Europarecht 2010*, pp. 71-101, deals with the ECJ's case law regarding citizenship and discrimination.

Feik, Freizügigkeit der Arbeitnehmer, in Eilmansberger/Herzig (ed.), *Jahrbuch Europarecht 2010*, pp. 139-150, gives an overview about recent decisions and legal developments regarding free movement of workers in Austria and in Europe.

Felten, Arbeit und Soziales, in Eilmansberger/Herzig (ed.), *Jahrbuch Europarecht 2010*, pp. 261-274, reports about labour law- and social security law-developments in Austria and on EC level.