REPORT
on the Free Movement of Workers in Denmark in 2010-2011

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Contents*

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Introduction – Main Issues

Transposition of Directive 2004/38

In 2011, amendments to the *Aliens Act* and the *EU Residence Order* have been made pertaining to the transposition of the provisions of Directive 2004/38, following the Commission's evaluation report on the Member States' transposition of the Directive and the Commission's recommendations to Denmark.

Pertaining to *language courses* and *introductory courses*, the Act on *Danish Courses for Adult Aliens et al.* and the Act *on Integration* were amended in 2011 to ensure compatibility with Directive 2004/38 Art. 25.

Customs control

As it has no doubt already come to the Commission's knowledge, there has recently been some debate on the compatibility with EU law of parts of the political agreement of May 2011 regarding the 'retirement reform' between the Danish government, the Danish People's Party and other MPs on permanently enhancing the customs (border) control in Denmark. The enhanced customs control was authorized by the Parliament's Finance Committee on 1 July 2011, and implementation began on 5 July 2011.

Expulsion of EU citizens

In March 2011, the Supreme Court passed 4 principled rulings, determining the threshold for administrative expulsion of EU citizens. The rulings are relevant also to the issue of free movement of Roma workers.

On 24 June 2011, an act tightening the rules on expulsion in the *Aliens Act* was adopted. As a consequence of the amendment of *Aliens Act* Section 26 (2), the main rule of the *Aliens Act* is that aliens committing *any* crime resulting in imprisonment must be expelled, unless this *for certain* would be contrary to Denmark's international obligations; *including* the EU rules.

Free movement of Roma workers

On 6 July 2010, 23 Romanian Roma were arrested following a comprehensive police action in Copenhagen. 11 of the Roma were arrested while sleeping in a closed post office and charged with violation of domestic order. 12 Roma were arrested in a temporary camp in a shrubbery and charged with illegal camping. The alleged crimes are punishable with minor fines. On 7 July 2010, the 23 Roma were administratively expelled on grounds of public order and health.

On 31 March 2011, the Supreme Court passed 4 principled rulings, determining the threshold for administrative expulsion of EU citizens. Following these Supreme Court rul-

ings, the Integration Ministry annulled the Immigration Service's administrative expulsion of 14 Roma, when processing the complaint cases that had been filed subsequent to the expulsions decisions in July 2010. In addition, an updated memorandum on expulsion and refusal of EU/EEA citizens has recently been issued by the Integration Ministry.

Family members

Measures are still being taken to prevent abuse of the EU rules on residence rights, in particular those concerning third-country family members of Danish citizens returning from another Member State. In such cases it is stipulated that the principal person applying for registration certificate or residence card for family members must declare to have established *genuine and effective residence* in the previous host country. If there are reasons to assume that this was not the case, the Danish citizen is required to submit evidence of the residence established in the other Member State. A non-exhaustive list of possible documentation has been laid down in administrative guidelines, and a system of spot checks has been implemented by the Integration Ministry.

In addition, a system has been set up by the Ministry of Refugee, Immigration and Integration Affairs to carry out *random checks* of cases in which family members applied for residence under the EU rules. According to the political agreement on the State budget for 2010, the number of such cases undergoing particularly thorough control was to be increased from 25 % to 50 %

Residence requirement

The exemption expressly referring to EU rules, modifying the residence requirement in the *Act on Active Social Policy*, is still being interpreted by the National Social Appeals Board so as to require that Danish citizens must have acquired the status of worker upon return from another Member State, regardless of EU residence right in the host country. As it results in significantly reduced social cash benefits, this interpretation and application of the residence requirement raises issues of discrimination under EU law. In a couple of cases pending before the Parliamentary Ombudsman, the Ombudsman has recently requested the Appeals Board and the Ministry of Employment to clarify the conformity of this practice with EU law, in particular Arts. 20 and 21 TEUF and the case law of the CJEU. The Ombudsman further asked the Appeals Board to explain the reasons for not having referred the pertinent EU law issues to the CJEU for preliminary ruling.

Study grants

In 2008, the Danish Ombudsman launched an investigation on his own initiative of the practice of the Board of Appeal for Danish Educational Support, which was finalized in April 2010. The report focuses on 2 topics of particular relevance to this report: The *concept of workers* and the *concept of consecutive stay*.

From the Ombudsman's report, it appears that the practice from the educational authorities was not entirely in compliance with EU law prior to April 2009, as the educational au-

thorities focused on the formal registration of EU/EEA citizens rather than performing an assessment of the EU/EEA citizen's status. Further, there seems to be some unsolved issues on retroactive effect of the change of practice and the Danish Educational Support Agency's compliance with the Board of Appeal's change of practice.

Integration measures

In 2010, the Act on *Integration* was amended to comprise also EU citizens and their family members. This means that EU citizens and their family members residing in Denmark on the basis of the EU rules on free movement are entitled to an introductory course offered by the municipalities pursuant to the Act Chapter 4a. The introductory course comprises a Danish course, a course in the Danish society, culture and history and offers aiming at employment.

Chapter I: The worker: Entry, residence, departure and remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS: ART. 7 (1A); ART. 7 (3A-D); ART. 8 (3A); ART. 14 (4A-B); ART. 17, ART 24 (2) OF DIRECTIVE 2004/38

The *Aliens Act*[1] applies to EU/EEA citizens both regarding general and specific sections. However, the provisions of the Act apply to EU/EEA citizens only to the extent this is in accordance with EU law, cf. Section 2 (3) emphasizing and highlighting the prevalence of EU law in case of any conflict or divergence with the Act.

Aliens Act Section 2 (4) provides the legal basis for the Minister of Refugee, Immigration and Integration Affairs to set out more detailed provisions on the implementation of the EU rules on free movement, cf. *Aliens Act* Section 6. This has resulted in the *EU Residence Order*[2] which is the central piece of legislation concerning free movement, as it implements the Directives on free movement.

Compared to last year's report, amendments have been made pertaining to the transposition of the provisions of Directive 2004/38. Also, a Bill amending the rules on expulsion was recently adopted by the Parliament; see below Section 3.

Following the Commission's evaluation report on the Member States transposition of Directive 2004/38[3] and the Commission's recommendations to Denmark, the Danish government thus amended the *Aliens Act*[4] and the *EU Residence Order* in 2011. According to the explanatory remarks to the Bill, the Commission is of the opinion that there is no basis for assuming that Denmark does not offer the protection to EU citizens and their family members as required by Directive 2004/38. Further, the Commission acknowledged that the provisions of Directive 2004/38 are complied with by the Danish authorities and courts. However, the Commission finds that certain provisions up to then as reflected in communications, notes, guidance etc. should be reflected in actual legal documents, thus removing the risk of wrongful decisions due to lack of knowledge of the rules.

Thus, the Danish government stresses that the Commission emphasizes that the matter is merely a question of formal transposition. 13 items have been identified of which the Danish transposition of Directive 2004/38 should be clarified. Consequently, the amendment does not imply substantial changes to the legislation, but merely clarifications to the Danish transposition of Directive 2004/38. According to the Danish government, the relevant provisions have been incorporated into the *EU Residence Order* as the most appropriate form of transposition. However, a few clarifications have been adopted in the *Aliens Act* as well.[5] The

1 Consolidation Act No. 1061 of 18 August 2010 and amendments.
2 Executive Order No. 474 of 12 May 2011.
3 (COM(2008)840) and the subsequent national reports on transposition.
4 By Act No. 463 of 18 May 2011, entering into force on 20 May 2011 as for the relevant provisions.
5 Bill No. L 167/2010-11 of 16 March 2011, general remarks para. 9 and specific remarks paras. 1.2, 1.6, 1.8, 1.9, 1.10.

transposition of the 13 items is performed in either the *Aliens Act* or the *EU Residence Order*, depending on which legal document already regulated the area.[6]

Whilst it falls outside the scope of this report to account for all the amendments, it should be noted that pertaining to the specific provisions of Directive 2004/38 mentioned in the headline to this Section, the Danish transposition of Art. 14 (4b) was clarified in the *EU residence Order*; see below Section 2.

The Danish transposition of the remaining provisions mentioned in the headline to this Section does not seem to have been amended substantially as compared to last years' report. Yet, various amendments of a more general nature have been made. Notably, a new Chapter 9 on grounds of public policy, security and health has been inserted in the *EU Residence Order* and amendments have been made to the relevant provisions of the *Aliens Act*, cf. Arts. 27-29. According to the Danish government, this amendment is merely of a formal nature; see Section 3 below on expulsion.[7] In addition, a new Chapter 10 on residence documents has been inserted in the *EU Residence Order*, cf. Art. 25; see below on administrative formalities.

Art. 7 (1a): Right of residence for more than 3 months for workers and self-employed

Texts in force

Laws
Aliens Act Section 2 (1) lays down the basic rule on the right to enter and reside for up to 3 months, which applies to EU citizens as well as members of their families, cf. Section 2 (2). As for EU citizens being workers or self-employed, this rule is modified by the *EU Residence Order* Section 3 (1-3); see below. Additionally, the rule is modified by the *EU Residence Order* Section 3 (4) for EU citizens being jobseekers; see below Section 2.

Administrative rules
EU Residence Order Section 3 (1), stipulates that an EU citizen has a right to reside in Denmark for more than the 3 months mentioned in *Aliens Act* Section 2 (1) when the person has taken up employment in Denmark or is self-employed, including is a service provider, which appears to be in accordance with Art. 7 (1a).

Art. 7 (3a-d): Retention of the status of the worker or self-employed

Texts in force

Administrative rules
EU Residence Order Section 3 (2) stipulates that an EU citizen who was previously comprised by Section 3 (1), but is no longer working, retains his/her status as a worker or self-employed person, provided that the EU citizen:

6 Cf. the Integration Minister's response to question 4 from a member of the Parliament, available at http://www.ft.dk/samling/20101/lovforslag/l167/spm/4/svar/796882/982528.pdf, accessed on 22 June 2011.
7 Bill No. L 167/2010-11, general remarks para. 9.3, item 7 and specific remarks paras. 1.6 and 1.9.

- is temporarily unable to work as a result of sickness or accident, cf. Section 3 (2) (i), which appears to be in accordance with Art. 7 (3a);
- is involuntarily unemployed upon paid occupation or self-employment for more than 1 year, which is duly recorded, and has registered with the jobcentre as job seeking, cf. Section 3 (2) (ii), which appears to be in accordance with Art. 7 (3b);
- is involuntarily unemployed upon the expiration of a fixed-term employment contract of less than 1 year duration, which is duly recorded, and has registered with the jobcentre as job seeking, cf. Section 3 (2) (iii). This group of EU citizens retain the status as an employee or self-employed person for 6 months, cf. Section 3 (3), which appears to be in accordance with Art. 7 (3c);
- has involuntarily become unemployed or lost his/her position as a self-employed during the first 12 months, which is duly recorded, and has registered with the jobcentre as job seeking, cf. Section 3 (2) (iv). This group of EU citizens retain the status as an employee or self-employed person for 6 months, cf. Section 3 (3), which appears to be in accordance with Art. 7 (3c); or
- embarks on vocational training related to the person's previous employment or is involuntarily unemployed and embarks on any form of vocational training, cf. Section 3 (2) (v), which appears to be in accordance with Art. 7 (3d).

Art. 8 (3a): Administrative formalities for EU citizens

Texts in force

Administrative rules

EU Residence Order Section 22 stipulates that the issuance of a registration certificate to an EU citizen comprised by Section 3 (worker, self-employed or service provider) may be conditioned by the presentation of a valid identity card or passport and either proof of self-employment in Denmark or a letter of appointment or a confirmation from his/her employer proving that he/she has paid employment in Denmark, which appears to be in accordance with Art. 8 (3a).

As mentioned above, a new Chapter 10 has been adopted in the *EU Residence Order* in order to clarify the Danish transposition of Art. 25. Section 41 stipulates that possession of a registration certificate, residence card, proof of entitlement to permanent residence, permanent residence card or receipt for the submission of an application thereon, may not be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof by the EU citizen and his/her family members, regardless of nationality. This provision appears to be in accordance with Art. 25, although the wording of the Directive is somewhat stronger than the wording of the Danish provision, cf. Art. 25's 'may *under no circumstances* be made a precondition'.

According to the Danish government, this provision is merely a formal clarification, as the obligation already follows from Danish administrative law.[8]

Pertaining to Art. 25 and the Danish transposition thereof, amendments have been made to other Acts as well; see below Chapter III.1.2.

8 Bill No. L 167/2010-11, general remarks para. 9.3, item 13.

Art. 14 (4a-b): Retention of the right to reside

Texts in force

Administrative rules
Apart from the expulsion provisions relating to criminal acts and public order (see Section 3 below), there is no legal basis for expulsion measures concerning EU citizens who are workers or self-employed persons. For jobseekers, the same is the case as long as they have actual chances to obtain employment (see Section 2 below). Thus, the Danish rules and practices on retention of residence right appear to be in accordance with Art. 14 (4a-b).

Art. 17: Right of permanent residence for persons who are no longer working

Texts in force

Administrative rules
EU Residence Order Section 20 stipulates that persons with a right of residence in Denmark under Sections 7, 12 or 14 (3) have a right to permanent residence without satisfying any further conditions.[9]

EU Residence Order Section 7 concerns retired persons, etc. and corresponds Art. 17 (1) (a-c) and 17 (2):

- Section 7 (1) (i) concerns an EU citizen who ceases paid employment or self-employment after having reached the age of entitlement to old-age pension as fixed in the *Old-Age Pension Act* or who ceases paid employment and retires on anticipatory pension, provided that the EU citizen has had business activity in Denmark for at least the previous 12 months and has resided in Denmark continuously for at least the previous 3 years. Hence, Section 7 (1) (i), cf. Section 20, appears to be in accordance with Art. 17 (1) (a).
- Section 7 (1) (ii) concerns an EU citizen who ceases paid employment or self-employment as a result of permanent incapacity to work, provided that the EU citizen has resided in Denmark continuously for at least the previous 2 years. No condition is imposed as to the residence period if such incapacity to work is the result of an accident at work or an occupational illness entitling to permanent benefits payable in whole or in part by a Danish authority. Hence, Section 7 (1) (ii), cf. Section 20, appears to be in accordance with Art. 17 (1) (b).
- Section 7 (1) (iii) concerns an EU citizen who works as an employee or self-employed in another Member State while retaining residence in Denmark to which the EU citizen return, as a rule, at least once a week, provided the EU citizen has had business activity and has resided in Denmark continuously for at least the previous 3 years.

Section 7 (3) states that as for an EU citizen falling within Section 7 (1) (iii), periods of paid employment or self-employment completed in another Member States are considered as having been completed in Denmark for the purpose of acquisition of the rights mentioned in

9 Section 20 is a modification to Section 19 on right of permanent residence for EU citizens who have lawfully resided in Denmark for a continuous period of five years, cf. Directive 2004/38 Art. 16.

subsection (1) (i) and (ii). Hence, Section 7 (1) (iii), cf. Section 7 (3), cf. Section 20, appears to be in accordance with Art. 17 (1) (c) first and second part.

- Section 7 (2) concerns periods of involuntary unemployment duly recorded by the competent office of the Danish Employment Service and periods without work over which the EU citizen has no control as well as absence from work or cessation of work due to illness or accident. These periods are considered as periods of employment. Hence, Section 7 (2), cf. Section 20, appears to be in accordance with Art. 17 (1) (c) third part.
- Section 7 (4) states that in the cases referred to in Section 7 (1) (i) and (ii), no condition is imposed as to the residence period or the period of business activity if the employee's or the self-employed person's spouse has Danish nationality or has lost it by marriage to that person. The provision only refers to the EU citizen's spouse and does not refer to the person's partner as opposed to Art. 17 (2). However, Section 2 (2) states that a registered partner is treated as the equivalent of a spouse. Furthermore, Section 16 (1) states that the provisions on spouses apply correspondingly in cases where a person over 18 years of age cohabits at a shared residence in regular cohabitation of prolonged duration with a principal person over 18 years of age.[10] Hence, Section 7 (4), cf. Section 20, cf. Section 2 (2), appears to be in accordance with Art. 17 (2), cf. Art. 3 (2) (b).

EU Residence Order Section 12 concerns family members of retired persons, etc. and corresponds to Art. 17 (3):

- Section 12 (1) concerns family members of an EU citizen falling within Section 7 (and having a right of permanent residence, cf. Section 20; see above) who accompany or join the EU citizen who has established real and actual stay in Denmark.
- Section 12 (2) makes it a condition for the right of residence under Section 12 (1) for family members falling within Section 2 (1) (iii-v), unless exceptional reasons make it inappropriate, that the EU citizen has such income or means at his/her disposal for the support of him-/herself and the family member that the persons in question are presumed, upon specific assessment, not to become a burden on the public authorities.

Section 12 (2), cf. Section 20, appears to be in accordance with Art. 17 (3), cf. Art. 14 (2), Art. 7 (1) (b), cf. Art. 7 (2), cf. Art. 8 (4).

EU Residence Order Section 14 concerns family members with a continued right of residence after the principal person's death or departure and corresponds to Art. 17 (4).

- Section 14 (3) concerns family members' – being EU citizens or third country nationals – right to permanents residence, cf. Section 20, when the family member has a right of residence under Sections 8 (1) or 9-11,[11] when the principal fell within Section 3 (1)[12] and when
  - the principal person had resided in Denmark for a continuous period of at least 2 years at his/her death;
  - the death was due to an accident at work or an occupational illness; or

10 Section 16 (2) makes it a condition that the principal person undertakes to support the cohabitant.

11 Family members of workers or self-employed persons, family members of seconded persons, family members of students and family members of persons with sufficient means, respectively.

12 An EU national who is a worker, self-employed person, including a service provider.

- the family member was the principal person's spouse and lost his/her Danish nationality by marriage to the principal person

Hence, Section 14 (3), cf. Section 20, appears to be in accordance with Art. 17 (4).

Art. 24 (2): Equal treatment

Texts in force

Administrative rules

As described below in Chapter IV.2.2, first-time job seeking EU citizens are not entitled to cash benefits under the Act on *Active Social Policy*[13], apart from costs related to return to their home country. EU citizens and their family members with residence right under EU law, on the other hand, are entitled to such benefits on equal terms with Danish citizens.[14]

Whereas these rules appear to be in accordance Arts. 14 and 27 of Directive 2004/38, the compatibility of the general exclusion from cash benefits under the Act on *Active Social Policy* with Art. 24 (2) may be questioned against the background of recent CJEU case law, see Chapter IV.2.2 and Chapter IX below.

2. SITUATION OF JOBSEEKERS

As mentioned above, the Danish transposition of Art. 14 (4b) was clarified in the EU residence Order Section 3 (4). Previously, Art. 14 (4b) was reflected in *Aliens Act* Section 2 (1), but this provision has now been amended, resulting in the right of residence for jobseekers to appear from the *EU Residence Order*, only, and the general right of residence for up to 3 months to appear from the *Aliens Act*.[15]

According to the *EU Residence Order* Section 21 (1), EU citizens with a right of time-limited residence shall apply for a registration certificate within 3 months of entry if the residence is expected to last for longer than 3 months. EU citizens with a right of residence pursuant to Section 3 (4), i.e. jobseekers, for up to 6 months shall not, however, apply for a registration certificate.[16] Thus, if seeking job, EU citizens have a right to residence in Denmark for up to 6 months without residence certificates/permits. The EU citizen must be able to present ID or passport on request.

Within this period the EU citizen has to supply for him/herself and may only be afforded social cash benefits for the return journey. Hence, an EU citizen who is a first-time jobseeker does not have access to social assistance or starting assistance.[17] The reasoning behind this is

13 Consolidation Act No. 946 of 1 October 2009, Section 12 a.
14 *Ibid*., Section 3 (2).
15 Bill No. L 167/2010-11, general remarks para. 9.3, item 11 and specific remarks para. 1.2.
16 Cf. the webpage of the Ministry of Refugee, Immigration and Integration, stating that an EU/EEA citizen seeking job must apply for a registration certificate with the Regional State Administration if the person in question wishes to stay in Denmark for more than 6 months. The application has to be handed in within 6 months from entry, see http://www.nyidanmark.dk/en-us/coming_to_dk/eu_and_nordic_citizens/eu-eea_citizens/residence_in_denmark_for_union_citizens_ and_eea_nationals.htm, accessed on 21 June 2011.
17 See more below Chapter IV.2.2

the view that social assistance and starting assistance are not support offered specifically for job seeking.[18] However, the EU citizen may enter an unemployment fund.[19]

If, upon the expiration of the 6 months time limit, the EU citizen can substantiate that he/she continues to seek job and has actual chances to obtain employment, he/she may not be sent out of the country.[20]

3. OTHER ISSUES OF CONCERN

Customs control

As has undoubtedly already come to the Commission's knowledge, there has recently been some debate on the compatibility with EU law of parts of the political agreement of May 2011 regarding the 'retirement reform' between the Danish government, the Danish People's Party and another MP (and now also the Christian Democrats) on permanently enhancing the customs (border) control in Denmark.

The headline of the Danish agreement is 'Permanent customs control in Denmark (enhanced border control).' The agreement stresses the importance of preventing cross-border crime committed by foreign gangs, the smuggling of drugs, weapons, persons and money as well as the evasion of Danish taxation by the use of foreign labour.[21]

As the means of achieving the aims of the agreement, the agreement states that the control will consist of an increase of the number of customs officers, new control building facilities, video surveillance of vehicles and enabling the police to act upon specific request from the customs officers. Further, comprehensive video surveillance of vehicles crossing the Danish borders will be imposed. In addition, and pertaining to the control at the Danish-German border, the agreement states that video surveillance will be established by the main road (Frøslev) and mobile video surveillance by the medium sized highways (Padborg, Kruså and Sæd) and by the minor border crossings. Additionally, the agreement states that

18 Cf. Guidance No. 33 of 4 May 2004 *to Section 12 a in the Act* on *Active Social Policy etc.*, para. 1.1, and Guidance No. 19 of 4 April 2008 on *EU/EEA Citizen's Access to Social Security and Starting Assistance*, paras. 2.2.3 and 3.2.2.B, issued by The National Directorate of Labour, 'Arbejdsdirektoratet', a body under The Ministry of Employment, official website: www.adir.dk.

19 Cf. Consolidation Act No. 838 of 4 July 2011 and amendments, and Executive Order No. 470 of 29 April 2010 on *Unemployment Insurance for Workers within EEA and Additional Countries*, cf. Guidance No. 36 of 29 April 2010.

20 Cf. Guidance No. 33 of 4 May 2004 *to Section 12 a in the Act on Active Social Policy etc.*, para. 1.1. note 1 and Bill No. L 167/2010-11, general remarks para. 9.3, item 11 and specific remarks para. 1.2.

21 http://www.fm.dk/Nyheder/Pressemeddelelser/2011/06/~/media/Files/Nyheder/Pressemeddelelser/2011/06/toldkontrol/Permanent%20toldkontrol%20i%20Danmark.ashx. The English press release on the matter is available at http://www.skat.dk/SKAT.aspx?oId=1947798&vId=0 and http://www.justitsministeriet.dk/pressemeddelelse+M58313fa4320.html, all accessed on 22 June 2011. The English press release on the agreement stresses that the aim of the agreement first and foremost is to enhance 'customs control and implies increased controls in relation to the smuggling into Denmark of mainly goods and items.' There thus seems to be a difference between the Danish debate (domestic policy) and the international debate (foreign policy) as noted by Thomas Gammeltoft-Hansen and Julie Herschend Christoffersen, the Danish Institute for International Studies (DIIS), in their Policy Brief of June 2011,'Danmarks Dilemma: Grænsekontrol og Schengen'.

scanners, including x-ray scanners, enabling the customs officers to scan persons as well as vehicles are part of the remedies.[22]

Pertaining to the compatibility with the Schengen acquis, the agreement stresses that it must be implemented within the framework of the current Schengen-cooperation.[23] Furthermore, the agreeing parties state that they share the concern as raised by France and Italy and will thus work on amending the Schengen acquis, allowing for temporary border control in situations of large-scale immigration to the Member States where a Schengen country does not fulfill its obligations to execute control by the EU's external borders.

Further, according to a notice of 10 June 2011 from the Ministry of Justice and the Ministry of Taxation, the agreement on permanent customs control is in compliance with Denmark's obligations pursuant to the Schengen cooperation and the EU Treaty, *as* the agreement does not entail person control or passport control in relation to the countries being part of the Schengen-cooperation, *as* the agreement will be implemented in such manner ensuring the flexible and safe handling of traffic, and *as* the EU Treaty allows for exceptional rules to the principle on free movement of goods on grounds of public order, security and protection of the life of human beings and animals – national exceptional rules which for numerous years have been an integrated part of the *Danish Customs Act* and within which scope the agreement on customs control falls.[24]

The enhanced customs control was authorized by the Parliament's Finance Committee on 1 July 2011, and implementation began on 5 July 2011.

As the Commission is corresponding with the Danish government on the issue[25] and as the legal and actual implementation of the political agreement on the customs (border) control is not yet clear, it is not possible at this stage to perform an assessment of the possible implications for workers or of the compatibility of the agreement with the EU rules on free movement of workers.[26] The actual as well as the legal implementation of the agreement may raise issues to be dealt with in future FMoW reports.

Expulsion of EU citizens

As described in detail in the previous report, the higher courts have in 2008-2009 examined various cases with more principled issues, and in 2009-2010 this practice was upheld by the courts. In general, the courts first examine whether the conditions in *Aliens Act* on expulsion are satisfied, and secondly examine the matter of the compatibility of the expulsion with Directive 2004/38 Art. 33, cf. Art. 27 and 28. Not all of the published summaries of the

22 Yet, pertaining to surveillance, the English press release merely states that the video surveillance will be directed at the vehicles' number plates.

23 The Danish original agreement of 11 May 2011 was amended on this point on 10 June 2011, emphasizing that the Danish efforts must be able to be implemented within the scope of the current Schengen cooperation, cf. http://www.fm.dk/Nyheder/Pressemeddelelser/2011/06/20110610 %20Styrket%20graensekontrol.aspx and http://www.eu-oplysningen.dk/nyheder/euidag/2011/ maj/schengenDK/?print=1.

24 http://www.justitsministeriet.dk/pressemeddelelse+M587d54ac6c3.html and http://skat.dk/SKAT.aspx?oId=1947940&vId=0, accessed on 22 June 2011.

25 http://www.ft.dk/dokumenter/tingdok.aspx?/samling/20101/beslutningsforslag/b144/bilag/9/index.htm and http://www.eu-oplysningen.dk/upload/application/pdf/11d43f68/Barroso.pdf, accessed on 1 July 2011.

26 As stated by Thomas Gammeltoft-Hansen and Julie Herschend Christoffersen, the Danish Institute for International Studies (DIIS), in their Policy Brief of June 2011, the actual implementation and the Danish legislation – as opposed to the political agreement – is decisive for the evaluation of the agreement's compatibility with the Schengen rules, cf. 'Danmarks Dilemma: Grænsekontrol og Schengen.'

judgments contain clear references to the EU rules on expulsion, yet making it questionable whether the EU rules have been observed in the given case. In general, however, it seems as if the courts conduct a concrete, individual assessment of the case concerned and the level of threat to society constituted by the defendant, as required by the EU legislation and case law on expulsion of EU citizens. Regarding the level of threat to society constituted by the defendant, however, it might be argued that the courts apply a rather low threshold; see more below Section 4 on the case law.

In 2011, the Supreme Court passed 4 principled rulings, determining the threshold for administrative expulsion of EU citizens. The rulings are relevant also to the issue of free movement of Roma workers and are thus addressed below Section 4.

Following the Parliament's adoption of Bill No. L 210 on 24 June 2011,[27] an Act tightening the rules on expulsion in the *Aliens Act* was introduced.[28] Among other things, the Act tightens the balancing rule in *Aliens Act* Section 26 (2) and extends the scope of the provision to include all crimes resulting in imprisonment.[29]

The amended Section 26 (2) thus stipulates:

> 'An alien must be expelled pursuant to [Aliens Act] Sections 22-24 and 25 unless this for certain would be contrary to Denmark's international obligations.'[30]

In addition, the amended Section 24b (1) stipulates:

> 'An alien is to be sentenced to suspended expulsion if there is no basis for expelling the person concerned pursuant to [Aliens Act] Sections 22-24, as this for certain would be contrary to Denmark's international obligations, cf. Section 26 (2)'. [31]

The Act entered into force on 1 July 2011.

The amending Act is a result of part of the political agreement of May 2011 regarding the 'retirement reform' between the Danish government, the Danish People's Party and the Christian Democrats on the tightening of the rules on expulsion, on investigating the possibilities of expelling unwanted, delinquent EU citizens, and on intensifying the assistance to refugees in the closer communities and also to strengthen the efforts on repatriation.[32]

As a consequence of the amendment of *Aliens Act* Section 26 (2), the main rule of the *Aliens Act* is that aliens committing *any* crime resulting in imprisonment must be expelled, unless this *for certain* would be contrary to Denmark's international obligations; *including* the EU rules.[33]

Consequently, *Aliens Act* Section 26 (1), requiring an assessment of the alien's personal situation, including his/her attachment to the Danish society, family members here, the length of the stay etc., to be made in order to assess whether the expulsion or revocation may be considered to be excessively burdensome, applies only to expulsion pursuant to *Aliens Act*

27 Submitted on 30 May 2011 by the Integration Minister, Bill No. L 210/2010-11.
28 Act No. 758 of 29 June 2011.
29 Bill No. L 210, specific remarks para. 1.7.
30 Author's translation.
31 Author's translation.
32 Bill No. L 210, general remarks para. 1.
33 Bill No. L 210, specific remarks para. 1.7 and general remarks para. 2.2.

Sections 25a-c.[34] However, as the previous Section 26 (1) to a large extent was a transposition of Denmark's international obligations – namely the ECHR, including the principle of proportionality, such assessment remain relevant to some extent, although the balancing has been changed.

The explanatory remarks furthermore state that Denmark's international obligations must continue to be complied with, and that it is up to the courts to perform an assessment of whether expulsion is possible within the scope of Denmark's international obligations, while referring to the legislator's clear desire of expulsion to as great an extent as possible.[35]

As the provisions of the *Aliens Act* continue to apply to EU/EEA citizens only to the extent this is in accordance with EU law, cf. Section 2 (3) emphasizing and highlighting the prevalence of EU law in case of any conflict or divergence with the Act, the impact on EU citizens of the amendment is somewhat questionable offhand.

In the explanatory remarks to the Bill, the government hence refers to *Aliens Act* Section 2 (3), Directive 2004/38 Arts. 27-33 and the requirement imposed on the Danish courts to perform a concrete assessment of a possible expulsion's compatibility with the EU rules.[36] However, the explanatory remarks further state that the Commission previously declared the former Section 26 (2) and its tightened balancing rule incompatible with Directive 2004/38 Art. 28 (1). As a result, the former Section 26 (2) was amended to expressly exempt EU citizens from the provision and its tightened balancing.[37]

Yet, the explanatory remarks state that as Section 26 (2) is amended by the Bill, and as the reference to Section 26 (1) as well as the balancing rule in Section 26 (2) are removed by the Bill, the exemption of EU citizens is to be repealed. On this point, the explanatory remarks thus seem to be based on the assumption that the *repeal of the exemption of EU citizens* is merely a formality. Yet, the explanatory remarks also state that Art. 28 (1) of the Directive does not contain a balancing rule requiring the enumerated criteria to speak decisively against expulsion. As a consequence, Section 26 (2) – with its new wording and balancing – now applies to EU citizens.[38]

As mentioned above, a new Chapter 9 on grounds of public policy, security and health was inserted in the *EU Residence Order*. Chapter 9 is to a large extent a transcript of Art. 27, 28 and 29 of Directive 2004/38, and thus a formal clarification of the Danish transposition of the Directive.[39] According to Section 39, upon decision[40] on cessation of residence rights pursuant to the Order or upon decision on refusal or expulsion pursuant to the *Aliens Act* of EU citizens and their family members on grounds of public order or security, regard must be paid to the duration of the person's stay in Denmark, the person's age, state of health, family and financial situation and also social and cultural integration in Denmark and attachment to his/her home country and also other relevant considerations. Further, Section 38 stipulates – among other things – that decisions made regarding EU citizens and their family members

34 Sections 25a – 25c comprise expulsion on the basis of minor offences, staying without the requisite permit, etc.

35 Bill No. L 210, general remarks para. 2.2. See also Information from the Public Prosecutor No. 3/2011 of 1 July 2011.

36 Bill No. L 210, general remarks para. 2.1.3.3.

37 By Act No. 463 of 18 May 2011, entering into force on 20 May 2011.

38 Bill No. L 210, specific remarks 1.7.

39 Cf. also Bill No. L 167, general remarks para. 9.3, item 7.

40 The wording is 'upon decision on…' and thus not 'before taking an expulsion decision', cf. the wording of the Directive. Whether this wording implies a balancing different from that of the Directive is not known.

pursuant to the Order and the *Aliens Act* on grounds of public order and security must comply with the principle of proportionality.

Initially, the interplay between the amended balancing rule in *Aliens Act* Section 26 (2) and Chapter 9 of the *EU Residence Order* is not clear. However, given the abovementioned explanatory remarks on Art. 28 (1), and the fact that the insertion of Chapter 9 is merely a matter of formal clarification, it must be assumed that the tightened balancing rule in *Aliens Act* Section 26 (2) prevails, thus requiring expulsion of EU citizens committing any crime resulting in imprisonment, unless this 'for certain' would be contrary to the EU rules (or other international obligations).

How this new concept of 'for certain' will be applied by the Danish courts is yet to be awaited.[41]

4. FREE MOVEMENT OF ROMA WORKERS

On 6 July 2010, the Lord Mayor of Copenhagen and the Minister of Justice were quoted in the Danish media for calling for measures to help 'Copenhagen to get rid of criminal Roma staying illegally in Denmark.' The Ministry of Justice stated that 'a number of police actions will occur, and there will be no softness. If – upon being apprehended – the Roma do not have money on them, I do not expect them to be allowed a deadline of 2 days to appear and prove they have money. Then they must be recommended for expulsion immediately.'[42]

On 6 July 2010, 23 Romanian Roma were arrested following a comprehensive police action in Copenhagen. 11 of the Roma were arrested while sleeping in a closed post office and charged with violation of domestic order. 12 Roma were arrested in a temporary camp in a shrubbery and charged with illegal camping. The alleged crimes are punishable with minor fines.[43]

On 7 July 2010, the 23 Romanian Roma were administratively expelled on grounds of public order and health.

On 7 July 2010 the Immigration Service issued a press release stating that:

> 'The Immigration Service expels 23 Roma
> Today, the Immigration Service decided to expel a total of *23 Roma*, arrested for violating domestic peace and illegal camping.
> The expulsion is done with reference to *public order and health.*'[44]

41 In its hearing statement of 9 May 2011 to the Bill, the Danish Judge Association notes that the Bill does not alter the fact that international obligations must be complied with, and that it is up to the Danish courts to perform a concrete assessment of whether expulsion is possible within the scope of Denmark's international obligations. The Judge Association further notes that following the Bill's political nature, it is the assessment of the association that it should make no further remarks. Available at http://www.ft.dk/samling/20101/lovforslag/l210/bilag/4/1009507.pdf, accessed on 14 July 2011.

42 Author's translation, cf. http://jp.dk/indland/article2118177.ece and http://politiken.dk/indland/ECE1011458/koebenhavn-vil-af-med-kriminelle-romaer/, accessed on 29 June 2011.

43 Cf. http://www.information.dk/240903, accessed on 29 June 2011.

44 Author's translation and emphasis. The Danish version of the press release is available at http://www.nyidanmark.dk/da-dk/nyheder/nyheder/udlaendingeservice/2010/juli/us-afviser-23-romaer.htm, accessed on 28 June 2011.
According to *Aliens Act* Section 25, an alien may be expelled if:
(i) the alien must be deemed a danger to national security; or
(ii) the alien must be deemed a serious threat to the public order, safety or health.

→

Prior to this, the Immigration Service issued a press release on 11 June 2010 stating that:

> 'Refusal of EU citizens
> In a case concerning *2 Romanian citizens* suspected of con, the Immigration Service decided on refusal. In practice, this means that the 2 persons concerned will be put on an airplane back to Romania.
> The 2 Romanians did not admit to the con to the police, and thus it was not possible to expel them from Denmark. However, as they were *not able to present resources for their stay in Denmark or for the return airplane ticket to Romania*, it was possible for the Immigration Service to decide on the rejection of the 2 Romanian solely on this basis.'[45]

As appears from the press releases, while the press release of 11 June 2010 mentions the Romanian citizenship of the aliens concerned, the press release of 7 July 2010 merely refers to the expelled aliens as 'Roma.'

According to *Aliens Act* Section 25a (1), an alien who has not lawfully stayed in Denmark for more than the last 6 months may further be expelled if: –
(i) the alien, in cases other than those mentioned in sections 22 to 24, has been sentenced for violation of section 42a(7), second sentence, cf. section 60(1), of this Act, section 119, 244 or 266, sections 276 to 283 or section 290 of the Criminal Code, section 73(2), cf. subsection (1)(i), of the Customs Act, or the Act on Arms and Explosives, or the alien has admitted the violation to the police or was apprehended during or in direct connection with commission of the offence; or
(ii) the alien has been sentenced for unlawful possession of euphoriant drugs, or the alien has admitted unlawful possession or use of euphoriant drugs to the police, or there are strong reasons for suspicion in general.
According to *Aliens Act* Section 25a (2), after entry, an alien who has not lawfully stayed in Denmark for more than the last 6 months may also be expelled if: –
(i) reason is found from information available on the alien to assume that the alien intends to stay or work in Denmark without the requisite permit. Aliens falling within section 2(1) or (2) [EU citizens and their family members] cannot be expelled on this ground;
(ii) the alien's means are insufficient to support him in Denmark and to pay for his return to his country of origin. Aliens falling within section 2(1) or (2) [EU citizens and their family members] cannot be expelled on this ground;
(iii) other reasons of public order, security, or health indicate that the alien should not be allowed to stay in Denmark.
According to *Aliens Act* Section 25b, an alien may be expelled if the alien is staying in Denmark without the requisite permit.

45 Author's translation and emphasis. The Danish version of the press release is available at http://www.nyidanmark.dk/da-dk/nyheder/nyheder/udlaendingeservice/2010/juni/afvisning-eu-borgere.htm, accessed on 28 June 2011.
According to *Aliens Act* Section 28 (1) an alien not issued with a residence permit, registration certificate or residence card etc may be refused entry on arrival from a country which has not acceded to the Schengen Convention if: -
(v) the alien's means are insufficient to support him both as concerns the entire intended stay in the Schengen countries and to pay for either his return journey or the passage to a country which has not acceded to the Schengen Convention and where he is certain of entry, and he is not able to acquire such means in a lawful manner. Aliens falling within section 2(1) or (2) [EU citizens and their family members] cannot be refused entry on this ground.
(vii) other reasons of public order, relations with foreign powers or reasons of security or health of the Schengen countries indicate that the alien should not be allowed to stay in Denmark.
According to *Aliens Act* Section 28 (5), refusal of entry under subsections (1) to (4) may further be effected until 3 months after entry. After having entered Denmark, aliens falling within section 2(1) or (2) [EU citizens and their family members] may, however, be refused entry only under subsection (1)(i) and (vii) and, if the authorities must defray the expenses of the alien's leaving Denmark, also under subsection (1)(v).
According to *Aliens Act* Section 28 (3), an alien not issued with a residence permit, or not issued with a registration certificate or residence card for Denmark, or a national of a Nordic country not permanently resident in
Denmark may be refused entry on arrival from a Schengen country under the provisions of subsection 1(i) to (vii), but see subsection (6). A national of a Nordic country can only be refused entry under subsection (1)(ii) if he enters from a non-Nordic country.

Following the expulsions, and apart from the EU and international debate this gave rise to,[46] there was some debate in the Danish media on the compatibility with international conventions, EU law and the memorandum issued by the Immigration Service in December 2009 on *Expulsion and Refusal*. As a response to part of this debate, a Danish newspaper published a letter from an official within the Immigration Service on 22 September 2010. In addition, this letter was published at the website of the Immigration Service on 23 September 2010. In the letter, the official accounts for the rules according to which the Immigration Service decides on expulsion and refusal of EU citizens, and the compatibility of the expulsions concerned with the memorandum issued by the Immigration Service in December 2009 on *Expulsion and Refusal*:

> 'Facts on administrative expulsion of EU citizens
>
> '[…] The possibilities of administrative expulsion and refusal of EU citizens is governed by the Aliens Act but must be regarded in connection with the EU rules. The free movement of persons is one of the fundamental rights of the EU Treaty, ensuring every EU citizen the right to move and reside freely in the territory of the Member States. Thus, EU citizens enjoy a special protection against expulsion.
> Despite of this, a Member State may refuse an EU citizen the right to enter or reside on grounds of public policy, security and health. In its practice, the EU Court has determined that expulsion of an EU citizen is justified only when the person's presence or behaviour represents an actual and sufficiently serious threat affecting one of the fundamental interests of society.
> Thus, a proportionality balancing must be conducted – an assessment of the circumstances' roughness on the one hand and considerations for the EU rules on the other hand. This includes for instance, how a Danish citizen would be punished.
> In all cases, a concrete assessment of for instance the nature and roughness of the punishable action, the risk of recurrence and the person's additional situation is performed.
> On this background, it is stated in the Immigration Service's memorandum, that expulsion of EU citizens may be decided only in concrete cases of aggravating circumstances. *When the Immigration Service in July 2010 decided on expulsion of a number of EU citizens on grounds of public policy, this was exactly due to the fact that the Immigration Service found such aggravating circumstance to be present, resulting in the expulsion not to be considered disproportional to fundamental EU rights.'*

The official thus concludes that the expulsions were not incompatible with the Immigration Service's memorandum. Further, the official concludes that the Immigration Service's assessment of the possibility of expulsion of EU citizens had not been revised, as claimed by some.[47] On 11 January 2011, the Immigration Service published a new and compiled guidance on *Administrative Expulsion and Refusal*, issued on 28 June 2010.

On 7 July 2010 – and thus the same date as the press release on the expulsion of '23 Roma' – the Integration Ministry completed a memorandum to the Integration Minister on *Expulsion and Refusal of Foreign Homeless etc.*:

> According to the memorandum para. 3.1.1, homeless, beggars or destitute who are EU/EEA citizens staying legally in Denmark may not be *expelled* for destitution pursuant to *Aliens Act* Section 25a (2) (ii). However, *Aliens Act* Section 25a (2) (iii) apply; see below.

46 Notably submission of the ERRC (European Roma Rights Centre) under the Universal Periodic Review by the HCR United Nations Human Rights Council), available at http://www.errc.org/cms/upload/file/denmark-submission-un-upr-19112010.pdf, accessed on 28 June 2011.

47 Author's translation and emphasis, the Danish version is available at http://www.nyidanmark.dk/ da-dk/nyheder/nyheder/udlaendingeservice/2010/september/fakta-om-administrativ-udvisning-af-eu-statsborgere.htm, accessed on 28 June 2011.

Yet, EU/EEA citizens may be *refused* on grounds of destitution pursuant to *Aliens Act* Section 28 (1) (v) up to 3 months after entry, but only if the authorities must defray the expenses of the alien's leaving Denmark, cf. *Aliens Act* Section 28 (5) (cf. also the memorandum para. 2.1).

Pertaining to the substantiation of destitution, prior to a decision on *expulsion or refusal* on grounds of destitution, the Immigration Service must ask the police to examine whether there are persons who may immediately provide the homeless, beggar or destitute with the means necessary. It may be required that a possible reference person immediately turns up at the police and substantiates the necessary resources. If the homeless, beggar or destitute for instance is in possession of a debit- or cash card issued by a financial institution or the like, the police must examine whether the person concerned in this manner is able to immediately acquire the necessary resources, cf. the memorandum para. 3.1. As these requirements are referred to as being applicable prior to decisions on expulsion as well as on refusal on grounds of destitution, and as EU/EEA citizens may be refused on grounds of destitution (see above on *Aliens Act* Section 28 (1) (v), cf. Section 28 (5)), these requirements must be applicable to EU/EEA citizens as well, according to the memorandum.

The memorandum further states that in cases on expulsion or refusal of homeless, beggars or destitute who are EU/EEA citizens and who has stayed in Denmark for 14 days or more, a request to the social authorities in order to procure information on whether the person is entitled to financial aid, no longer has to be made. It is not clear what legal basis the memorandum refers to as the basis for such perception.

According to the memorandum para. 3.2.1, *Aliens Act* Section 25a (2) (iii) on other reasons of public order, security, or health indicating that the alien should not be allowed to stay in Denmark, is applied on beggars, intoxicated persons, violent persons etc., previously sanctioned or warned etc.
Pertaining to EU/EEA citizens staying legally in Denmark, the memorandum states that *expulsion* pursuant to this provision may be effected only when the person's presence or behaviour represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
Further, the memorandum states that in situations where the Immigration Service on this basis assesses that there are not sufficient grounds for deciding on expulsion pursuant to *Aliens Act* Section 25a (2) (iii), the Immigration Service must assess whether is it possible to *refuse* the person concerned pursuant to *Aliens Act* Section 28 (1) (vii).
The memorandum hence states that *Aliens Act* Section 28 (1) (vii) on *refusal* is applied in situations where the circumstances as a main rule would lead to expulsion, but where considerations on the EU/EEA citizen's free movement is against *expulsion* (cf. also the memorandum para. 2.1, stating that *Aliens Act* Section 28 (1) (vii) may be applicable where for instance the person's substantial attachment to Denmark results in there being no basis for deciding on expulsion with entry prohibition, cf. the (previous) *Aliens Act* Section 26 on balancing[48]). As examples of EU/EEA citizens comprised by the provision, the memorandum enumerates EU/EEA citizens who are homeless, beggars, destitute, mentally disturbed and undergoing treatment in their home country, and who by his/her behaviour constitutes a threat to the public order for instance by walking around on the streets naked and yelling and screaming.

According to the memorandum para. 3.3, if an alien, including EU/EEA citizens, being homeless, beggar, destitute, stays illegally in Denmark, the person must be expelled pursuant to *Aliens Act* Section 25b if the conditions are met, immediately upon establishment of illegal stay in Denmark. According to the memorandum para. 3.4.1, EU/EEA citizens staying in Denmark as tourists are entitled to stay in

48 The memorandum thus seems to be based on the assumption that refusal pursuant to *Aliens Act* Section 28 may be used as an alternative to expulsion pursuant to *Aliens Act* Section 25a in situations where expulsion is not possible due to the EU rules on free movement and/or *Aliens Act* Section 26 (the requirement on balancing of the person's personal circumstances, such as attachment to Denmark etc.). Cf. also the memorandum para. 3.1 based on the same assumption. However, the memorandum para. 3.1 states that expulsion is preferred to refusal, as refusal is not accompanied with an entry prohibition – as opposed to expulsion.

Denmark for 3 months, while EU/EEA citizens seeking job are entitled to stay in Denmark for 6 months. The memorandum further states that upon the assessment of whether an EU/EEA citizen may be expelled on grounds of illegal stay, it must be part of the decision whether the alien is job seeking and has actual chances of being hired. Most likely, an EU/EEA citizen being a homeless, beggar or destitute, will rarely be able to substantiate that he/she is job seeking and has actual chances of being hired, according to the memorandum.

Generally on the statement of the case, the memorandum states in para. 4, that if the police encounter an alien on the street who may be perceived a homeless, beggar or destitute, the police examine whether the person is issued with a valid residence permit. If this is not the case, the police examine whether the case should be presented the Immigration Service with the purpose of administrative expulsion or refusal either due to illegal stay, on grounds of public order or because the person concerned is not in possession of or is not able to acquire sufficient means for his/her stay and return journey.

On 31 March 2011, the Supreme Court passed 4 principled rulings, determining the threshold for administrative expulsion of EU citizens.[49] The cases are examples of *indirect judicial review* of the Immigration Service's/Integration Ministry's administrative decisions on expulsion. The indirect judicial review is caused by the fact that the cases before the Supreme Court dealt with the *lawfulness of the deprivation of liberty* initiated with the purpose of ensuring enforcement of the expulsions.[50]

In all 4 cases the Supreme Court refers to UfR2008.2394H and states that persons deprived of liberty pursuant to *Aliens Act* should not be any less protected than persons subjected to other administrative deprivation of liberty. The Supreme Court thus concludes that the judicial review pursuant to *Aliens Act* Section 37 implies an intensity similar to that of the *Danish Constitutional Act* Section 71 (6); and thus, a full judicial review.[51]

The Supreme Court further states that although the decision of deprivation of liberty is made to ensure enforcement of the decision on expulsion, and although the validity of the decision on expulsion may not be reviewed in a case on deprivation of liberty pursuant to Section 37, the review of the lawfulness of the deprivation of liberty must entail a certain review of the basis for the decision. In other words, the Supreme Court states that in order to rule on the lawfulness of the deprivation of liberty, the Supreme Court must to some extent rule on the *lawfulness of the expulsion*, as the decision on expulsion forms the basis of the decision on deprivation of liberty. Consequently, the 4 rulings help in clarifying the state of law in administrative expulsion of EU citizens.

Case 143/2009: The administrative deprivation of liberty of 2 EU citizens to ensure enforcement of expulsion was lawful, cf. Aliens Act Section 25a (1) (i), cf. Section 26 (1), and Directive 2004/38 Art. 27 (2) and 28 (1)[52]

49 Cases No. 143/2009, 264/2010, 316/2010 and 319/2010. Published in weekly legal journal ('Ugeskrift for Retsvæsen') as U2011.1788H, 2011.1794H, U2011.1799H and U2011.1800H, respectively.

50 An alien may be deprived liberty in order to ensure enforcement of a refusal or expulsion pursuant to *Aliens Act* Section 36 (1) if the measures referred to in section 34 are insufficient to ensure enforcement.
Pursuant to *Aliens Act* Section 37(1), an alien deprived of liberty under Section 36 must, if he has not already been released, be brought before a court of justice within 3 full days after the enforcement of the deprivation of liberty, and the court shall rule on the lawfulness of the deprivation of liberty and its continuance.

51 Cf. also Jens Vedsted-Hansen in *Juristen* No. 1, February 2009 pp. 16-20: 'Domstolsprøvelse af farevurderingen i udvisningssager HK af 2.7.2008 (U 2008.2394H) og HK af 19.11.2008 (U 2009.420) & (U 2009.426)'.

52 U2011.1788H.

2 Romanian citizens entered Schengen (Norway) on 22 October 2008. On 24 October 2008 they were arrested in a Danish clothing shop and charged with theft of a fur for DKK 4,800. 1 of the Romanians was also charged with violence for biting an employer in the shoulder. Subsequently, the police issued fine notices on DKK 200 to each, and also a fine notice on DKK 372 for the biting, accepted by the defendants. They were both previously punished in Denmark for theft. In connection with the presentation of the cases for the Immigration Service with the purpose of deciding on expulsion, the defendants were deprived of liberty. On 25 October 2008, the Immigration Service decided on expulsion and entry prohibition for 1 year, and on 30 October 2008, the decision was upheld by the Integration Ministry. In its decision, the Integration Ministry – among other things – emphasized that the defendants committed the theft with accomplishes, appeared to have entered Denmark with the purpose of committing crime, as the crime was committed shortly after entry, and were previously punished for organized theft in Denmark. The deprivation of liberty was brought before the courts.

The Supreme Court stated that according to Aliens Act Section 25a (1) (i), an alien who has not lawfully stayed in Denmark for more than the last 6 months may be expelled if the alien has been sentenced for theft – among other things – or the alien has admitted the violation to the police or was apprehended during or in direct connection with commission of the offence. However, expulsion of aliens comprised by the EU rules may occur only to the extent this is compatible with these rules, cf. Aliens Act Section 2 (3).

The Supreme Court took the view that the defendants admitted the theft (and the violence as for 1 of the defendants), committed the theft with accomplishes, and shortly after the entry into Denmark, were previously punished in Denmark for theft and had no attachment to Denmark.

On this background, the Supreme Court found that the conditions on expulsion pursuant to Aliens Act Section 25a (1) (i), cf. Section 26 (1), were met. Further, the defendants' behaviour must be regarded as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, cf. Directive 2004/38 Art. 27 (2), and as they had no attachment to Denmark, the expulsion was not considered disproportional, cf. Art. 27 (2) and 28 (1), and cf. Aliens Act Section 2 (3).

The Supreme Court further agreed that the deprivation of liberty was necessary in order to ensure the possibility of expulsion, as less intrusive measures were not sufficient.

Case No. 264/2010: The administrative deprivation of liberty of an EU citizen to ensure enforcement of expulsion was not lawful, cf. Aliens Act Section 25a (2) (iii), and also Directive 2004/38 Art. 27 (2)[53]
A Romanian citizen entered Denmark on 16 July 2010. On 19 July 2010, the defendant was arrested at an allotment hut, as the owner of the hut had reported to the police that 3 aliens stayed in his allotment garden. The defendant was charged with violation of domestic peace, pled not guilty and was issued with a fine on DKK 25. The defendant claimed he was permitted by the owner to stay there, and that he was seeking job. So far, he had provided for himself by collecting bottles. He was previously punished in Denmark for theft.
In connection with the presentation of the case for the Immigration Service with the purpose of deciding on expulsion, the defendant was deprived of liberty. On 20 July 2010, the Immigration Service decided on expulsion and entry prohibition for 2 years. In its decision, the Immigration Service – among other things – emphasized that the defendant upon arrest was not in possession of resources for his stay or return (or return ticket) and did not substantiate that he in a legal manner would be able to raise such means. Further, the crime on violation of domestic peace was committed jointly. On 3 August 2010, the defendant was deported to Romania. The deprivation of liberty was brought before the courts.

The Supreme Court stated that according to Aliens Act Section 25a (2) (iii), an alien who has not lawfully stayed in Denmark for more than the last 6 months may also be expelled if other reasons of public order, security, or health indicate that the alien should not be allowed to stay in Denmark. However,

53 U2011.1794H.

expulsion of aliens comprised by the EU rules may occur only to the extent this is compatible with these rules, cf. Aliens Act Section 2 (3).

The Supreme Court took the view that the defendant without the owner's permission stayed in his allotment garden for 3 days, the case was settled with a fine notice on DKK 25, the crime was committed shortly after his entry into Denmark to which he had no attachment. In addition, the defendant previously accepted a fine notice on DKK 1,000 for shop lifting.

The Supreme Court stated that a violation of domestic peace of this nature was of such coincidental nature and had such limited damaging impact that the situation could not be regarded as comprised by Aliens Act Section 25a (2) (iii) on reasons of public order. The Court thus referred to the provision's wording, history and preparatory work. Consequently, the deprivation of liberty was considered unlawful pursuant to the Aliens Act.

In addition, the Court stated that the expulsion would have been unlawful as well as it would be contrary to Directive 2004/38 as the defendant's behaviour could not be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, cf. Art. 27 (2) and Aliens Act Section 2 (3).

Case 319/2010: The administrative deprivation of liberty of an EU citizen to ensure enforcement of expulsion was not lawful, cf. Directive 2004/38 Art. 27 (2), and Aliens Act Section 2 (3)[54]
A Romanian citizen entered Denmark on 18 August 2010. On 20 August 2010 he was found by the police at an abandoned building (closed post office), picking the lock of a bicycle with a screwdriver. He was arrested and charged with violation of domestic peace (the building) and for illegal handling of lost property (the bike). The defendant pled guilty and was issued with a warning; withdrawal of charge. The defendant had no resources but was hoping to get a job as a mason. He explained that he had stayed overnight in the closed post office. Further, he previously travelled between various countries and earned money on collecting bottles, selling trash and begging.
In connection with the presentation of the case for the Immigration Service with the purpose of deciding on expulsion, the defendant was deprived of liberty. On 20 August 2010, the defendant was expelled, and on 31 August 2010 he was deported to Romania. The deprivation of liberty was brought before the courts.

The Supreme Court stated that according to Aliens Act Section 25a (1) (i), an alien who has not lawfully stayed in Denmark for more than the last 6 months may be expelled if the alien has been sentenced for illegal handling of lost property – among other things – or the alien has admitted the violation to the police or was apprehended during or in direct connection with commission of the offence. However, expulsion of aliens comprised by the EU rules may occur only to the extent this is compatible with these rules, cf. Aliens Act Section 2 (3).

The Supreme Court took the view that the defendant pled guilty in illegal handling of lost property, that the bike was placed at a plot by an abandoned house where there was a lot of garbage and other bicycles tossed at the plot. There were no accomplices and the case was settled with a warning. The crime was committed shortly after his arrival to Denmark, to which the defendant had no attachment. The defendant was not previously punished in Denmark. The Supreme Court further noted that violation of domestic peace may not form the basis for expulsion pursuant to Aliens Act Section 25a (1) (i).

On this background, the Supreme Court found that the conditions in Aliens Act Section 25a (1) (i), cf. Section 26 (1) on expulsion were met – as regards the illegal handling with lost property. However, an expulsion was not compatible with Directive 2004/38, as the situation – despite of the fact that it was committed shortly after the entry into Denmark – was of such coincidental nature and had such limited damaging impact that the defendant's behaviour could not be regarded as representing a genuine, pre-

54 U2011.1800H.

sent and sufficiently serious threat affecting one of the fundamental interests of society, cf. Art. 27 (2), cf. Aliens Act Section 2 (3). Consequently, the deprivation of liberty was unlawful, cf. Aliens Act Section 2 (3).

Case 316/2010: The administrative deprivation of liberty of an EU citizen to ensure enforcement of expulsion was lawful, cf. Aliens Act Section 25a (1) (i), cf. Section 26 (1), and Directive 2004/38 Art. 27 (2) and 28 (1)[55]
A Polish citizen was caught in theft at a supermarket on 6 September 2010. He pled guilty in the theft of 17 packages of condoms and 14 packages of batteries for a total value of DKK 1,493. As the defendant had no resources, the case was settled with a warning.
In connection with the presentation of the case for the Immigration Service with the purpose of deciding on expulsion, the defendant was deprived of liberty. On 7 September 2010, the defendant was expelled, and on 15 December 2010 the decision was upheld by the Integration Ministry. In its decision, the Integration Ministry – among other things – emphasized that the defendant upon arrest was not in possession of resources for his maintenance. Further, the nature and the extent of the stolen goods indicate theft with the purpose of resale. The deprivation of liberty was brought before the courts.

The Supreme Court stated that according to Aliens Act Section 25a (1) (i), an alien who has not lawfully stayed in Denmark for more than the last 6 months may be expelled if the alien has been sentenced for theft – among other things – or the alien has admitted the violation to the police or was apprehended during or in direct connection with commission of the offence. However, expulsion of aliens comprised by the EU rules may occur only to the extent this is compatible with these rules, cf. Aliens Act Section 2 (3).

The Supreme Court took the view that the defendant was apprehended in direct connection with the commission of the offence, previously was issued with 2 fine notices for theft and violation of Executive Order on Euphoriant Drugs and had no attachment to Denmark.

On this background, the Supreme Court found that the conditions in Aliens Act Section 25a (1) (i), cf. Section 26 (1) on expulsion were met. Further, the defendant's behaviour represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, cf. Art. 27 (2), cf. Aliens Act Section 2 (3), and as he had no attachment to Denmark, the expulsion was not considered disproportionate, cf. Art. 27 (2) and 28 (1).

The Supreme Court further agreed that the deprivation of liberty was necessary in order to ensure the possibility of expulsion, as less intrusive measures were not sufficient.

In the rulings, the Supreme Court thus upholds the case law on judicial expulsion – as described in the previous report – in administrative expulsions. Accordingly, the rulings must be considered valuable guidelines for expulsion of EU citizens; by judgment as well as by administrative decision. Consequently, crime committed by EU citizens in a professional manner, like organized or systematic crime, such as crime committed by people with previous sentences for similar crimes, crime committed with accomplishes or crime committed with the purpose of resale, must – based on a concrete, individual assessment of the circumstances of the case – be assumed to lead to expulsion, when the person in question has no real attachment to Denmark and/or has entered Denmark just prior to committing the crime. In this context, the monetary value of the crime is less important.[56]

55 U2011.1799H.
56 Cf. Cases 143/2009 and 316/2010.

Conversely, crime consisting of isolated incidents and with limited damaging impact, such as violating domestic peace by staying overnight at other people's property[57] or illegal handling of lost property[58] – without the presence of aggravating circumstances – is not considered to be comprised by Directive 2004/38's requirements on constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and on proportionality.

Following these Supreme Court rulings, the Integration Ministry annulled the Immigration Service's administrative expulsion of 14 Roma, when processing the complaint cases that had been filed subsequent to the expulsions decisions in July 2010.[59]

On 18 April 2011 the Integration Ministry issued a press release addressing the matter:

> 'The Integration Minister: EU citizens continue to risk expulsion if they commit crime
> - Although the Integration Ministry reversed a number of administrative expulsions of EU citizens, we will continue to keep a watchful eye on aliens from EU countries, entering Denmark without any apparent reason. And if they commit crime in this country, we will be able to expel them also in the future. Those are the words from the Integration Minister Søren Pind, who now want an examination of how the immigration authorities and the police may handle such cases in the best manner henceforth.
> In summer 2010, the Immigration Service administratively expelled a number of EU citizens. Subsequently, the expulsions were appealed to the Integration Ministry which now reversed the cases, as it was the assessment that the basis for the expulsions was not sufficient.
>
> 'In a number of cases submitted, the Supreme Court assessed that violation of domestic peace is not sufficient to form the basis of expulsion. Obviously, the immigration authorities have taken this to heart, and accordingly – and among other reasons – it has been decided to reverse the complaint cases,' says Søren Pind.
>
> Yet, at the same time, the Minister determines that the immigration authorities and the police also for the future will keep a watchful eye on EU citizens who enters Denmark without any apparent reason:
>
> 'It seems we have to be prepared for a harder effort from the police towards these cases with EU citizens who move for – so to speak – reasons other than those being the core of the EU's free movement – namely work. We thus have to follow them closely and perform a careful assessment of their behaviour', the Integration Minister explains, and continues:
>
> 'If we are speaking of crime other than mere trifles, it is the assessment that we on the basis of the rulings from the Supreme Court to a large extent may proceed quickly with expulsion. In other cases we have to watch them and strike at any violation of the legislation. Then it is up to the authorities to assess whether it is sufficient for an expulsion. This may be the case, for instance, in situations of repeated crimes, or in situations of more organized circumstances – for instance it the crime is committed jointly.'
>
> Together with the affected authorities – the Ministry of Justice, the Immigration Service and the National Police, the Integration Ministry will now perform a closer examination of how to handle such cases in the future.'[60]

57 Such crime was not considered comprised by *Aliens Act* Section 25a (2) (iii) on reasons of public order either, cf. Case 264/2010.

58 Cf. Case 319/2010.

59 Interview with an official within the Integration Ministry to a Danish newspaper, available at http://politiken.dk/indland/ECE1259192/romaer-blev-ulovligt-smidt-ud-af-danmark/, accessed on 28 June 2011. See also the press release described below.

Currently, what character these measures will assume is not known. The measures may, however, raise issues to be dealt with in future FMoW reports.

On 30 June 2011, the Integration Ministry issued a memorandum on *the Access to Expulsion and Refusal of EU/EEA Citizens on Grounds of Destitution or Considerations on Public Order*. As the memorandum is issued just prior to the delivery of this report, the memorandum is dealt with in the following only regarding some main points:

> According to the memorandum para. 1.3 on *destitution*, intervention in the residence rights of EU/EEA citizens may be done only through the use of the rules on *refusal*. The memorandum further refers to *Aliens Act* Sections 28 (1) (v), 28 (3) and 28 (5) on refusal if the authorities must defray the expenses of the alien's leaving Denmark, cf. Section 2 (3). In addition, the memorandum deals with Directive 2004/38 and case law from the CJEU on being an unreasonable burden for the social system, and concludes that EU/EEA citizens being destitute may not be refused despite of the fact that the authorities must defray the expenses of the alien leaving Denmark, if this is the only application on public assistance. Further, refusal may not be made, despite of the fact that the person concerned is a destitute, if the person did not apply for public assistance.
> However, if the EU/EEA citizen has stayed in Denmark for more than 3 months, claims to be a tourist but does not have resources for his/her maintenance and must be considered a destitute, *expulsion* may be made pursuant to *Aliens Act* Section 25b,[61] as the stay is no longer considered comprised by the right to free movement pursuant to Directive 2004/38 and thus is illegal. Modifications apply to jobseekers, cf. the memorandum para. 1.6, further referring to *Antonissen.*[62] The memorandum further states that a formal requirement imposed on job seekers not staying for more than 6 months on substantiating that he/she is a job seeker may not be imposed. It may be required that he/she renders being a job seeker probable, however.
>
> According to the memorandum para. 1.3.1 on *begging*, in case of aggravating circumstances, an EU/EEA citizen may be expelled pursuant to *Aliens Act* Section 25a (2) (iii) on public order etc. If there are no aggravating circumstances, it must be assessed whether the person concerned is an unreasonable burden on the social system, cf. above on refusal.
>
> The memorandum para. 1.4 deals with refusal and expulsion on grounds of *public order* etc. and refers to *Aliens Act* Section 28 (1) (vii), cf. 28 (3) on refusal and *Aliens Act* Sections 25a (1) (i) and 25a (2) (iii) on expulsion and the requirements as laid down in Directive 2004/38 and CJEU case law.[63] Further, reference is made to the assessment required pursuant to *Aliens Act* Section 26 (1) and the *EU Residence Order* Section 39 upon decisions on expulsion and the Danish court's case law.
> In particular, the memorandum deals with the Supreme Court's rulings of March 2011 (as described above). The memorandum para. 1.4.2 concludes that upon the assessment of whether the expulsion of an EU/EEA citizen staying legally in Denmark for a short period of time with no real attachment to Denmark is proportional, the right to free movement must be weighed to the character and roughness of the crime. Thus, within the assessment of the crime, it is of importance whether the crime is of professional nature (i.e. organized, entry into Denmark with the purpose of committing the crime, being in possession of remedies) or a result of a spontaneous action. Further, an assessment of whether the crime is of coincidental nature and has limited damaging effect must be made. If this is the case, the main rule is that expulsion cannot be made. In addition, previous punishment and other behavior are

60 Author's translation, the Danish version is available at http://www.nyidanmark.dk/da-dk/nyheder/pressemeddelelser/integrationsministeriet/2011/april/integrationsministeren_euborgere_risikerer_fortsat_udvisning.htm, accessed on 28 June 2011.

61 I.e. when staying in Denmark without the requisite permit. The expulsion is accompanied by an entry prohibition of 2 years.

62 Case C-292/89.

63 The expulsion is accompanied by an entry prohibition of 2 years.

emphasized in order to determine whether there is a risk of repetition. Yet, previous sentences may not in itself form the basis of expulsion.

The memorandum para. 3 further states that on the background of the Supreme Court rulings of March 2011, the practice on administrative expulsion on grounds of public order in particular (cf. *Aliens Act* Section 25a (2) (iii)) must be designed to be conditional on the presence of several aggravating circumstances as the point of departure.

Chapter II: Members of the family

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

Texts in force

According to Section 2 (1) of the EU Residence Order, family members encompass the following categories of persons:

- the principal person's[64] spouse
- the principal person's descendants under 21 years of age and the descendants under 21 years of age of the principal person's spouse;
- the principal person's other dependent descendants and any other descendants of the principal person's spouse who are dependent on the principal person;
- relatives in the ascending line of either the principal person or the principal person's spouse if they are dependent on the principal person;
- the principal person's other relatives if they are dependent on the principal person or are living under the roof of the principal person in the country from where they come; or
- the principal person's other family members where serious health grounds strictly require the personal care of the family members by the principal person.

A registered partner is treated as the equivalent of a spouse, cf. Section 2 (2). In addition, Section 2 (3) stipulates that the provisions of the EU Residence Order on spouses apply similarly in cases where a person above 18 years of age cohabits at a shared residence in regular cohabitation of prolonged duration with a principal person above 18 years of age. It is a precondition for the right of residence of a cohabitant that the principal person undertakes to support the applicant, cf. Section 16. These rules concerning cohabiting partners are identical to those applying to the right of Danish citizens to family reunification.[65]

As regards *reverse discrimination*, various issues have been persistently raised in recent years concerning the rules on residence right for third-country family members of Danish citizens, as well as their implementation in administrative practice. In particular, there have been contentious issues concerning the *personal scope* of application of the EU rules concerning third-country spouses of Danish citizens. The scope was previously limited to Danes who had been *economically active* in another Member State, i.e. having resided there as workers, service providers or self-employed persons, or as retired from such activity. On the contrary, students and persons with sufficient means were not entitled to bring their spouses with them back to Denmark upon stay in another EU Member State.

As part of the political agreement of 22 September 2008 on the implementation of the EU rules on free movement in light of the *Metock* judgment,[66] it was decided to widen the

64 A principal person is defined as an EU national who has an independent right of residence in Denmark under the EU rules, cf. Section 1 (1).

65 Cf. Section 9 (1) (i) and (3) of the Aliens Act.

66 CJEU judgment of 25 July 2008 *Metock* (C-127/08). The political agreement resulted in Executive Order No. 984 of 2 October 2008 amending the 2008 EU Residence Order (No. 300 of 29 April 2008). Detailed →

personal scope of application of these rules concerning third-country spouses of Danish citizens. Accordingly, the EU rules can now be invoked by a Danish citizen who has resided in another Member State as either worker, self-employed person, service provider, as a retired worker or self-employed or service provider, or as a seconded person, student or person with sufficient means.[67] Although this issue was not expressly dealt with in the *Metock* judgment, the adjustment of administrative practice in this regard was decided as an indirect consequence of the judgment, probably in order to prevent further controversy over the Danish implementation of the EU rules pertaining to the exercise of free movement rights by citizens upon return from another Member State.

Previous practice also included a requirement that the Danish citizen be *economically active upon return* to Denmark, or returning to Denmark for retirement upon such activity in the host Member State. As a result of the CJEU judgment in *Eind*[68] the Ministry of Refugee, Immigration and Integration Affairs adopted new guidelines according to which the returning Danish citizen will be entitled to bring his or her family back to Denmark even if he or she is not employed or carrying out other economic activity at the time of return from abroad.[69]

2. ENTRY AND RESIDENCE RIGHTS

Texts in force

Sections 8-12 of the EU Residence Order lay down specific rules on residence rights for family members of workers, self-employed persons, jobseekers, seconded persons, students, persons with sufficient means, and retired persons, respectively. Sections 14 and 15 provide for the continued right of residence for family members after the principal person's death or departure, and upon dissolution of the marriage. Since 2008 the EU Residence Order also includes a specific provision on residence right for family members of Danish citizens, cf. Section 13 stating that, to the extent it follows from EU law, family members of a Danish citizen have a right of residence in Denmark beyond the three months period following from Section 2(1) and (2) of the Aliens Act.

Detailed rules on documentation and other requirements for the issuance of registration certificates and residence cards have been laid down in Sections 21-29 of the EU Residence Order.

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guidelines on the right to family reunification under EU law, and on the control measures mentioned below in Section 3, were laid down in Information to the Immigration Service about amendments of the EU Residence Order and of practice as a consequence of the *Metock* judgment, Ministry of Refugee, Immigration and Integration Affairs, 2 October 2008.

67 Internal guidelines on the processing of applications for family reunification under the EU rules where the principal person is a Danish citizen, Danish Immigration Service, Family Reunification Information No. 5/10, 1 July 2010, para. 4.1.2. See also official information from the Ministry of Refugee, Immigration and Integration Affairs and the Danish Immigration Service, accessible at www.nyidanmark.dk/en-us/coming_to_dk/eu_and_nordic_citizens/eu-eea_citizens/family_reunification_in_denmark (family members of EU citizens generally) and www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/family_reunification_under_eu-law (family members of Danish citizens) (accessed 15 August 2011).

68 CJEU judgment of 11 December 2007 *Eind* (C-291/05).

69 Press release of 15 January 2008 from the Ministry of Refugee, Immigration and Integration Affairs.

While *administrative fees* have been imposed on applicants for family reunification under the general rules of the Aliens Act,[70] payment of such fees will not be required if it would be incompatible with EU law, cf. Section 9 h (1) and (2) of the Aliens Act. It was made clear in the preparatory remarks that this implies a general exemption of EU citizens and other persons enjoying free movement rights, including EEA and Swiss citizens as well as Turkish citizens falling within the scope of Decision No. 1/80 of the EU-Turkey Association Council.[71]

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

As a result of the CJEU judgment in *Metock*,[72] the requirement of *previous lawful residence* in an EU/EEA Member State was abolished. Instead, various measures were taken in order to prevent abuse of the EU rules on residence rights, in particular those concerning family members. This decision was implemented by the amendment of the EU Residence Order, inserting provisions on the refusal of registration certificates and residence cards on grounds of public policy, public security or public health, or in case of abuse of rights or fraud (Section 22 (5), Section 23 (2), and Section 26 (1) and (3)).

Furthermore, it has become a precondition for the issuance of the family member's registration certificate or residence card that both spouses or partners declare that the purpose of contracting the marriage or the partnership or establishing cohabitation was not solely to obtain a separate basis of residence for the person applying for the residence document (Section 23 (1) and Section 26 (2), respectively).

A declaration is also required that the principal person has established genuine and effective residence in Denmark. If there are reasons to assume abuse of rights, evidence of genuine and effective residence must be submitted by the principal person (Section 23 (1) *in fine* and Section 26 (2) *in fine*).

As a particular measure to prevent abuse by Danish citizens upon return from another Member State, it is stipulated in administrative guidelines that the principal person applying for registration certificate or residence card for family members must solemnly declare to have established *genuine and effective residence* in the host country. If there are reasons to assume that this is or was not the case, the Danish citizen is required to submit evidence of the residence established in the other Member State. A non-exhaustive list of possible documentation has been laid down in administrative guidelines, according to which the evidence will have to be assessed on an individual basis, so that the requirement should not become unreasonable or insurmountable.[73]

In practice, however, the Danish Immigration Service appears to occasionally request certain forms of documentation that it may be difficult or even impossible for the principal person to deliver retroactively, such as evidence of the purchase of daily necessities in the

70 Act No. 1604 of 22 December 2010 amending the Aliens Act.
71 Explanatory remarks to Bill No. 66/2010-11, general remarks para. 2.6.
72 CJEU judgment of 25 July 2008 *Metock* (C-127/08). See above Section 1 on further consequences of the judgment.
73 Internal guidelines on the processing of applications for family reunification under the EU rules where the principal person is a Danish citizen, Danish Immigration Service, Family Reunification Information No. 5/10, 1 July 2010, para. 4.1.4.

host country.[74] Even while this may ultimately not be a strictly required means of evidence in order to have the registration certificate or residence card issued, it may nonetheless bring applicants under the impression that such forms of documentation are necessary. This is likely to cause particular problems if the period of residence in another Member State dates several years back, and the relevant documentation may therefore no longer be available.[75] Such cases with retroactive assessment of residence in the host country have been pending as a result of the widening of the personal scope of application of the EU rules concerning third-country spouses that was part of the implementation of the *Metock* judgment in 2008. Thus, Danish citizens who were precluded from obtaining residence for their family members upon return from another Member State under previous administrative practices in possible violation of EU law, may now have difficulties in providing sufficient evidence if they manage to get their cases reopened in accordance with the adjusted practice.

Judicial practice
Nothing to report.

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

Measures taken to prevent abuse of the EU rules on residence rights, in particular those concerning third-country family members of Danish citizens returning from another Member State, in connection with the implementation of the *Metock* judgment, are described above in Section 3.

In addition, a system has been set up by the Ministry of Refugee, Immigration and Integration Affairs to carry out *random checks* of cases in which family members have applied for residence under the EU rules. According to the political agreement on the State budget for 2010, the number of such cases undergoing particularly thorough control – probably subsequent to the decision taken – was to be increased from 25% to 50%.[76]

5. ACCESS TO WORK

Texts in force
According to Section 14 (1) (ii) of the Aliens Act, aliens who are encompassed by the EU free movement rules, as described in Sections 2 and 6 of the Aliens Act, are exempt from the requirement of a work permit. This exemption did not apply to EU-10 workers falling under the transitional rules, but it is applicable to all EU workers since the abolishment of these rules as of 1 May 2009 (see Chapter VII). Similarly, Section 18 of the EU Residence Order

74 Letters of 21 April 2010, 4 June 2010 and 10 June 2011 from the Danish Immigration Service to the third-country spouses of Danish citizens, resident or ex- resident in Sweden. Such a requirement could potentially raise further issues concerning the free movement of goods between the host country and the Member State in which the citizen is working, as well as issues concerning the protection of privacy.

75 Examples of this are letters of 4 June 2010 and of 1 July 2011 from the Danish Immigration Service to the third-country spouses of Danish citizens who claim residence in Sweden in 2002- 2004 and in 2004-2006, respectively, as a basis for the spouses' residence right upon return to Denmark.

76 Finanslov 2010: Initiativer på Integrationsministeriets område, Press release from the Ministry of Refugee, Immigration and Integration Affairs, 12 November 2009.

exempts from the requirement to hold a work permit all persons who have the right of residence under the EU Residence Order.

Judicial practice
Nothing to report

6. THE SITUATION OF FAMILY MEMBERS OF JOBSEEKERS

Texts in force
The abovementioned rules on residence rights for family members of EU workers apply similarly to the family members of jobseekers, cf. Section 8 (3) of the EU Residence Order. The period of residence permitted for the purpose of seeking employment is normally limited to 6 months, but may be extended pursuant to Section 3 (4) of the EU Residence Order (see above Chapter I.2), and the jobseeker will be permitted to bring family members to Denmark for the same duration of time.

While the personal scope of this residence right was previously limited to spouses, registered partners or regularly cohabiting partners, children below 21 years of age, and other dependent family members, jobseekers can now bring all the family members as defined in Section 2 (1) of the EU Residence Order (see above Section 1). However, as opposed to the close family members of workers and self-employed persons whose residence right is not conditional on economic sufficiency, the residence right of all family members of jobseekers is normally based on the condition that the jobseeker has such income or other economic means that he or she can provide for the family without becoming a burden to the public.

Judicial practice
Nothing to report

Chapter III: Access to employment

Aliens Act Section 14 (1) (ii), cf. Section 13, and *EU Residence Order* Section 18, exempts EU citizens from the requirement to have a work permit in order to take up employment in Denmark, which is imposed on most other groups of foreigners.

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

Employment under a collective agreement or on individual contract (as opposed to employment as a civil servant, see below) is not conditional on the applicant being a Danish citizen. Foreign citizens are generally free to hold such posts.[77]

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

EU/EEA citizens may register with the public job centres, make use of the facilities and receive guidance.[78] The 91 job centers have a website: www.jobnet.dk, available for all jobseekers and employers in Denmark.[79]

The job centres must offer advice on:

- the actual job opportunities in their geographical area;
- the use of www.jobnet.dk;
- entering CV on www.jobnet.dk;
- the work out of job applications and/or CV;
- work and residence permit/registration certificate, Civil Registration System number (CPR), tax card, public health insurance, language school and contact with the authorities;
- local, regional and national education or continuing education opportunities; and
- the Danish job market.[80]

The job centres have an international Section, *EURES,* being the international branch of job centres.[81] EURES is the co-operation between the European Commission and the Public Employment Services of the EEA countries and Switzerland and other partner organizations (such as unions, employers' associations and local/regional authorities) with the purpose of

77 For general information on the Danish labour market, see *Employment in the Danish State Sector*, a publication from the State Employers' Authority, available at www.perst.dk/Publications/2005/ Employment%20in%20the%20Danish%20State%20Sector.aspx, accessed on 22 June 2011.

78 Consolidation Act No. 731 of 15 June 2010 on *Responsibility for and Regulation of the Active Employment Initiative*; cf. Consolidation Act No. 710 of 23 June 2011on *Active Employment Initiative*. See also https://www.workindenmark.dk/Find%20information/Til%20arbejdstagere/Naar%20du%20arbejder%20i%20Danmark/De%20danske%20jobcentre/Hvad%20du%20kan%20bruge%20dit%20lokale%20jobcenter%20til%20-%20et%20overblik.aspx, accessed on 22 June 2011.

79 https://info.jobnet.dk/om+jobnet/jobnet+in+english/.

80 Cf. Consolidation Act No. 731 of 15 June 2010 on *Responsibility for and Regulation of the Active Employment Initiative* Chapter 4 ff. See also 'Welcome pack' on www.workindenmark.dk, available at https://www.workindenmark.dk/Find%20information/Til%20arbejdstagere/~/media/14774523E15743BA88DCC121F33972B0.ashx, accessed on 22 March 2010.

81 Official website: www.eures.dk (referring to www.workindenmark.dk).

supporting the free movement of workers by facilitating information, advice and recruitment for citizens and companies.

Along with the centres, the website www.workindenmark.dk is available for employers and employees. The website offers a job bank, CV bank, information on job opportunities as well as information on rules for working and living in Denmark.

In January 2011, 4 international 'Citizen Service Centers' were established in 4 main cities in Denmark (Aalborg, Aarhus, Copenhagen and Odense). The aim of the centers is apparently to make it as easy as possible for foreign employees or job seekers and Danish employers to contact the Danish authorities. Consequently, the centres offer help with paperwork, such as issuance of registration certificates etc., guidance on job seeking, Danish courses etc. and information on living and working conditions etc. in Denmark. Thus, all the authorities a foreign employee typically need to contact are represented at the International Citizen Service. The authorities represented comprise the Danish Tax and Customs Administration (SKAT), the Danish Immigration Service, Workindenmark and the municipalities.[82]

1.2 Language requirements

Concerning equal treatment in access to employment, the central piece of legislation is the Act on *Prohibition against Discrimination on the Labour Market.*[83]

The Act covers the activities/behaviour of any employer, anyone who runs guidance and educational activities, anyone deciding on the access to exercise self-employed activity and anyone who decides on the membership of and participation in organizations for employers or employees. The Act applies in recruitment, dismissal, relocation and promotion of employees and further applies on conditions of salary and work, vocational guidance, vocational education, further education and re-education, cf. Section 2 and 3.[84] The Act prohibits *direct and indirect discrimination*, harassment, instructions on differential treatment and reprisals on grounds of *race, colour, religion or belief, political opinion, sexual orientation,*

82 Cf. http://www.ams.dk/Reformer-og-indsatser/Indsatser/International-rekruttering/International%20Citizen%20Service%20Centre.aspx, accessed on 22 June 2011.

83 Consolidation Act No. 1349 of 16 December 2008.

84 The National Labour Market Authority ('Arbejdsmarkedsstyrelsen'), which is an authority under the Ministry of Employment, issued a circular to the Act on *Prohibition against Discrimination on the Labour Market:* Circular No. 60339 of 29 October 1998. The Circular concerns employment agencies and their dealing with employers and ethnic minorities. According to the Circular para. III.B, a language requirement is formally a neutral requirement. However, in situations where an employer imposes a language requirement which is not reasoned/objectively justifiable, a language requirement may constitute indirect discrimination. This will be the case if the requirement to the person's ability to speak or write Danish is disproportionate and without relevance for the maintenance of the job in question. In general, qualification requirements have to be justified by considerations of satisfactory maintenance of the job in question according to the Circular. According to the Danish comments to FMoW report 2008-2009, the Circular is not aimed at the municipalities; responsible for the public employment service. However, the Act on *Prohibition against Discrimination on the Labour Market* applies to the municipalities. To this, it should be noted, that the Circular may account for the interpretation of the Act, cf. also the below mentioned cases from the Board of Equal Treatment on language requirements, and may thus constitute general guidelines to the prohibition of different treatment on the labour market. This is caused by the fact that the basis of the Circular is the Act on *Prohibition against Discrimination on the Labour Market* and the principle of equality, applying to public authority.

age, handicap or national, social or ethnic origin. Certain exceptions apply in more specified circumstances.[85]

Language requirements may constitute indirect discrimination on grounds of ethnic origin in situations where an employer imposes a language requirement which is not reasoned/objectively justifiable, is disproportionate and without relevance for the maintenance of the job in question. Hence, the *Board of Equal Treatment* (dealing with cases on direct and indirect discrimination inside and outside the labour market)[86] has in various cases decided on the compatibility of language requirements with the Act, for instance:[87]

> *In Case No. 2500116-09 of 27 April 2010* the Board found it to be rendered sufficiently probable that an employer violated the Act on *Prohibition against Discrimination on the Labour Market* by refusing to hire an employee due to the fact that the complainant spoke English with an Eastern European accent.
>
> *In Case No. 2500048-10 of 10 December 2010* the Board found that a university's refusal to hire a foreign employee did not constitute a violation of the Act on *Prohibition against Discrimination on the Labour Market*. The job advert concerned a position as elite postdoc and the position was aiming at candidates who would be able to conduct teaching in Danish. The requirement on teaching in Danish was not found to hinder the complainant in applying for the job. The employees' refusal to hire the complainant was found to be based on the applicant's CV and qualifications.

Pertaining to *language courses* (and introductory courses), see below Chapters IV.2.1 and VIII.3.1.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

Public employers in particular have a special obligation to ensure equality for all employees regardless of gender, religion, ethnic origin etc.[88] as stated in the Co-operative Agreement, Section 5 (3) ('Samarbejdsaftalen'), which is an agreement on co-operation and co-operation committees in the state's companies and institutions.[89] Apart from the legislation on prohibition of differential treatment on specific grounds, a public employer is subject to administrative law, the principle of equality ('lighedsgrundsætning'), the principle of legality ('legalitetsprincippet') and the rule on instruction ('instruktionsreglen').

85 The Act transposes parts of Directive 2000/43/EC on equal treatment of all regardless of race or ethnic origin into Danish law and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; cf. Act No. 253 of 7 April 2004 and Act No. 1417 of 22 December 2004 amending Act No. 459 of 12 June 1996.

86 Official website http://www.ligebehandlingsnaevnet.dk/.

87 Cf. Case No. 53/2011, decision of 29 April 201 and Case No. 116/2010, decision of 10 December 2010.

88 Guidance on *Personnel Administration* ('Personale-Administrativ Vejledning'), para. 15.2.2.10, June 2011, issued by the State Employers' Authority ('Personalestyrelsen'), an agency within the Ministry of Finance, to public employers.

89 Circular No. 9203 of 7 June2011.

2.1 Nationality conditions for access to positions in the public sector

Laws
According to the *Danish Constitutional Act* Section 27 (1), Danish nationality is a prerequisite for employment as a *civil servant*.[90] This is modified, however, by the fact that foreign citizens can be employed on conditions similar to those of civil servants in positions where persons with Danish nationality are employed as civil servants. A rule on this is inserted in the Act on *Civil Servants*[91] and the Act on *Civil Servants' Pension*,[92] and reference is made to this rule and its connection with Art. 39 of the EC Treaty in the Guidance on *Personnel Administration*.[93]

Draft legislation, circulars, etc.
Circular 210 of 11 December 2000 ('Ansættelsesformcirkulæret') specifies the special positions where appointments as *civil servants* ('tjenestemænd') are confined. If the position is not regulated by the Circular, the employment is not encompassed by the rules on civil servants, and aliens are free to hold such posts on terms similar to those of Danish citizens.

According to the Guidance on *Personnel Administration*, the right to be employed on terms similar to that of civil servants is limited by restrictions justified by considerations of public order, public security and public health. Moreover, the job advertisement may not impose a requirement of Danish citizenship in a manner discouraging EAA citizens from applying for the position, unless the position is encompassed by restrictions justified by regard for public order, public security and public health. The Guidance further states that the rules on free movement do not apply to positions in the public sector. Further, the case law from the CJEU determines that Art. 39 (4) applies only to posts involving participation in the exercise of public authority and duties designed to safeguard the general interest of the state or other public authorities. Moreover, these criteria must be assessed on a case-by-case basis, taking into account the tasks and responsibilities covered by the post.[94]

2.2 Language requirements

Laws
Concerning equal treatment in access to employment, the central piece of legislation is the Act on *Prohibition against Discrimination on the Labour Market.*[95]
The Act covers the activities/behaviour of any employer, anyone who runs guidance and educational activities, anyone deciding on the access to exercise self-employed activity and anyone who decides on the membership of and participation in organizations for employers or employees. The Act applies in recruitment, dismissal, relocation and promotion of employees and further applies on conditions of salary and work, vocational guidance, vocational education, further education and re-education, cf. Section 2 and 3. The Act prohibits *direct and indirect discrimination*, harassment, instructions on differential treatment and reprisals on grounds of *race, colour, religion or belief, political opinion, sexual orientation, age,*

90 Constitutional Act No. 169 of 5 June 1953.
91 Consolidation Act No. 488 of 5 May 2010, Section 58 c.
92 Consolidation Act No. 489 of 6 May 2010, Section 19 (1).
93 Paras. 15.2.2.2 and 15.2.2.4.
94 Paras. 15.2.1.4 and 15.2.2.4.
95 Consolidation Act No. 1349 of 16 December 2008.

handicap or national, social or ethnic origin. Certain exceptions apply in more specified circumstances.[96]

Language requirements may constitute indirect discrimination on grounds of ethnic origin in situations where an employer imposes a language requirement which is not reasoned/objectively justifiable, is disproportionate and without relevance for the maintenance of the job in question. Hence, the *Board of Equal Treatment* (dealing with cases on direct and indirect discrimination inside and outside the labour market)[97] has in various cases decided on the compatibility of language requirements with the Act, as described above Section 1.2.

2.3 Recognition of professional experience for access to the public sector

Draft legislation, circulars, etc.

In a paragraph in the Guidance on *Personnel Administration* it is expressly stated that previous employment in other Member States shall be taken into account to the same extent as had it been employment in Denmark.[98] This applies to Danish citizens and other EU/EEA citizens alike. In the guidelines reference is made to the principle on non-discrimination, the jurisprudence of the CJEU and the Communication from the Commission from December 2002.[99]

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

Nothing to report.

96 The Act transposes parts of Directive 2000/43/EC on equal treatment of all regardless of race or ethnic origin into Danish law and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; cf. Act No. 253 of 7 April 2004 and Act No. 1417 of 22 December 2004 amending Act No. 459 of 12 June 1996.

97 Official website http://www.ligebehandlingsnaevnet.dk/.

98 Para. 16.2.3.2.

99 *Free movement of workers – achieving the full benefits and potential*, Communication from the Commission, 11 December 2002 (COM (2002) 694).

Chapter IV: Equality of treatment on the basis of nationality

In Denmark, the labour market is characterised by a *collective bargaining model*. The key aspect of this model is the fact that the government will intervene as little as possible in the relationship between employers and employees as long as the labour market parties themselves are able to reach agreement.[100]

However, labour market laws do exist, and concerning equal treatment, the central piece of legislation is the Act on *Prohibition against Discrimination on the Labour Market etc.,*[101] dealing with discrimination on the labour market. The Act covers the activities/behaviour of any employer, anyone who runs guidance and educational activities, anyone deciding on the access to exercise self-employed activity and anyone who decides on the membership of and participation in organizations for employers or employees. The Act applies in recruitment, dismissal, relocation and promotion of employees and further applies on conditions of salary and work, vocational guidance, vocational education, further education and re-education, cf. Section 2 and 3. The Act prohibits *direct and indirect discrimination*, harassment, instructions on differential treatment and reprisals on grounds of *race, colour, religion or belief, political opinion, sexual orientation, age, handicap or national, social or ethnic origin*. Certain exceptions apply in more specified circumstances.[102]

As regards discrimination on grounds of *nationality*, the Act does not comprise all kinds of discrimination. Hence, differential treatment on the grounds of *citizenship* is not in itself comprised by the Act. However, a requirement on citizenship may be categorized as indirect discrimination on grounds of national or ethnic origin.[103]

Discrimination on the grounds of nationality is not prohibited in national, Danish legislation *per se*, but may indirectly be prohibited on other grounds, such as race and ethnic origin.[104] Discrimination on the grounds of nationality may thus be included in more general legislation on discrimination as described above and below.

The *Danish Constitutional Act* Section 70 stipulates that nobody may be deprived of access to the full enjoyment of civil and political rights or evade the fulfillment of any general civic duty on the grounds of his/her *profession of faith or descent*.

Section 71 further stipulates that the personal liberty is inviolable and that no Danish citizen may be subjected to any form of imprisonment on the grounds of his/her *political or religious convictions or his/her descent.*[105]

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100 Cf. *Employment in the Danish State Sector* pp. 8-9, a publication from the State Employers' Authority, available at www.perst.dk/Publications/2005/Employment%20in%20the%20Danish%20State%20Sector.aspx, accessed on 22 June 2011.

101 Consolidation Act No. 1349 of 16 December 2008.

102 The Act transposes parts of Directive 2000/43/EC on equal treatment of all regardless of race or ethnic origin into Danish law and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; cf. Act No. 253 of 7 April 2004 and Act No. 1417 of 22 December 2004 amending Act No. 459 of 12 June 1996.

103 Cf. Guidance on the Act on *Prohibition against Discrimination on the Labour Market etc.* No. 9237 of 6 January 2006, issued by the Ministry of Employment.

104 Cf. White Paper No. 1422/2002 of 18 September 2002 on the implementation of the Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin para. 7.2, recommending not to include a direct prohibition on discrimination on the grounds of nationality in Danish legislation.

105 Constitutional Act No. 169 of 5 June 1953.

Also, the *Criminal Code* Section 266b stipulates that any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information, by which a group of people is threatened, scorned or degraded on account of their *race, colour, national or ethnic origin, religion, or sexual inclination* shall be liable to a fine or to imprisonment.[106]

Further, the Act on *Prohibition on Differential Treatment on the Grounds of Race etc.* prohibits differential treatment by persons within commercial or public businesses in serving a person or giving a person access to an area open to the public on the grounds of *race, colour, national or ethnic origin, religion or sexual orientation*.[107]

Moreover, the Act on *Ethnic Equal Treatment* deals with public and private activities outside the labour market and lays down a prohibition against *direct and indirect discrimination*, harassment, instructions to discriminate and reprisals on the grounds of *race or ethnic origin*. Certain exceptions apply in more specified circumstances.[108]

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

According to an article printed in a Danish newspaper, a not yet published inquiry conducted by the Danish Centre against Human Trafficking reveals critical instances of forced labour in Denmark.[109] Thus, foreign workers seem to be traded, cheated and exploited in Denmark, among other things through temporary employment agencies. The extent of the forced/slave labour is not known, but it seems to concern workers also from the EU. The report by the Danish Centre against Human Trafficking may be dealt with in future FMoW reports once published.

Also, in 2011, there was some political debate on the information provided on the governmental 'Seasonal Work website', run by Workindenmark and the National Labour Market Authority.[110] The opposition claimed that some of the information provided on salary and working conditions on the website contributed to social dumping.[111] Following this, Workindenmark and the National Labour Market Authority regretted some of the information. The information has subsequently been corrected by the National Labour Market Authority in order to correspond to the information available at workindenmark.dk.

Specific issue: Working conditions in the public sector

- Recognition of professional experience for the purpose of determining the working conditions (e.g. salary; grade, career perspectives)

106 Consolidation Act No. 1235 of 26 October 2010.
107 Consolidation Act No. 626 of 29 September 1987.
108 Consolidation Act No. 374 of 28 May 2003 and amendment.
109 Official website http://www.centermodmenneskehandel.dk/, cf. http://www.information.dk/telegram/259121.
110 At http://www.seasonalwork.dk.
111 Cf. the speech given by the Minister of Employment on the consultation on the Seasonal Work website on 23 March 2011, Arbejdsmarkedsudvalget 2010-11, AMU alm. del, endeligt svar på spørgsmål 344, available at http://www.ft.dk/dokumenter/tingdok.aspx?/samling/20101/almdel/amu/spm/344/svar/796739/982255/index.htm, accessed on 19 July 2011.

- Taking into account of diplomas for determining working conditions (salary, grade, career perspectives etc)
- Equal treatment in relation to issues like civil servant status, trade union rights etc.

Regarding grade (i.e. loyalty) the explicit statement on seniority being estimated from the first employment within the Danish State, only, has been removed by the most recent *Circular No. 9111 of 15 April 2011;* see below 'draft legislation etc.'

Texts in force

Laws

According to the *Danish Constitutional Act* Section 27 (1), Danish nationality is a prerequisite for employment as a *civil servant*.[112] This is modified, however, by the fact that foreign citizens can be employed on conditions similar to those of civil servants in positions where persons with Danish nationality are employed as civil servants. A rule on this is inserted in the Act on *Civil Servants*[113] and the Act on *Civil Servants' Pension*,[114] and reference is made to this rule and its connection with Art. 39 of the EC Treaty in the Guidance on *Personnel Administration*.[115]

Draft legislation, circulars, etc.

Circular 210 of 11 December 2000 ('Ansættelsesformcirkulæret') specifies the special positions where appointments as *civil servants* ('tjenestemænd') are confined. If the position is not regulated by the Circular, the employment is not encompassed by the rules on civil servants, and aliens are free to hold such posts on terms similar to those of Danish citizens.

According to the Guidance on *Personnel Administration*, the right to be employed on terms similar to that of civil servants is limited by restrictions justified by considerations of public order, public security and public health. Moreover, the job advertisement may not impose a requirement of Danish citizenship in a manner discouraging EAA citizens from applying for the position, unless the position is encompassed by restrictions justified by regard for public order, public security and public health. The Guidance further states that the rules on free movement do not apply to positions in the public sector. Further, the case law from the CJEU determines that Art. 39 (4) applies only to posts involving participation in the exercise of public authority and duties designed to safeguard the general interest of the state or other public authorities. Moreover, these criteria must be assessed on a case-by-case basis, taking into account the tasks and responsibilities covered by the post.[116]

Regarding salary, grade, and career perspectives etc., the *Guidance on Personnel Administration* states that *professional experience obtained in another EU/EEA country* must be accounted for in the same manner as had the occupation been in Denmark.[117] Hence, the comparison of previous occupation must be performed on an objective and non-discriminatory basis, and without accounting for whether the previous employment was on

112 Constitutional Act No. 169 of 5 June 1953.
113 Consolidation Act No. 488 of 5 May 2010, Section 58 c.
114 Consolidation Act No. 486 of 6 May 2010, Section 19 (1).
115 Paras. 15.2.2.2 and 15.2.2.4.
116 Paras.15.2.1.4 and 15.2.2.4.
117 Para. 16.2.3.2.

the conditions for civil servants or collective agreements. These principles apply to both workers from other Member States and Danish citizens working in another Member State. In the guidelines reference is made to the jurisprudence of CJEU and the Communication from the Commission from December 2002. *Circular No. 6633 of 16 July 1987* on Salary Seniority lays down the detailed rules on determination of advantages.

Regarding grade (i.e. loyalty) the explicit statement on seniority being estimated from the first employment within the Danish State, only, has been removed by the most recent *Circular No. 9111 of 15 April 2011.* There is thus no explicit referral to the Danish State. However, the Circular stipulates that within the seniority, employment within the State and the national church is included. Further, employment in the public school prior to 1 April 1993 is counted in. In addition, the Circular stipulates that employment in independent institutions after 1 April 2011 is included to the extent the person concerned has been comprised by the Ministry of Finance's competence to determine or agree on salary and working conditions.

2. SOCIAL AND TAX ADVANTAGES

2.1 General situation as laid down in Art. 7 (2) Regulation 1612/68

Danish courses

Pertaining to *language courses* and *introductory courses*, the Act on *Danish Courses for Adult Aliens et al.* and the Act *on Integration* were amended in 2011 to ensure compatibility with Directive 2004/38 Art. 25.[118] Also, in 2010, the Act on *Integration* was amended to comprise also EU citizens and their family members;[119] see more below.

According to the Act on *Danish Courses for Adult Aliens et al.* and the corresponding Executive Order, adult aliens with regular residence pursuant to the EU rules on free movement and with residence in the municipality may receive education by attending Danish courses etc. provided by the municipality, cf. the Act Section 2 (1) (ii).[120]

EU/EEA frontier workers have a right to Danish courses on terms equal to those issued with a residence permit and residing in Denmark, cf. Section 2a.[121] Danish courses are cost-free for all aliens comprised by the Act, cf. Section 14.[122]

Further, a free vocational offer on Danish courses on the internet ('Online Dansk') is available for aliens, cf. Section 16a. In addition, cost-free 'intro-Danish' i.e. Danish courses aiming at the Danish labour market for aliens above 18 residing in Denmark on a more temporary basis with the purpose of employment or encompassed by Section 2 a (frontier workers), is available. The offer of Intro-Danish applies to all aliens having ordinary employment,

118 By Act No. 462 of 18 May 2011.
119 By Act No. 571 of 31 May 2010.
120 Consolidation Act No. 1010 of 16 August 2010 and the abovementioned amendment and Executive Order No. 779 of 29 June 2011. See also Guidance on *Danish Courses for Adult Aliens et al*. No. 9242 of 21 June 2011, 2.2.1.
121 The provision was adopted by Act No. 485 of 12 June 2009, described in detail in the previous report. See also Guidance on *Danish Courses for Adult Aliens et al*. No. 9242 of 21 June 2011, 2.2.5.
122 The provision was adopted by Act No. 485 of 12 June 2009, described in detail in the previous report.

continuous lawful residence and a right to take up employment in Denmark, cf. Section 16b.[123]

According to the Act on *Integration*, EU citizens and their family members are now comprised by the Act, cf. Section 2 (4) (viii).[124] This means that EU citizens and their family members residing in Denmark on the basis of the EU rules on free movement are entitled to an introductory course offered by the municipalities pursuant to the Act Chapter 4a. The introductory course comprises a Danish course, a course in the Danish society, culture and history and offers aiming at employment.[125]

Moreover, Section 24g provides the legal basis for the municipalities to offer support to companies establishing a special advice function to aliens residing on the basis of the EU rules on free movement (among others).

According to the Act amending the Act on *Danish Courses for Adult Aliens* and the Act on *Integration* in 2011, the provisions thus clarify EU citizens' entitlement to Danish courses and introductory courses on the basis of presenting evidence of the status as a worker etc. pursuant to the EU rules, as opposed to the previous requirements on presentation of registration certificate and registration in the Civil Registration System. Consequently, the explanatory remarks specifically refer to Directive 2004/38 Art. 25 as the basis for the amendment.[126]

Social assistance to Danish citizens upon return from another Member State

Section 11 (3) of the *Act on Active Social Policy*[127] makes it a requirement for the payment of full social assistance ('kontanthjælp') that the recipient has resided in Denmark during a total period of 7 years within the past 8 years. If this requirement is not fulfilled, the significantly lower amount of the so-called *starting assistance* ('starthjælp') will be paid out instead. The provisions on starting assistance and the residence requirement for entitlement to full social assistance were adopted in 2002.[128] The purpose of the residence requirement and the reduced assistance that follows from non-compliance, as officially stated in the preparatory works of the legislation, was to create stronger incentives for refugees and immigrants to seek employment and become self-sufficient as an alternative to receiving social benefits.[129] From the political background and the legislative context it could be assumed that an additional, yet only implicit, purpose was to make it less attractive for third-country citizens to come to Denmark and apply for asylum or other kinds of residence permit.[130]

123 Adopted by Act No. 1512 of 27 December 2009, described in detail in the previous report. See also Guidance on *Danish Courses for Adult Aliens et al.* No. 9242 of 21 June 2011, 7.

124 Consolidation Act No. 1062 of 20 August 2010. The group of people comprised by the Act on *Integration* was extended by Act No. 571 of 31 May 2010, amended by Act No. 462 of 18 May 2011.

125 Cf. Section 24c and explanatory remarks to Bill No. L 149, 2010/1 of 23 February 2011, general remarks para. 2.6.

126 Explanatory remarks to Bill No. L 149/2010-11 of 23 February 2011, general remarks paras. 2.6, 3.4, and 8 and specific remarks paras. 1.3, 1.5 and 2.1.

127 Consolidation Act No. 946 of 1 October 2009.

128 Act No. 361 of 6 June 2002 amending the Act on Active Social Policy and the Integration Act.

129 Cf. Ministry of Refugee, Immigration and Integration Affairs, *En ny udlændingepolitik* ('A new aliens policy'), government policy paper 17 January 2002, pp. 6-7, and the explanatory remarks to Bill No. 126/2001-02 (2. Session), paras. 1 and 4.

130 *Ibid*., p. 1, and explanatory remarks to Bill No. 126/2001-02 (2. Session), para. 1.

In any event, it was not intended to make the residence requirement an obstacle to the free movement of EU citizens. This is demonstrated by Section 11 (6) of the Act on Active Social Policy, stating that the requirement of 7 years of residence in Denmark does not apply to EU/EEA citizens insofar as they are entitled to cash benefits under EU law. The somewhat unclear scope of this exemption was clarified in the explanatory memorandum. Reference was here made to Regulation No. 1612/68 and the EEA Agreement, and the CJEU caselaw according similar rights to self-employed persons as to workers under these instruments. It was further explained that the requirement of 7 years of residence therefore does not apply to workers and self-employed persons, nor to Danish citizens comprised by Regulation No. 1612/68, such as Danish citizens having resided as workers in another EU/EEA country.[131] Against this background, Section 11 (6) would seem to imply that Danish and other EU/EEA citizens would only rarely, and mainly due to residence periods outside the EU/EEA Member States, be referred to the starting assistance as a result of non-compliance with the residence requirement.

Some decisions from the National Social Appeals Board ('Ankestyrelsen') have created doubts about the scope of this EU exemption, in particular regarding Danish citizens who have resided under the EU rules in another Member State, and then move back to Denmark. In the first case the applicant had returned to Denmark after a number of years of residence and work in another EU/EEA country. Upon return he applied for full social assistance, but was only granted the lower starting assistance. The reason given for this was that he did not fulfil the residence requirement in Section 11 (3) of the Act on Active Social Policy, and that his period of residence in the other Member State did not count towards the 7 years requirement because he had not acquired the *status of worker* in Denmark. This conclusion, as well as the line of reasoning, was upheld by the National Social Appeals Board. The Appeals Board referred to the caselaw of the CJEU, in particular the *Tsiotras* judgment,[132] invoking this as a basis of the assumption that the status of worker is lost in case of cessation of an employment contract unless it is documented that the EU citizen is genuinely jobseeking in the Member State in which he or she got unemployed.133

The Appeals Board's decision seems to be based on misinterpretation of the EU rules, as the *Tsiotras* judgment dealt with a particular situation regarding the transitional arrangements upon the accession of Greece to the EC. Furthermore, the Appeals Board seems to have confused the requirement of previous employment and actual jobseeking in a host Member State with the issue of seeking employment in the Member State of origin upon return to that country. Only a month after the publication of this decision the Appeals Board admitted another case concerning starting assistance in order to carry out a new principled examination 'as a supplement' to the abovementioned decision.[134]

In its decision on the latter case, the National Social Appeals Board maintained focus on the issue of having *acquired the status of worker* upon the Danish citizen's return to Denmark from another Member State.[135] While that criterion was rather obviously met, the decision seems at the same time to detract attention from the more pertinent question of whether the person actually had such status while staying in another EU Member State. In this case

131 Explanatory remarks to Bill No. L 126/2001-02 (2. Session), para. 5.4 and specific remarks on Section 11 (4) (the EU exemption was moved to Section 11 (6) by amending Act No. 379 of 25 April 2007).

132 CJEU judgment of 26 May 1993 *Tsiotras* (C-171/91). Particular reference was made to para. 11 of the judgment.

133 National Social Appeals Board, decision of 14 December 2005. Reported in A-1-06.

134 National Social Appeals Board, admissibility decision of 3 March 2006.

135 National Social Appeals Board, decision of 30 August 2006. Reported in A-34-06.

the Danish citizen who applied for cash benefits had been living in Germany as a housewife for 21 years, when returning to Denmark with her four children. Although she might have been eligible for residence right under EU law in Germany, and perhaps actually did hold an EU residence certificate there, that issue was never highlighted in the appeals case, and did not appear to be considered relevant by the Appeals Board. While the latter decision is questionable under Danish social welfare law for similar reasons as the abovementioned decision from December 2005 – and possibly also raises problems under EU law – it cannot as such be considered an impediment to the free movement of workers between Member States.

Five Appeals Board decisions from 2009 as well as one from 2010 upheld the *acquisition of the status of worker in Denmark* upon return as the decisive criterion for the application of the EU exemption from the residence requirement for payment of full social assistance. All of these cases concerned Danish citizens, and were admitted by the National Social Appeals Board with a view to clarification of the EU rules pertaining to applications for social assistance. In the first case, the Danish citizen had returned to Denmark after staying in Germany for around 1½ years, and it is not entirely clear whether and to which extent she had been employed in Germany. As she had only been temporarily employed for one day upon return, she was found not to have acquired the status of worker in Denmark, and the Appeals Board held that her period of residence in Germany could 'therefore' not be taken into account on equal terms with residence in Denmark.[136]

The second case dealt with the special issues relating to the child of a Danish citizen working and residing in another Member State. While acknowledging the principle that family members derive rights from workers under EU law, the Appeals Board again here focused merely on the status of worker in Denmark. As he was working and residing in Belgium, the applicant's father could not be considered a worker in Denmark, and the applicant could 'therefore' not invoke derived EU rights from him in Denmark, just as the applicant himself had not acquired the status of worker in Denmark since he had returned for educational purposes and had been applying for social assistance when he left school.[137]

In the third of the 2009 decisions, the Appeals Board held the Danish citizen to have acquired the status of worker after 18 days of actual employment upon return to Denmark. The applicant had been working on a non-temporary contract conditions, and was unable to work due to illness caused by an assault after this short period of employment. As the applicant was considered a worker in Denmark, the previous residence in another Member State would count towards the residence requirement on equal terms with residence in Denmark.[138] The applicants in the most recent three cases were, on the other hand, not considered to have acquired the status of worker or self-employed person upon return to Denmark from other Member States. Consequently, they were found not to be entitled to full social assistance under the EU exemption from the residence requirement.[139]

While the interpretation adopted by the Appeals Board is probably at variance with the legislative intentions behind the EU exemption in the Act on Active Social Policy, it also seems unsustainable under EU law at least since the *Eind* judgment which established that upholding EU rights upon return to the country of origin is not contingent on the EU citi-

136 National Social Appeals Board, decision of 29 April 2009. Reported in No. 137-09.
137 National Social Appeals Board, decision of 29 April 2009. Reported in No. 138-09.
138 National Social Appeals Board, decision of 15 July 2009. Reported in No. 180-09.
139 National Social Appeals Board, decisions of 24 September 2009, 17 December 2009 and 25 March 2010. Reported in No. 207-09, No. 6-10 and No. 112-10, respectively.

zen's renewed acquisition of the status of worker in that country.[140] Furthermore, the Appeals Board does not appear to have considered the principled issue of reverse discrimination as a separate problem under EU law as regards the interpretation and application of this residence requirement in Danish legislation. Thus, the abovementioned Appeals Board decisions did not include any consideration of the possible relevance of the CJEU judgments in such cases as *D'Hoop*, *Collins*, *Trojani, Eind* or *Vatsouras and Koupatantze*.[141]

In a few cases pending before the Parliamentary Ombudsman, the Ombudsman has recently requested the Appeals Board and the Ministry of Employment to clarify the conformity of this practice with EU law, in particular Arts. 20 and 21 TEUF and the relevant case law of the CJEU.[142] The Ombudsman further asked the Appeals Board to explain the reasons for not having referred the pertinent EU law issues to the CJEU for preliminary ruling.[143]

2.2 Specific issue: the situation of jobseekers

According to Section 12 a of the *Act on Active Social Policy*,[144] EU/EEA citizens residing in Denmark as first-time jobseekers on the basis of Community law, as well as persons with a right to stay until 3 months without administrative formalities, are entitled to no other economic assistance than coverage of costs related to the return to their home country. This provision was inserted into the Act in implementation of the political agreement on access to the labour market following the EU enlargement in 2004.[145] According to the available information, the National Social Appeals Board has not examined any cases concerning Section 12 a.[146]

Section 3 (2) of the *Act on Active Social Policy* makes it a precondition for entitlement to social assistance of longer duration – defined as more than half a year, cf. Section 3 (3) – that the recipient be either a Danish citizen or an EU citizen or a family member who has a right of residence under EU law, or have such entitlement under an international agreement.

Provided that these provisions are administered on the basis of a correct understanding of the EU rules on residence right, they should not give rise to violations of Arts. 24 (2) or 27 of

140 CJEU judgment of 11 December 2007 *Eind* (C-291/05).

141 CJEU judgments of 11 July 2002 *D'Hoop* (C-224/98), 23 March 2004 *Collins* (C-138/02), 7 September 2004 *Trojani* (C-456/02), 11 December 2007 *Eind* (C-291/05), and 4 June 2009 *Vatsouras and Koupatantze* (C-22/08 and C-23/08). Notably, in the Danish comments to the FMoW Report 2008-2009 (memorandum of January 2010 from the Ministry of Employment, p. 4) the Appeals Board explained that '[t]he EU rulings have along with other legal sources been included in the National Social Appeals Board's assessment in relation to decisions on this matter' while the Appeals Board has 'not – on the basis of the information in the cases – found reason to involve these judgements in the grounds for the decisions', and the Appeals Board has not in any of the published decisions 'found that there were real doubts, whether the applicants could be considered as migrant workers. The main issue in the decisions have been the applicants' status as workers under Regulation 1612/68'. This explanation, in itself raising an issue of compliance with procedural standards on reasoned administrative decisions, illustrates the fact that the Appeals Board has consistently and exclusively applied the criterion of acquired status of worker in Denmark, with little focus on the status held in the host Member State that may be the basis of entitlements under EU law.

142 Letters of 28 June 2010 from the Parliamentary Ombudsman to the National Social Appeals Board.

143 Letter of 28 June 2010 from the Parliamentary Ombudsman to the National Social Appeals Board.

144 Consolidation Act No. 946 of 1 October 2009.

145 Act No. 282 of 26 April 2004. Guidance on the new provision was issued by the National Directorate of Labour ('Arbejdsdirektoratet') in Guidelines No. 33 of 4 May 2004. The transitional arrangements as well as their gradual abolishment were described in previous FMoW Reports (see also Chapter VII below).

146 Search result from the list of appeals cases examined by the National Social Appeals Board ('Ankestyrelsen'), available at www.ast.dk/afgoerelser/principafgoerelser, accessed on 17 August 2011.

Directive 2004/38 or Art. 7 (2) of Regulation No. 1612/68. However, the impact of CJEU judgments such as *Collins*, *Trojani*, *Ioannidis* and *Vatsouras and Koupatantze*[147] on the application of the Act on Active Social Policy has not yet been clarified by the National Social Appeals Board. In particular, the latter judgment would seem to limit the applicability of Section 12 a of the Act to first-time jobseekers in the strict sense of this notion (see also Chapter IX of this Report).

EU-10 workers are reported to have experienced problems in a number of cases where they, upon dismissal from jobs in which they had been working for a longer period, applied for social assistance while seeking new jobs in Denmark. The social administration in some municipalities seem to have very precise information about EU citizens' entitlement to social assistance and to administer the rules accordingly, whereas other municipalities seem to base their practice on an incorrect understanding of the rules, probably confusing the abovementioned provision on first-time jobseekers and the general rules concerning EU workers' access to social assistance on equal terms with Danish citizens. The National Directorate of Labour ('Arbejdsdirektoratet') apparently suggested patience towards the municipalities, but stated its preparedness to consider the need for additional guidance on the applicable law.[148] More general guidelines concerning the right of EU/EEA citizens to cash benefits under the Act on Active Social Policy were issued by the National Directorate of Labour in April 2008.[149] As the guidelines appear less than clear on various aspects of the law, and they do not take heed of the abolishment of the transitional rules concerning EU-10 workers, they may be expected to be updated in the near future.[150]

147 CJEU judgments of 23 March 2004 *Collins* (C-138/02), 7 September 2004 *Trojani* (C-456/02), 15 September 2005 *Ioannidis* (C-258/04), and 4 June 2009 *Vatsouras and Koupatantze* (C-22/08 and C-23/08).

148 See *A 4* No. 17, weekly newsletter from the Danish Confederation of Trade Unions ('LO'), 11 May 2009.

149 Guidelines on EU/EEA citizens' right to social assistance and starting assistance, No. 19 of 4 April 2008, National Directorate of Labour.

150 In the Danish comments to the FMoW Report 2008-2009 (memorandum of January 2010 from the Ministry of Employment, p. 3) the National Labour Market Authority confirmed that the Guidelines would be updated in the near future. This does not appear to have occurred yet, cf. https://www.retsinformation.dk/Forms/R0710.aspx?id=115636, accessed 17 August 2011.

Chapter V: Other obstacles to free movement of workers

To give up residence in Denmark fiscally

A person with *residence* in Denmark is – among others – comprised by the rules on unlimited tax liability in the Act on *Pay-as-you-earn Taxation* Section 1.[151]

It seems to be rather difficult for Danish citizens to be regarded as having *given up residence* in Denmark when moving to another Member State; in particular when owning a year-round residence in Denmark, or when being a young person moving from the parents' residence – even to take up work in another Member State.

According to the *Planning Act* Section 41, retired persons having owned a summerhouse for 8 years are personally entitled to reside in the summerhouse all year.[152]

The tax authorities thus apply an interpretation of the concept of *'having residence at one's disposal in Denmark'*, according to which a person owning a summerhouse in Denmark and being – only formally – entitled to reside in it all year remains subject to the Danish rules on unlimited tax liability, regardless of whether the summerhouse is suitable for living in all year:

> In *SKM2011.153.SR* the National Tax Board in a binding response ruled on the question on giving up residence in Denmark in relation to a person who was planning to move to Spain and visit Denmark only during vacations. In Spain, the inquirer owned a condominium. In Denmark, the inquirer owned 2 permanent residences and 1 summerhouse.
> *The 2 permanent residences*: 1 of the residences was acquired with the purpose of selling the other residence. Due to the decreasing prizes on the real estate market, however, the plans were changed and the residence was rented out on a 3-year time-limited lease. This lease ended, but a new 3-year time-limited lease commenced from 2010. Both leases were irrevocable to the inquirer for a period of 3 years.
> The other residence served as the inquirer's home. By default, the inquirer intended to sell this residence upon moving to Spain. However, due to the low prices on the real estate market, the inquirer at first intended to rent out the residence on a 3-year time-limited lease, irrevocable to the inquirer for a period of 3 years.
> *The summerhouse*: The inquirer attempted to sell the summerhouse from 2007 to 2009 which was not possible. The inquirer was planning to make another attempt on selling. The summerhouse was non-insulated and without central heating – heated by electric heating. According to the *Planning Act* Section 41, the inquirer was personally entitled to reside in the summerhouse all year.
> *Ruling*: The National Tax Board concurred with the Ministry of Taxation's recommendation and reasoning.
> Thus, the National Tax Board found that regarding the 2 permanent residences, the inquirer would not be considered comprised by the rules on unlimited tax liability in the Act on *Pay-as-you-earn Taxation* Section 1, provided the 2 residences were rented out on the above mentioned terms (i.e. 3-year time-limited lease, irrevocable to the inquirer for a period of 3 years).
> Concerning the *summerhouse*, however, the National Tax Board found that given the *entitlement pursuant to the Planning Act Section 41 to reside in the summerhouse all year*, and case law (SMK2005.396.LR) from which it appears that it was not part of the National Tax Tribunal's assessment *whether or not the summerhouse was suitable for residing in all year*, the inquirer was considered

151 Consolidation Act No. 1403 of 7 December 2010. Cf. Circular No. 135 of 4 November 1988.
152 Consolidation Act No. 937 of 24 September 2009.

having residence at his disposal in Denmark. Consequently, the inquirer was comprised by the rules on unlimited tax liability in the Act on *Pay-as-you-earn Taxation* Section 1.

In *SKM2008.432.ØLR* the High Court ruled on the question on giving up residence in Denmark in relation to a 22 year old person who moved to England and took up work as an export truck driver in England during 1999 through 2000. Until March 1999, he resided with his parents in Denmark and was listed in the National Register of Persons at his parents' residence, when informing moving for England on 12 March 1999. He kept his postal address with his parents.
In England, the person allegedly resided at 2 different residences with the hauler and colleagues, respectively, within the working-period. The person spent holidays in Denmark. His former room was given to his little brother and he thus stayed overnight in the basement when visiting. Many of the person's drives started and ended in Denmark.
On 12 February 2001 the person was – again – listed in the National Register of Persons on an address in Denmark, now different from his parent's address.
According to a statement from the English Tax Administration, the person in 1999 had 34 ½ possible residence days at the residence in England and 139 residence days in England. Further in 1999, he had 66 possible residence days in Denmark and 82 residence days in Denmark. In 2000, the person had 9 possible residence days in England and 111 residence days in England. Further in 2000, he had 116 possible residence days in Denmark and 175 residence days in Denmark.
Ruling: The High Court ruled that it was up to the plaintiff to substantiate that he gave up his residence in Denmark upon moving to England. The High Court did not find this to be substantiated. The High Court thus took the view that the plaintiff until moving to England *always resided with his parents*, that he was *22 years old*, that there was *no limitation or change in the (cost-free) disposal of the residence* after moving to England, *regardless* of the little brother taking over his room, that he had *no significant furniture,* and also that he kept *his postal address* with his parents. The High Court further put emphasis on the plaintiff moving to England in June 1999, and on the statement from the English Tax Administration on *possible* residence days in Denmark and England, respectively.
In addition, the High Court took the view that the plaintiff had regular residences at his disposal in Denmark as well as in England, but found the attachment to Denmark to exceed the attachment to England; this was of importance to the ruling pursuant to the double taxation agreement between Denmark and England.
Consequently, the plaintiff was comprised by the rules on unlimited tax liability in the Act on *Pay-as-you-earn Taxation* Section 1.

Chapter VI: Specific Issues

1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES)

Texts in force

Laws

The Act on *Pay-as-you-earn Taxation* ('Kildeskatteloven')[153] Chapter I A deals with frontier workers.[154]

Sections 5 A-5 D provides the frontier worker with a choice on how his/her income should be taxed.

As a frontier worker does not reside in Denmark, the rules on unlimited tax liability in the Act on *Pay-as-you-earn Taxation* Section 1 do not comprise the worker. Instead the rules in Section 2 on limited tax liability apply, which limits the access to tax relief.

As a modification to this, Section 5 A stipulates that provided the frontier worker earns at least 75 % of his/her global income in Denmark in the shape of payment for personal work or profit from performing business, he/she may choose access to deduction for expenses, cf. Sections 5 B-5 C, i.e. tax relief, resulting in the frontier worker being in a position similar to an unlimited tax liable comprised by Section 1.

Administrative rules

The *EU Residence Order* Section 7 (1) (iii) read in connection with Section 20, implements Directive 2004/38 Art. 17 (1) (c) on the right to permanent residence for persons no longer working in the host Member State.[155] Section 7 (1) (iii), cf. Section 7 (1), stipulates that an EU citizen who works as an employee or self-employed in another Member State while retaining residence in Denmark to which the EU citizen return, as a rule, at least once a week, has a right to residence for more than the 3 months pursuant to *Aliens Act* Section 2 (1), provided the EU citizen has had business activity and resided in Denmark continuously for at least the previous 3 years.

As mentioned above Chapter I on Art. 17, Section 7 (3) stipulates that as for an EU citizen falling within Section 7 (1) (iii), periods of paid employment or self-employment completed in another Member States are considered as having been completed in Denmark for the purpose of acquisition of the rights mentioned in subsection (1) (i) and (ii).

Regarding the compatibility of the residence requirement in Section 7 (1) (iii) with *Hartmann*, the Ministry of Refugee, Immigration and Integration Affairs states that *Hartmann* does not concern the issue of permanent residence.[156] Thus, the Ministry has the view that the provision is not against the ruling in *Hartmann*.[157] In more detail regarding *Hart-*

153 Consolidation Act No. 1403 of 7 December 2010.

154 The rules on frontier workers were originally introduced by Act No. 1095 of 20 December 1995 on the background of the Commission's recommendation 1993-12-21 and the judgments in C-279/93 and C-80/94. The rules took effect from the income year 1992.

155 See above Chapter I.

156 CJEU judgment of 18 July 2007 (C-212/05).

157 It should be noted, however, that Section 7 (1) (iii) might be read as forming the legal basis of an 'independent' residence right (i.e. a residence right not dependant on Section 20 on permanent residence). This is caused by the fact that Section 20 states that persons with a *right of residence* in Denmark under Section(s) 7 →

mann, the Ministry states that the case concerns issues on social security under Regulation 1612/68 which, according to the Ministry, do not apply directly to the rules on rights of residence of EU citizens and their family members under Directive 2004/38. The Ministry further states that frontier workers residing in Denmark and working in their home country are considered to be persons of sufficient resources in terms of Directive 2004/38; see below. As a justification of this, the Ministry refers to COM (2009) 313 p. 4.[158]

Miscellaneous (administrative practices, etc.)

According to the Guidance on *Residence under the EU Residence Order to the Regional State Administration* para. II.1.3, the obligation to register pursuant to *Aliens Act* Section 2 (1) does not apply to EU citizens who are commuters. A requirement on leaving Denmark at least once a week may not be imposed. At the most, a requirement on departure at least once every 3 months may be imposed, as a new 3 months period begins each time the EU citizens enters Denmark upon staying at his/her residence in another EU country.

According to information obtained from the Ministry of Refugee, Immigration and Integration Affairs in 2010, frontier workers residing in Denmark and working in their home-country are considered persons of sufficient resources.[159]

As for specific situations of frontier workers, the Ministry further informs these to be as follows:

- When for instance a German citizen takes up residence in Denmark and works in Germany, the German citizen is considered a person of sufficient resources in terms of Directive 2004/38.[160]
- When for instance a German citizen takes up work in Denmark and maintains his/her residence in Germany, there are no consequences in terms of residence rights.[161]
- When a Danish citizen takes up residence in Sweden and works in Denmark, this has no consequences in terms of residence rights as the person is a Danish citizen.[162] However, regarding the rights to family reunification, the interpretation of the EU rules on family reunification applied by the Danish immigration authorities results in a Danish citizen taking up residence in Sweden and working in Denmark to be considered a person of sufficient resources due to the fact that the person's means originates from another EU country. Thus, the Danish citizen will achieve the right to family reunification under the EU rules upon return to Denmark, cf. Directive 2004/38 Art. 7 (1) (b).
- When a Danish citizen maintains his/her residence in Denmark and works in Sweden, this has no consequences in terms of residence rights and no rights to family reunification are derived from the EU rules.[163]

[...] have a *right to permanent residence without satisfying any further conditions*. It thus seems as if Section 7 (1) (iii) forms the legal basis of a residence right above 3 months but not being permanent, whereas Section 20 forms the legal basis of a right to permanent residence (corresponding that of Directive 2004/38 Art. 17 (1) (c)).

158 Cf. email of 11 May 2010 from an official within the Ministry of Refugee, Immigration and Integration Affairs.

159 Cf. email of 11 May 2010 from an official within the Ministry of Refugee, Immigration and Integration Affairs.

160 Cf. also Guidance on *Residence under the EU Residence Order to the Regional State Administration* para. I.2.14.

161 *Ibid*.

162 This is most likely due to the special Nordic rules.

163 Cf. in general email from an official within the Ministry of Refugee, Immigration and Integration Affairs of 27 July 2009.

2. SPORTSMEN/SPORTSWOMEN

Football

Nationality quotas

As described in detail in the previous reports, the rules on the Danish Football Association ('Dansk Boldspil-Union', DBU),[164] a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF),[165] Fédération Internationale de Football Association (FIFA)[166] and the Union des Associations Européennes de Football (UEFA)[167] and under the competence of the Court of Arbitration for Sport (CAS)[168] and the International Football Association Board (IFAB), do not contain nationality quotas with regard to players with citizenship from countries within Europe generally applicable. However, in 2009 the DBU adopted rules on *home-grown players* covering only the best Danish football league; the *Super* or *SAS league*. According to the DBU, the concept of Home Grown players is in accordance with UEFA's rules on participation in the Champions League and the new Europe League, and thus, similar to the international concept of Home Grown players.[169] Consequently, in an official first team of 25 players, DBU's rules require the clubs in the Super league to have a minimum of *8 Home Grown players* of which *at least 4 players* have been *educated in the club* and *the additional up to 4 players* have been *educated in another Danish club*. In this connection, 'educated' refers to the player having been entitled to play for the club for a minimum of *36 months* in total during the age of *15 to 21*. In cases where a club is not able to meet the requirement on the number of Home Grown players, the number of players on the first team is reduced correspondingly with the number of missing Home Grown players.[170]

According to the DIF, the purpose of the adoption of the concept is to motivate the domestic talent development by retaining a clear Danish element in the best Danish teams.[171]

As for international matches ('landskampe'), only players who are Danish citizens and entitled to play for a Danish club or an alien club organized under a football federation which is a member of FIFA, must be selected. Regarding players with citizenship from countries outside of Europe, nationality quotas are applied.

Transfer fees

According to the rules on the Danish Football Association ('Dansk Boldspil-Union', DBU), FIFA's Regulations for the Status and Transfer of Players apply regarding *training compen-*

164 Official website: www.dbu.dk.
165 Official website: www.dif.dk.
166 Official website: www.fifa.com.
167 Official website: www.uefa.com.
168 Official website: www.tas-cas.org.
169 Cf. News from DBU, July 2009, available at: www.dbu.dk/Nyheder/2009/Juli/regulering_skal_sikre_danske_spillere_i_sas_ligaen.aspx, accessed on 19 July 2011.
170 Cf. *Propositioner for Herre-DM* Section 14 (2), available at http://www.dbu.dk/turneringer_og_resultater/love_og_regler/ovrige/Propositioner%20for%20Danmarksturneringen.aspx, accessed on 5 July 2011.
171 Cf. email of 18 August 2009 from an official within the Ministry of Culture and DBU Bulletin, No. 8, August 2009, available at: www.dbu.dk/klubservice/Publikationer/~/media/Files/DBU_Broendby/bulletin/bulletin_august_2009.pdf, accessed on 19 July 2011.

sation. In the event of transfer between Danish clubs, there is no requirement on payment of training compensation.[172]

As for *solidarity contribution*, DBU as well refers to FIFA's Regulations on the Status and Transfer of Players, which requires a proportional solidarity contribution to be paid to any of the player's training or education club(s) when a professional player is transferred during the course of his contract. The solidarity contribution equals 5 % of the compensation paid to his former club, not including training compensation.[173]

Basketball

Nationality quotas

As described in detail in the previous reports, the rules on Denmark's Basketball Federation ('Danmarks Basketball-Forbund', DBBF),[174] a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF)[175] and the International Basketball Federation (FIBA Europe),[176] do not contain nationality quotas as regards players with citizenship from countries within Europe. However, nationality quotas are applied with regard to players with citizenship from countries outside of Europe. Furthermore, special rules apply to national teams.[177]

Transfer fees

As described in detail in the previous reports, transfer fees are not applied in Danish basketball. However, on 13 June 2009, DBBF adopted rules on young players, prescribing a *compensation sum* to be paid to the club of origin when the young talent plays in the best series later on. The compensation sum currently amounts to approximately 270 Euro (2,000 DKK) per season for men, and approximately 130 Euro (1,000 DKK) per season for women.[178]

Volleyball

Nationality quotas

As described in detail in the previous reports, the rules on the Danish Volleyball Federation ('Dansk Volleyball Forbund', DVBF),[179] a member of the Sports Confederation of Denmark

172 Cf. Circular No. 68 (2010) *Danske regler om overgangsperioder, betaling af træningskompensation og fordeling af solidaritetsbidrag,* available at http://www.dbu.dk/oevrigt_indhold/Cirkulaerer/53%20danske_regler_om_overgangsperioder_betaling_af_traeningskompensation_og_solidaritetsbetaling.aspx, accessed on 5 July 2011.

173 *Ibid*. and *FIFA Regulations on the Status and transfer of players – ANNEX 5,* available at http://www.dbu.dk/turneringer_og_resultater/love_og_regler/ovrige/beregning_af_solidaritetsbidrag.aspx, accessed on 5 July 2011.

174 Official website: www.danmarksbasketballforbund.basket.dk.

175 Official website: www.dif.dk.

176 Official website: www.fibaeurope.com.

177 Cf. *Danmarks Basketball-forbund, Love og Reglementer 2010/11*, available at http://www.danmarksbasketballforbund.basket.dk/da/Downloads/~/media/DBBF1/downloads/Love%20%20reglementer%202010%20%2011.ashx, accessed on 5 July 2011.

178 Ibid.

179 Official website: www.volleyball.dk.

('Danmarks Idræts-Forbund', DIF),[180] the International Volleyball Federation (FIVB)[181] and the International Volleyball Federation's European Volleyball Confederation (CEV),[182] do not seem to contain nationality quotas. However, DVBF imposes a 2 year residence requirement on non-Danish citizens upon participation in certain tournaments and special rules apply to national teams. Furthermore, DVBF is subject to the rules issued by FIVB as regards the number of alien players hired per team in the clubs and alien players simultaneously on court. However, DVBR does not seem to have implemented the regulations of FIVB on limitation of the number of players from other national federations simultaneously on court.[183]

Transfer fees

As described in detail in the previous reports, the Danish Volleyball Federation ('Dansk Volleyball Forbund', DVBF) is subject to FIVB's rules on transfer. According to the rules on DVBF, a fee of 1,000 Euro must be paid to DVBF for the issuance of the transfer certificate upon transferring to an alien club.[184]

Handball

Nationality quotas

As described in detail in the previous reports, the rules on Danish Handball Federation ('Dansk Håndbold Forbund', DHF),[185] a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF),[186] the International Handball Federation (IHF),[187] the European Handball Federation (EHF)[188] and the Scandinavian Handball Federation ('Skandinavisk Håndbold Forbund', SkHF) do not contain nationality quotas. However, DHF is subject to the regulations of the federations and both DHF and the international federations are contemplating on a regular basis to adopt regulations limiting the number of alien players in Danish Handball. According to information previously obtained from the Ministry of Culture, DHF is aware of the limitations for such regulations following the EU rules on free movement.[189]

Transfer fees

The Danish Handball Federation ('Dansk Håndbold Forbund', DHF) is subject to the rules of IHF and EHF on transfer and applies *education compensation*.

180 Official website: www.dif.dk.
181 Official website: www.fivb.com.
182 Official website: www.cev.lu.
183 Cf. *Fælles Turneringsreglement, Version 2010-11,* Section 13, available at http://www.volleyball.dk/graphics/Docs/Gaeldende-reglementer/2-1%20F%E6lles-turneringsreglement%2020 10.pdf, and *Reglement for benyttelse af udenlandske spillere i klubber under DVBF, Version 2009-10,* available at http://www.volleyball.dk/graphics/Docs/Gaeldende-reglementer/2-7-Reglement-for-benyttelse-af-udenlandske-spillere.pdf, all accessed on 5 July 2011.
184 Cf. *Vejledning til spillere, der skal spille i udenlandske klubber, Version 2007-08,* available at http://www.volleyball.dk/graphics/Docs/Gaeldende-reglementer/2-8-Vejledning-spillere-til-udlandet.pdf, accessed on 5 July 2011.
185 Official website: www.dhf.dk.
186 Official website: www.dif.dk.
187 Official website: www.ihf.info.
188 Official website: www.eurohandball.com.
189 Cf. email of 30 June 2008 from an official within the Ministry of Culture.

The *education compensation* may be requested for contract players at the age of 16-23, who has been on contract within the past 12 months provided the player appears on the match report for the season on question. The education compensation may amount to a maximum of 2,500 Euro for each season the player has been on contract between the player's 16th to 23th year. Moreover, an additional compensation of 500 Euro for each year the player has been on contract and played for a youth national team may be requested. Hence, the education compensation may amount to a maximum of 24,000 Euro (8 x 3,000).[190]

Ice-hockey

Nationality quotas

The rules on Denmark's Ice-Hockey Association ('Danmarks Ishockey Union', DIU),[191] a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF)[192] and the International Ice Hockey Federation (IIHF),[193] do contain nationality quotas, as a club at any time is allowed to have 8 players on contract who do not hold Danish citizenship. In this context, players on contract comprise players on try-out and players playing on the club's first team without having entered into a contract with the club.[194]

Transfer fees

As described in detail in the previous reports, Denmark's Ice-Hockey Association ('Danmarks Ishockey Union', DIU) is subject to the rules on transfer of IIHF. Moreover, a fee of approximately 1,000 Euro (8,250 DKK) must be paid for the issuance of the transfer card.[195]

Rugby

Nationality quotas

As described in detail in the previous reports, the rules, the rules on the Danish Rugby Association ('Dansk Rugby Union', DRU),[196] a member of the Sports Confederation of Denmark ('Danmarks Idræts-Forbund', DIF),[197] the International Rugby Board (IRB),[198] the Association Europ'eenne Rugby (FIRA-AER)[199] and the Scandinavian Rugby Union (SRU) do not contain nationality quotas.

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190 Cf. *Grundlæggende retningslinjer for uddannelseskompensation,* June 2011, available at http://www.dhf.dk/Renderers/ShowMedia.ashx/GrundlæggenderetningslinjerforUK201011.pdf?id=ccb8e208-bbe9-433b-a23f-4a2fa963a29a, accessed on 5 July 2011.

191 Official website: www.ishockey.dk.

192 Official website: www.dif.dk.

193 Official website: www.iihf.com.

194 Cf. *Love og Turneringsbestemmelser, June 2011, DIUs Turneringsbestemmelser, II. Superligaen, divisionerne og pokalturneringen* Section 8, available at http://www.ishockey.dk/PDF/Love_og_turnering_2011.pdf, accessed on 5 July 2011.

195 Cf. *Love og Turneringsbestemmelser, June 2011, DIUs Turneringsbestemmelser, X. Klubskifte og transfer* Section 2.

196 Official website: www.rugby.dk.

197 Official website: www.dif.dk.

198 Official website: www.irb.com.

199 Official website: www.fira-aer-rugby.com.

According to the most recent membership statement from 2011, DRU has 2,354 members.[200] This makes DRU among DIF's smallest federations and its activities are solely performed on an amateur basis. Thus, neither nationality quotas nor transfer fees exist in Danish rugby.[201]

3. THE MARITIME SECTOR

As described in the previous report, the Act on *the Danish International Register of Shipping*[202] Section 10 (2) was amended in 2009.[203]

The wording of the provision is:

> 'Collective agreements as mentioned in subsection 1 [regarding wages and working conditions on board ships] concluded by a Danish trade union can cover only persons having residence in Denmark, or who must be put on the same footing as persons considered having residence in Denmark pursuant to EU law or other concluded international obligations.'[204]

No changes have been made to this in 2010 – July 2011. However, on 1 June 2011, the Parliament adopted a Bill amending several Acts governing the maritime sector.[205]

For a detailed description of the area, including conditions on nationality and residence, pay and working conditions etc., see the thematic report on the position of seafarers of August 2011.

4. RESEARCHERS/ARTISTS

According to information previously obtained from the Ministry of Employment, no rules on the interpretation of the concept of worker apply specifically to researchers and artists.[206] Hence, the general rules requiring such cases to be dealt with on a case-by-case basis, apply, comprising criteria such as the requirement on the employment to be real and genuine and not to be regarded as marginal or of such limited extent that the income appears as a purely marginal supplement to a person's other income or means in order to serve as the basis for the residence right. Moreover, the minimum requirement on the duration of employment of 10-12 hours on a weekly basis, apply as a main rule. Regarding fixed-term and short-term employment contracts in particular, the Danish Immigration Service emphasizes the requirement on dealing with the cases on a case-by-case basis. While referring to practice from

200 Cf. http://www.dif.dk/da/OM_DIF_OG_FORBUNDENE/Kontakt_forbundene.aspx, accessed on 5 July 2011.
201 Cf. email of 21 May 2010 from an official within the Danish Ministry of Culture.
202 Consolidation Act No. 273 of 11 April 1997.
203 By Act No. 214 of 24 March 2009, entering into force on 1 April 2009.
204 Author's translation.
205 Bill No. L 189, 2010-11 of 7 April 2011 resulting in Act No. 662 of 14 June 2011.
206 Cf. email of 15 July 2009 from an official within the Ministry of Employment.

the CJEU, the Danish Immigration Service states that no lower limit on the duration of employment may be set.[207]

Act *on Pay-as-you-earn Taxation* ('Kildeskatteloven') Sections 48 E and 48 F[208] on taxation for key employees and researchers who are migrant workers residing in Denmark were amended in 2010 with the purpose of simplifying the arrangement and improving the possibilities of attracting foreign experts to Denmark for tasks lasting for more than 3 years.[209] The amended provisions provide an optional 26% gross taxation for 5 years for persons who have not been liable to unlimited tax or have been liable to taxation in Denmark of salary or income from self-employment the past 10 years prior to the employment – on more specified conditions. The provisions have the purpose of making it more appealing for highly educated and qualified employees to reside in Denmark for a longer period of time.

5. ACCESS TO STUDY GRANTS[210]

Danish nationality is a prerequisite for the award of the State educational support, for studies in Denmark as well as for studies abroad.[211] As for students not being Danish citizens, these may be given a status equal to that of Danish citizens on conditions following from the Danish rules.[212]

As for *EU/EEA citizens* in particular, special rules apply. Thus, EU/EEA citizens and their family members may be given a status equal to that of Danish citizens on conditions following from the EU rules. Consequently, EU/EEA citizens who are *not workers or self-employed* and their family members do not acquire the right to study grants until they have resided for 5 consecutive years in Denmark; see more below 'texts in force.'[213]

Residence in Denmark for a period of at least 2 consecutive years within the last 10 years prior to the reception of the application is a prerequisite for the award of the State educational support for *study programmes abroad*. Exceptions apply to certain schools in Flensburg and Schleswig and to students not registered as departed in the Civil Registration System (in situations where the student has been living with his/her parents abroad as a consequence of the parents being stationed for the Danish State); see more below 'texts in force'.[214]

In 2008, the Danish Ombudsman launched an investigation on his own initiative of the practice of the Board of Appeal for Danish Educational Support, which was finalized in April 2010.

Within his report, the Ombudsman focuses on 2 topics of particular relevance to this report: 1) The *concept of workers* and 2) the *concept of consecutive stay*; see more below 'miscellaneous.'

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207 Cf. also Guidance on *Residence under the EU Residence Order to the Regional State Administration* para.I.1.1.1, referring to CJEU judgment of 6 November 2003 *Franca Ninni-Orasche* (C-413/01) on short-term employment of 10 weeks duration.

208 Consolidation Act No. 1403 of 7 December 2010.

209 By Act No. 1565 of 21 December 2010. Cf. Bill No. L 81/2010-11 of 17 November 2010, general remarks paras. 1 and 2.

210 This Section is to a large extent based on the analytical note on study grants of January 2011.

211 Cf. Consolidation Act No. 661 of 29 June 2009 Section 2 (1) (1), referring to Section 2a (1).

212 See also www.su.dk/English/Sider/equalstatusdanishrules.aspx, accessed on 13 January 2011.

213 See also www.su.dk/English/Sider/equalstatuseurules.aspx, accessed on 13 January 2011.

214 Cf. Consolidation Act No. 661 of 29 June 2009 Section 2 (3).

***Study grants for studies in* Denmark**

According to the Act *on the State Educational Grant and Loan Scheme* ('SU-loven')[215] and the corresponding Executive Order *on the State Educational Grant and Loan Scheme* ('SU-bekendtgørelsen'),[216] every student is entitled to state educational support (grants and loan) for his/her further education in Denmark when:

1. the student is a Danish citizen;[217] and
2. the student is over the age of 18;[218] and
3. the student is actively studying;[219] and
4. the student is not receiving other public support aiming at covering his/her living expenses, apart from scholarship awarded to a PhD study prior to obtaining a degree;[220] and
5. the student fulfills certain requirements on not having an income higher than a specified amount;[221] and
6. the student fulfills certain requirements on not having deliberately evaded prosecution or sentences in Denmark;[222] and
7. the education at which the student is enrolled and is attending in Denmark has been approved by the Danish Educational Support Agency as entitling to study grants, and the approval has not later been revoked.[223]

The Act *on the State Educational Grant and Loan Scheme* Section 2a (2) – (3) and Executive Order *on the State Educational Grant and Loan Scheme* Section 67 deals with EU/EEA citizens and their acquisition of the right to State educational support. According to these provisions, an *EU/EEA citizen* may be given equal status to that of Danish citizens for studies in Denmark or abroad when the EU/EEA citizen is either:

1. considered a *worker or self-employed person* under the EU rules; or
2. (the following categories are also considered to be comprised by the concepts of worker or self-employed by retaining their status:
   - an EU/EEA citizen who *has been working* in Denmark as an employee or self-employed person, when there is a connection between the education and the former work in terms of contents and time
   - an EU citizen who is involuntarily unemployed and as a consequence of health grounds or structural circumstances in the labour market is in need of retraining with the purpose of employment in a profession without connection to the former work in Denmark in terms of contents and time)

215 Consolidation Act No. 661 of 29 June 2009 and amendments.
216 Executive Order No. 455 of 8 June 2009 and amendments.
217 Cf. Consolidation Act No. 661 of 29 June 2009 Section 2 (1) (1) referring to Section 2a (1). Special rules apply to EU/EEA citizens; see below.
218 Cf. Consolidation Act No. 661 of 29 June 2009 Section 2 (1) (3).
219 Cf. Consolidation Act No. 661 of 29 June 2009 Section 2 (1) (4) and Executive Order No. 455 of 8 June 2009 Chapter 1.
220 Cf. Consolidation Act No. 661 of 29 June 2009 Section 2 (1) (5) and Executive Order No. 455 of 8 June 2009 Section 69 on non-Danish citizens receiving *or* having the possibility of receiving support from their home-country. Regarding the latter, exemptions are made pertaining to EU/EEA citizens.
221 Cf. Consolidation Act No. 661 of 29 June 2009 Chapters 6 and 7 and Executive Order No. 455 of 8 June 2009 Chapters 12 and 13.
222 Cf. Consolidation Act No. 661 of 29 June 2009 Sections 2 (4), (5), (6) and (7).
223 Cf. Consolidation Act No. 661 of 29 June 2009 Section 2 (1) (2) and Chapter 2 and Executive Order No. 455 of 8 June 2009 Chapter 2.

3. a *spouse or registered partner* of an EU/EEA citizen who is considered to be *a worker or self-employed* under the EU rules, if he/she is or has been residing with the EU/EEA citizen while the EU/EEA citizen was a worker or self-employed in Denmark; or
3. a *child* of an EU/EEA citizen who is considered a *worker or self-employed* under the EU rules, if the child resided in Denmark with the EU/EEA citizen and is or has been residing with the EU/EEA citizen while the EU/EEA citizen was a worker or self-employed in Denmark. It is a condition that the student is not of such age or status making it unreasonable to attach importance to the parent's circumstances. If the child is not residing in Denmark at the time of the commencement of the education, the child is entitled to study grants only if the EU/EEA citizen is considered to be a worker or self-employed under the EU rules and has provided for the child until the time of the commencement of the education; or
4. a *parent* to an EU/EEA citizen who is considered to be a *worker or self-employed* under the EU rules, when the parent is provided for by the EU/EEA citizen and resides with or has been residing with the EU/EEA citizen while the EU/EEA citizen is or was a worker or self-employed in Denmark; or
5. an *EU/EEA citizen or family member* thereof who has resided for 5 *consecutive* years in Denmark.224 The stay in Denmark is not considered to be interrupted due to temporary stays outside the country when these stays do not exceed 6 months a year in total, or when the stay abroad is of longer duration due to compulsory military service, or if one stay of a maximum of 12 consecutive months is caused by substantial grounds, such as pregnancy and birth, serious illness, studies or foreign assignment. In cases of more than 2 years consecutive absence from Denmark, the right to study grants is not acquired until the passing of a subsequent stay in Denmark of 5 consecutive years.

Executive Order *on the State Educational Grant and Loan Scheme* Section 66 deals with students who are *not Danish citizens*, regardless of nationality. According to this provision, a foreign student may be given equal status to that of Danish citizens for studies in Denmark, only, when the alien is either:

1. a German citizen belonging to the Danish minority in Southern Schleswig; or
2. an Icelandic citizen residing in Denmark on 6 March 1946 or within 10 years before that date; or
3. comprised by the Act on *Integration* Section 2 (2) and (3);[225] or
4. upon entry in Denmark was below 20 and together with his/her parents took up residence in Denmark and the family still resides in Denmark; or
5. just prior to the application has had *registered* residence in Denmark for 2 consecutive years and has been, and still is, married or in a registered partnership with a Danish citizen for a minimum of 2 years; or
6. just prior to the commencement of the education has had *registered* residence in Denmark for a minimum of 2 consecutive years and has been working as an employee or self-employed for a minimum of 30 hours a week; or

224 And who does not fall within one of the abovementioned categories of economically active persons (worker, self-employed or family member thereof).

225 Being a refugee or family reunified, cf. amending Executive Order No. 771 of 24 June 2010.

7. just prior to the application has had *registered* residence in Denmark for a minimum of 5 consecutive years, when the stay in Denmark was not initiated by the purpose of studying.
   In situations of more than 2 years consecutive stay abroad, the right to study grants ceases until one of the above mentioned conditions once again are fulfilled, cf. Section 68 (3).

Study grants for studies abroad

As for studies abroad, there is a distinction between *study periods abroad* and *study programmes abroad*.

A study period is defined as being a part of the Danish study programme at which the student is enrolled. The duration of the study period abroad is usually ½-1 year.

A study programme abroad is defined as a whole education. An example of this is a Masters degree.

Besides being awarded study grants and/or loan, the student may be awarded supplementary grants/international scholarships for tuition fees during studies abroad on more specified conditions.[226]

Study periods abroad

State educational support may be offered when:
1. the Danish educational institution accepts the study period abroad as part of the current Danish study programme (which entitles to educational support);[227] and
2. the student twice a year supplies the Danish educational institution with documentation proving that the student is pursuing his/her study according to schedule (i.e. course of study and study activity).[228]

Study programmes abroad

State educational support may be offered when:
1. the student and the studies meet the same conditions as laid down for Danish studies;[229] and
2. the student has been a resident in Denmark for a period of at least 2 consecutive years within the last 10 years prior to the reception of the application (as a main rule – exceptions apply to certain schools in Flensburg and Schleswig and to students not registered as departed in the Civil Registration System);[230] and

226 Cf. Consolidation Act No. 661 of 29 June 2009 Chapter 11a and Executive Order No. 455 of 8 June 2009 Sections 61-62.
227 Cf. Executive Order No. 455 of 8 June 2009 Section 53 (1).
228 Cf. Executive Order No. 455 of 8 June 2009 Section 53 (2).
229 Cf. Executive Order No. 455 of 8 June 2009 Section 54 (1).
230 Cf. Consolidation Act No. 661 of 29 June 2009 Section 2 (3).

3. the student twice a year supplies the Danish Educational Support Agency with documentation proving that the student is pursuing his/her study according to schedule (i.e. course of study and study activity);[231] and
4. the student is not receiving educational support under the rules of the country in question;[232] and
5. the study is officially recognized in the country in question;[233] and
6. the Danish Educational Support Agency upon application approves that the specific education abroad entitles to educational support (decisions performed on a case-by-case basis for each educational level).[234]

   Special rules apply to education received in another Nordic country and to education in Germany received by students belonging to the German minority in Denmark.[235]

Thus, *residence in Denmark for a period of at least 2 consecutive years within the last 10 years* prior to the reception of the application is – as a main rule – a prerequisite for the award of the State educational support for *study programmes abroad*.

This provision was adopted in 2002 with the purpose of ensuring that the State educational grant for study programmes abroad will be awarded to students who, by residing in Denmark for a period of time, have achieved an affiliation to Denmark, only.[236] The explanatory remarks to the Bill state that the provision 'first and foremost will affect Danish citizens who have not resided in Denmark for at least 2 out of the past 10 years.' Next, the explanatory remarks state that 'also EU/EEA citizens will be precluded from study grants for education abroad when not having resided in Denmark for at least 2 out of the past 10 years.' The provision does not affect the access to study grants for study periods abroad.[237] It seems to be a rather questionable assumption that the imposed residence requirement 'first and foremost will affect Danish citizens'.

Miscellaneous (administrative practices, etc.)

The *State Educational Grant and Loan Scheme* is managed by the Danish Educational Support Agency[238] in collaboration with the educational institutions and under the auspices of the Danish Ministry of Education.[239] The Danish Educational Support Agency deals with complaints on decisions on State educational grants and loan. Decisions of the Danish Educational Support Agency may be appealed to the Board of Appeal for Danish Educational Support.[240]

Decisions made by the Danish Educational Support Agency (hereinafter 'the Agency') and the Board of Appeal for Danish Educational Support (hereinafter 'the Board of Appeal' or 'Board') are not publicly available. However, in 2008 the Danish Ombudsman launched an investigation on his own initiative of the practice of the Board, which was finalized in

231 Cf. Executive Order No. 455 of 8 June 2009 Section 63 (3). Additional rules on substantiation apply to study programmes of more than 1 year, cf. Section 89 and amending Executive Order No. 771 of 24 June 2010.
232 Cf. Executive Order No. 455 of 8 June 2009 Section 54 (2).
233 *Ibid*. and Section 59 of the Order.
234 Cf. Executive Order No. 455 of 8 June 2009 Sections 55 and 64.
235 Cf. Executive Order No. 455 of 8 June 2009 Sections 56-57.
236 By Act No. 416 of 6 June 2002, cf. Bill No. L 177, 2001/2 of 20 March 2002, specific remarks para. 1, 1.
237 Bill No. L 177, general remarks para. 3 and specific remarks para. 1, 1.
238 Official website: www.sustyrelsen.dk; website on study grants: www.su.dk.
239 Official website: www.uvm.dk.
240 Cf. Consolidation Act No. 661 of 29 June 2009 Chapter 11. The Board does not have a website

April 2010. Within his report, the Ombudsman reviews certain cases brought before the Board of Appeal. Consequently, the following is based on the report published by the Danish Ombudsman in 2010.[241]

Regarding Directive 2004/38, the Ombudsman notes that he did not find instructions on the interpretation of the Directive in relation to the rules on the Danish educational support on either the website of the Ministry of Education or the website of the Danish Educational Support Agency (the Board of Appeal for Danish Educational Support does *not* have a website).[242] The Ombudsman further notes that the Board is under the obligation to include Directive 2004/38 in its interpretation of the Act *on the State Educational Grant and Loan Scheme* Section 2a on EU/EEA citizens as the Act implements parts of the Directive.

The Ombudsman focuses on 2 topics of particular relevance to this report: 1) The *concept of workers* and 2) the *concept of consecutive stay*, as described below in Sections A and B, respectively.[243]

A) Practice on the concept of workers from the Board of Appeal for Danish Educational Support

A.1) Outline of the practice on the concept of workers from the Board of Appeal for Danish Educational Support[244]

For the purpose of his report, the Ombudsman has received and reviewed 9 cases on the Act *on the State Educational Grant and Loan Scheme* Section 2a (2) on EU/EEA citizens and the corresponding Executive Order *on the State Educational Grant and Loan Scheme* Section 67 and the concept of workers.

From the cases, it appears that prior to April 2009, the educational authorities did not perform an assessment of whether an EU/EEA citizen could be regarded a worker/self-employed. Thus, the educational authorities emphasized only the formal registration of the EU/EEA citizen in question as conducted by the Regional State Administrations contrary to Directive 2004/38 Art. 25 (1).[245] Consequently, EU/EEA citizens registered as persons of sufficient means, family reunified or students were rejected educational support simply because of their formal registration, despite of the fact that some of these students did fall within the scope of the concept of workers.

In March 2009, the Ombudsman conducted a hearing and asked the Board of Appeal for its comments on specific issues related to cases on EU/EEA citizens and the Board's practice on focusing solely on the formal registration of the EU/EEA citizen in question. The Board did not answer the Ombudsman's questions, but changed its practice from 21 April 2009 from focusing solely on whether the EU/EEA citizen in question was in fact registered as a worker or self-employed by the Regional State Administrations, to considering whether the

241 *Inquiry of the Practice of the Board of Appeal for Danish Educational Support within Selected Areas,* 2008-3784-980 (hereinafter 'the Ombudsman's Report').
242 The Ombudsman's Report p. 55.
243 The Ombudsman's Report pp. 15ff.
244 The Ombudsman's Report pp. 15-16, p. 55 and pp. 59-66.
245 And most likely contrary to the Act *on the State Educational Grant and Loan Scheme* Section 2a (2), implementing parts of the Directive.

EU/EEA citizen in question might be considered a worker, despite of being registered as for instance a person of sufficient means.

According to the Ombudsman, the Board's change of practice in April 2009 has resulted in the Board allowing the applicants to present evidence that the applicant (or his/her relatives) must be regarded as workers/self-employed regardless of registration certificates. As a result of this, the Board has reversed several decisions made by the Agency; see below Section A.2.

The Board of Appeal has not considered whether the change of practice should have retroactive effect. In October 2009, the Agency notified the Board of Appeal that the Agency would *not* comply with the new practice of the Board, since the Agency did not consider themselves competent to undo the Regional State Administrations' decisions on registration certificates.

In March 2010, the Board of Appeal informed the Ombudsman that the new practice of the Board apparently is in contradiction with 2 memorandums from the Ministry of Refugee, Immigration and Integration Affairs stating that the immigration authorities conduct the general and specific interpretation of the residence status of EU citizens and their family members under EU law, while the relevant responsible authorities perform the general and specific interpretation of which derivative rights the EU/EEA citizens' residence status give rise to at the resort area in question. In addition, the Board informed the Ombudsman that the Board agrees with the Ombudsman on his view that the Agency is bound by the Board's practice. However, the Board does not consider itself competent to issue directives to the Agency as to how to decide in cases etc. On the basis of the Ombudsman's recommendations on the Board deciding on retroactive effect, reopening of cases and communication to the Agency and Ministry of Education, the Board intends to ask the Ministry of Education on its position on the various issues. There is currently no information available on the progress of this.

A.2) Summary of cases on the concept of workers from the Board of Appeal for Danish Educational Support after April 2009[246]

Case No. 25
Prior to the applicant being admitted for study, the applicant was registered as a worker by the Regional State Administration. Following the commencement of her studies, the applicant asked the Regional State Administration to amend the registration certificate to student, which was done.
However, the applicant continued to work alongside her studies (12-20 hours per week) and was later aware of the fact that she could apply for study grants. She was denied study grants by the Agency on grounds of her registration certificate as a student.
The Board of Appeal reversed the decision and granted her study grants on the grounds that the applicant was considered a worker under the EU rules, regardless of the registration certificate.

Case No. 26
An Icelandic citizen was refused study grants by the Agency with references to Executive Order on the State Educational Grant and Loan Scheme Section 66 (1) (6) (on students who are not Danish citizens) as the Agency did not find that the applicant had worked at least 30 hours a week for a period of 2 years.
The Agency further stated that the applicant could not be regarded a worker under EU law as he did not continue to work during his studies and as his previous occupation (as a mason) had no correlation with the education at the Technical School.
The Board of Appeal reversed the decision and granted him study grants while referring to Executive Order on the State Educational Grant and Loan Scheme Section 67 (1) (on EU/EEA citizens) stating that there was in fact temporal and substantive relationship between the education and the work as a mason (full time).

Case No. 27
Both the applicant and the applicant's mother were issued with registration certificates as family reunified. The Agency rejected the application for study grants on grounds of the mother's registration certificate as family reunified. The Agency thus found that the mother could not be regarded a worker.
The Board of Appeal reversed the decision and granted the applicant study grants on the grounds that the mother worked as a school teacher in Denmark.

Case No. 29
Since entering Denmark in August 2006, the applicant had held a registration certificate as a student. The applicant had, however, since September 2007, been working alongside the studies around 15-20 hours a week. From January 2009, the applicant applied for study grants for the Master's degree. The Agency refused study grants on grounds of the registration certificate as a student.
The Board of Appeal revised the decision and granted the applicant study grants on the grounds that the applicant was considered a worker under EU law.

Case No. 30
Since entering Denmark in June 2007, the applicant held registration certificate as a person of sufficient resources. From February 2008, the applicant had worked 10-12 hours a week. The applicant applied for study grants in January 2009. The Agency rejected the application on grounds of the registration certificate as a person of sufficient resources.
The Board of Appeal reversed the decision and granted the applicant study grants on the grounds that the applicant was considered a worker under EU law. In addition, the Board referred to Directive 2004/38/EC Art. 25 (1).

246 The Ombudsman's Report pp. 60-61.

B) Practice on the concept of consecutive stay from the Board of Appeal for Danish Educational Support

B.1) Outline of the practice on the concept of consecutive stay from the Board of Appeal for Danish Educational Support[247]

For the purpose of his report, the Ombudsman received and reviewed 3 cases on the Act *on the State Educational Grant and Loan Scheme* Section 2a (2) and (3) and Executive Order *on the State Educational Grant and Loan Scheme* Sections 66 and 67 and the concept of consecutive stay. It should be noted that at the time of the Ombudsman's inquiry, the wording of Section 66 on consecutive stay was similar to the wording of Section 67 on consecutive stay. However, the wording of Section 66 has now been amended by the introduction of the requirement on the consecutive stay having to be *registered*.

From the cases, it appears that the Board's interpretation of the concept of consecutive stay was not uniform. Regarding Section 67, the Board emphasized the period of substantiated stay in Denmark rather than what might be possible to get registered with the National Register of Persons or the Regional State Administrations. In relation to Section 66, however, the Board emphasized the formal circumstances rather than the substantive facts.

In January 2009, the Ombudsman reviewed 1 case on the interpretation of consecutive stay in Executive Order *on the State Educational Grant and Loan Scheme* Section 66 – Case 37/2008, see below. In this case, the Agency stated that residence may be counted from the immigration authorities' decision on residence permit at the earliest. The Board emphasized that residence could be counted from the authorities' issue of procedural residence permit at the earliest.

In March 2009, the Ombudsman conducted a hearing asking the Board of Appeal for its comments on the interpretation of the requirement of consecutive stay in Denmark and its relation to Directive 2004/38. In its reply, the Board noted that the Board did not take Directive 2004/38 Art. 7 into consideration. The Board further noted that the right of residence is valid only if certain conditions are met. Moreover, the complainant in Case 37/2008 could not substantiate her stay by registration at the National Register of Persons. In a different case (Case No. 23, see below), the Agency was informed by the Welfare Ministry's civil registration office that persons entering from abroad may be entered into the National Register of Persons if they have fixed abode in Denmark, only. Otherwise, persons arriving from abroad could not be considered having entered Denmark or having acquired the rights conditional on having entered Denmark.

In its statement of March 2010, the Board noted that the decision in Case 37/2008 was based on a concrete evaluation of the information on the applicant's stay in Denmark, including her temporary departure from Denmark.

Moreover, the Ombudsman reviewed 2 cases – Cases No. 23 and 28 – on the interpretation of consecutive stay in Executive Order *on the State Educational Grant and Loan Scheme* Section 67. From these cases it appears that the Board emphasized the period of substantiated stay in Denmark rather than what might be possible to get registered by the National Register of Persons or the Regional State Administrations. According to the Om-

247 The Ombudsman's Report pp. 16 and 66-70.

budsman, this practice is thus in line with the Board's new interpretation of the concept of workers, as described above Section A. Also, the interpretation appears to be in line with the interpretation applied by the Danish immigration authorities regarding Directive 2004/38 Art. 16 on the requirement and calculation of consecutive stay when acquiring the right to permanent residence.

Following the differences in the Board's interpretation of the concept of consecutive stay when applying Executive Order *on the State Educational Grant and Loan Scheme* Section 66 and Section 67, respectively, the Ombudsman wonders why the interpretation of the concept of consecutive stay in Section 66 is not similar to that of Section 67 – and to the Act *on the State Educational Grant and Loan Scheme* Section 2a (2) and the interpretation applied by the Danish immigration authorities regarding Directive 2004/38/EC. The Ombudsman notes that identical expressions must be interpreted uniformly, unless there is clear basis indicating differently in the Parliament's preparatory work. According to the Ombudsman, no such clear basis exists or has been stated by the Board.

In its statement of March 2010, the Board stated that it agrees with the Ombudsman regarding the requirement on uniform interpretation of identical expressions. Moreover, the Board agrees with the requirement to interpret the concept of consecutive stay in compliance with Directive 2004/38 making the applicants' continuous legal residence in Denmark decisive (rather than making the formal registration decisive).

The wording of Section 66 has now been amended by the introduction of the requirement on *registered* consecutive stay.

The Ombudsman thus recommends the Board to consider how to reopen cases decided pursuant to the former Section 66 in which the Board has emphasized a criterion different than that of the requirement on the applicant's continuous legal residence. There is currently no information available on this process.

B.2) Summary of cases on the concept of consecutive stay from the Board of Appeal for Danish Educational Support[248]

Case No. 37/2008 (Section 66 (on students not being Danish citizens))
An Estonian woman did, according to her own information, enter Denmark in January 2006. She stated she could substantiate the entry with her flight ticket. Upon entry, she was pregnant and came to Denmark to marry her Danish boyfriend – the father of the child. Upon arrival, she lived on the man's address, and they were married later in January 2006. In April 2006 she applied for family reunification. In May 2006, the Immigration Service issued her with a procedural residence permit. In January 2007 she was issued with a residence permit pursuant to Aliens Act Section 9 (1) (1) on family reunification. Only from this time, she was able to register with the National Register of Persons at the spouse's residence.
In September 2007, she commenced an education and applied for study grants from January 2008 (2 years of continuous residence since marriage/entry). The Agency refused her request stating that the stay could be counted only from January 2007 when she was registered with the National Register of Persons.
The Board of Appeal reversed the decision, calculating the stay from May 2006 when the Immigration Service issued the procedural residence permit.

248 The Ombudsman's Report pp. 68-69.

Case No. 23 (Section 67 (on EU/EEA citizens))
A German citizen entered Denmark in January 2004. She applied for study grants in January 2009 and had thus in principle had 5 years of continuous stay in Denmark. Nevertheless, the Agency refused study grants on the grounds that she was registered as departed for Germany for a period of 7½ months during the 5 years in the National Register of Persons. She complained and argued that the reason for her being registered as departed was that she could not be registered in the National Register of Persons due to the fact that she had no accommodation in Copenhagen. She had actually lived in Copenhagen at friends and acquaintances, did study, did receive Danish study grants and had a registered postal address in Denmark. The Agency upheld its refusal referring to the Act on the National Register of Persons and to the Welfare Ministry having stated that persons can only be recorded in the National Register of Persons when they have a Danish residence.
In February 2009, the Board of Appeal reversed the decision on the grounds that notwithstanding the registration with the National Register of Persons, she had 5 years of continuous stay in Denmark

Case No. 28 (Section 67 (on EU/EEA citizens))
A German citizen had, according to his own information, stayed in Denmark for the period of August 2001 to September 2008 interrupted only by a few months in Germany in summer 2003. According to the National Register of Persons, however, he had been in Germany for a period of more than 1 year (from June 2003 to August 2004). The applicant applied for study grants from October 2008. The Agency refused the applicant study grants on the grounds that he did not have continuous stay for 5 years in Denmark according to the National Register of Persons. The applicant had attached his lease on a dorm in Aabenraa for the period of August 2003 to substantiate that he had resided in Denmark and not in Germany as registered in the National Register of Persons. The Agency upheld its refusal in a letter of March 2009 (and thus, 1 month after the Board's decision in Case No. 23).
The Board of Appeal reversed the decision, stating that regardless of the registration in the National Register of Persons it must be substantiated that the applicant had lived in Denmark again in August 2003.

Draft legislation, circulars, etc.
By Act No. 883 of 6 July 2011, *Aliens Act* Section 9c (6) on the issue of residence permits for students not being EU citizens was amended. The Act enters into force on 1 January 2012.

As conditions for the issue of residence permits with the purpose of studies, the Act authorizes the Integration Minister to adopt rules on requirements on proof of passing a language test *and* the opening of a blocked account containing an amount corresponding up to 1 year of State educational support.

According to the explanatory remarks of the Bill, the requirements will not be imposed on EU/EEA citizens. The explanatory remarks further refer to Art. 63 of the Treaty and state that the requirement will be administered in compliance with EU law.[249]

6. YOUNG WORKERS

Please see above Chapter VI.2 on sportsmen/sportswomen from which it appears that within certain areas of the Danish sporting sector, the concepts of *Home Grown players* and *training* or *education compensation* are applied. Most likely, the application within Danish foot-

249 Bill No. L 212, 2010/1 of 1 June 2011, general remarks para. 8. Also, it should be noted that the issuance of registration certificates to EU citizens being students is governed by the *EU Residence Order* Section 5, cf. *Aliens Act* Sections 2 and 6.

ball of the concept of Home Grown players in particular may de facto cause obstacles to the free movement of young sportspersons. It should be noted, however, that the consequence for not meeting the requirement on 8 Home Grown players does not seem to be of a severe nature for the club in question. This is due to the fact that the number of players on the first team, normally consisting of 25 players, is reduced correspondingly with the number of missing Home Grown players.

The Danish labour market terms of employment and salaries are generally governed by collective agreements reached by trade unions and employer associations or individual contracts rather than by legislation. Employers hiring an employee not being a member of the union the employer has reached an agreement with, must offer the employee employment under conditions comparable to those of the other employees hired by the employer.[250]

However, there are several labour market laws stipulating minimum requirements, such as the Act on *Working Environment,* the Act on *Holidays*, the Act on *Equal Treatment,* the Act on *Employment Contract* and the Act on *Allowance for Illness or Parental Leave*, etc.[251]

The Danish legislation on protection of young workers on the labour market makes a distinction between young workers comprised by compulsory education and young workers not comprised by compulsory education. The rules on compulsory education appear from the Act on *Primary and Lower Secondary Education* Chapter 5 ('Folkeskolen').[252] In brief, compulsory education ceases on the 31st July when the young person has received regularly teaching for 9 years, at the latest on the 31st July within the calendar year the young person turns 17 or has completed primary school or an education on equal footing with this.

The legislation on protection of young workers on the Danish labour market as described in the analytical note of August 2010 do not seem to cause obstacles to the free movement of young workers.

However, additional requirements on documentation seem to be imposed on minors. Thus, according to the Guidance on *Residence under the EU Residence to the Regional State Administration* para. I.1.1.3, EU citizens who are minors and who wish to be issued with a registration certificate as a worker (as opposed to as a family member) must present proof of/information must be obtained on

- the nature of the work
- with whom the EU citizen will reside during the stay in Denmark
- statement of income and expenses in connection with private accommodation
- original declaration of consent from the person(s) having parental rights and responsibilities.

250 See the web site of the Ministry of Employment at: http://uk.bm.dk/Themes/The%20Danish%20Labour%20Market.aspx accessed on 22 June 2011.

251 www.workindenmark.dk/Find%20information/Til%20arbejdstagere/Naar%20du%20arbejder%20i%20Danmark/Ansaettelsesforhold.aspx, accessed on 22 June 2011.

252 Consolidation Act No. 998 of 16 August 2010.

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
2. Transitional measures imposed on workers from Bulgaria and Romania

According to a political agreement of 4 December 2008, the transitional rules were to be abolished altogether. The Bill implementing that agreement was tabled before the Parliament on 25 February 2009,[253] adopted by the Parliament on 21 April 2009, and entered into force as of 1 May 2009.[254]

253 Bill No. L 141/2008-09.
254 Act No. 313 of 28 April 2009, amending the Aliens Act.

Chapter VIII: Miscellaneous

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

Both principled and practical aspects of the interaction of Regulation No. 1408/71 – and since 1 May 2010 Regulation No. 883/2004 as well – and Danish social welfare legislation seem to come increasingly into focus at various administrative levels, not least as far as the delimitation of benefits covered by the Regulation is concerned. As described in previous versions of the FMoW Report, the National Social Appeals Board ('Ankestyrelsen') has clarified the impact of Regulation No. 1408/71 in a number of important decisions in recent years.

Since the application of these Regulations does not really seem to fall within the scope of the FMoW Report, no detailed analysis or further update of this case law will be included in this version of the Report.

As an illustration of the delimitation between Regulation No. 1612/68 and Regulation No. 1408/71 it could be mentioned, however, that in one of the cases concerning social assistance to Danish citizens upon return from another Member State (see Chapter IV.2.1 for a general account) the National Social Appeals Board noted that Regulation No. 1408/71 does not apply to questions concerning social assistance under the Act on Active Social Policy, as this cash benefit does not belong to the category of social security covered by the Regulation. Since the applicant in this case was not considered to have acquired the status of worker upon return to Denmark, she was found not to be entitled to full social assistance in accordance with the EU exemption from the residence requirement, but only to the reduced cash benefit of the starting assistance.[255] While the Appeals Board's reasoning again here is based on the less relevant criterion of acquired status of worker in Denmark, the result may be more appropriate in this particular case due to the fact that the applicant had been a long-distance student at a Danish university, in receipt of Danish study grants, during her residence in another Member State. The more general impact of EU citizenship in connection with such residence was not considered, however, as the Appeals Board only focused on the possible status of worker under Regulation No. 1612/68.

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

As mentioned above Chapter VI.1, the Ministry of Refugee, Immigration and Integration Affairs states that *Hartmann* (C-212/05) concerns issues on social security under Regulation 1612/68 which, according to the Ministry, do not apply directly to the rules on rights of residence of EU citizens and their family members under Directive 2004/38. The Ministry further states that frontier workers residing in Denmark and working in their home country are

255 National Social Appeals Board, decision of 24 September 2009. Reported in No. 207-09.

considered to be persons of sufficient resources in terms of Directive 2004/38. As a justification of this, the Ministry refers to COM (2009) 313 p. 4.[256]

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

Pertaining to *language courses* and *introductory courses*, the Act on *Danish Courses for Adult Aliens et al.* and the Act *on Integration* were amended in 2011 to ensure compatibility with Directive 2004/38 Art. 25.[257] Also, in 2010, the Act on *Integration* was amended to comprise also EU citizens and their family members;[258] see more below.

According to the Act on *Danish Courses for Adult Aliens et al.* and the corresponding Executive Order, adult aliens with regular residence pursuant to the EU rules on free movement and with residence in the municipality may receive education by attending Danish courses etc. provided by the municipality, cf. the Act Section 2 (1) (ii).[259]

EU/EEA frontier workers have a right to Danish courses on terms equal to those issued with a residence permit and residing in Denmark, cf. Section 2a.[260]

Danish courses are cost-free for all aliens comprised by the Act, cf. Section 14.[261]

Further, a free vocational offer on Danish courses on the internet ('Online Dansk') is available for aliens, cf. Section 16a.

In addition, cost-free 'intro-Danish' i.e. Danish courses aiming at the Danish labour market for aliens above 18 residing in Denmark on a more temporary basis with the purpose of employment or encompassed by Section 2 a (frontier workers), is available. The offer of Intro-Danish applies to all aliens having ordinary employment, continuous lawful residence and a right to take up employment in Denmark, cf. Section 16b.[262]

According to the Act on *Integration*, EU citizens and their family members are – now – comprised by the Act, cf. Section 2 (4) (viii).[263] This means that EU citizens and their family members residing in Denmark on the basis of the EU rules on free movement are entitled to an introductory course offered by the municipalities pursuant to the Act Chapter 4a. The

256 Cf. email of 11 May 2010 from an official within the Ministry of Refugee, Immigration and Integration Affairs.

257 By Act No. 462 of 18 May 2011.

258 By Act No. 571 of 31 May 2010.

259 Consolidation Act No. 1010 of 16 August 2010 and the abovementioned amendment and Executive Order No. 779 of 29 June 2011. See also Guidance on *Danish Courses for Adult Aliens et al*. No. 9242 of 21 June 2011, 2.2.1.

260 The provision was adopted by Act No. 485 of 12 June 2009, described in detail in the previous report. See also Guidance on *Danish Courses for Adult Aliens et al*. No. 9242 of 21 June 2011, 2.2.5.

261 The provision was adopted by Act No. 485 of 12 June 2009, described in detail in the previous report.

262 Adopted by Act No. 1512 of 27 December 2009, described in detail in the previous report. See also Guidance on *Danish Courses for Adult Aliens et al.* No. 9242 of 21 June 2011, 7.

263 Consolidation Act No. 1062 of 20 August 2010. The group of people comprised by the Act on *Integration* was extended by Act No. 571 of 31 May 2010, amended by Act No. 462 of 18 May 2011.

introductory course comprises a Danish course, a course in the Danish society, culture and history and offers aiming at employment.[264]

Moreover, Section 24g provides the legal basis for the municipalities to offer support to companies establishing a special advice function to aliens residing on the basis of the EU rules on free movement (among others).

According to the Act amending the Act on *Danish Courses for Adult Aliens* and the Act on *Integration* in 2011, the provisions thus clarify EU citizens' entitlement to Danish courses and introductory courses on the basis of presenting evidence of the status as a worker etc. pursuant to the EU rules, as opposed to the previous requirements on presentation of registration certificate and registration in the Civil Registration System. Consequently, the explanatory remarks specifically refer to Directive 2004/38 Art. 25 as the basis for the amendment.[265]

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

In Danish immigration legislation and according to information obtained from the Ministry of Employment and the Ministry of Refugee, Immigration and Integration Affairs, there is a distinction between ordinary employment and highly qualified employment when deciding on the issue of residence permits for third-country nationals on the basis of employment.

Ordinary employment is characterized by the fact that the work may as well be performed by Danish or alien workers residing in Denmark or workers from the EU/EEA as by third-country nationals not residing in Denmark. In connection with applications on residence permits on the basis of employment, the Danish immigration authorities consult the regional councils on employment in case of doubt on whether there is available and qualified labour in Denmark and the EU/EEA countries within the professional area concerned. The occupational and commercial evaluation forms the basis of the processing of the case by the Ministry of Refugee, Immigration and Integration Affairs. For the issue of residence permits on the basis of employment, it is a condition that the work is of such special nature that the issue of residence permit is recommended. In general, residence permits are not issued for third-country nationals on the basis of unskilled work or ordinary skilled work.

As for highly-qualified employment, various schemes in *Aliens Act* Section 9a, such as the green card scheme, the positive list, the pay limit scheme and the corporate residence permit, ease the access for third-country nationals in obtaining residence permits on the basis of employment. When issuing residence permits on the basis of highly qualified employment, the Danish immigration authorities do *not* consult the regional councils on employment on whether there is available labour in the EU/EEA countries within the area concerned. Yet, the Danish authorities consider the Union preference principle as being complied with. The reasoning behind this view is the fact that EU citizens may enter and work without restrictions, whereas third-country nationals are subject to additional requirements, both administratively and materially.[266]

264 Cf. Section 24c and explanatory remarks to Bill No. L 149, 2010/1 of 23 February 2011, general remarks para. 2.6.

265 Explanatory remarks to Bill No. L 149, 2010/1 of 23 February 2011, general remarks paras. 2.6, 3.4, and 8 and specific remarks paras. 1.3, 1.5 and 2.1.

266 Cf. email of 28 May 2010 from an official within the Ministry of Employment.

It might be questioned whether the Union preference principle can be considered as being complied with solely on the basis of requirements imposed on third-country nationals.

3.3 Return of nationals to new EU Member States

Apart from some political debate on the possible establishment of 'transit rooms', there is nothing to report.

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

In Denmark, there is no establishment of specific bodies competent to deal with complaints of violation of Community Law. Hence, the complaints must be launched to the common bodies competent to deal with legal disputes, such as the courts, the sector specific complaint bodies, the administrative bodies and the Ombudsman.

5. SEMINARS, REPORTS AND ARTICLES[267]

Legislation (main)

Aliens Act: Consolidation Act No. 1061 of 18 August 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=133236

Acts amending *Aliens Act:*
- Act No. 463 of 18 May 2011, https://www.retsinformation.dk/Forms/R0710.aspx?id=137163 cf. Bill No. L 167, 2010-11 of 16 March 2011, https://www.retsinformation.dk/Forms/R0710.aspx?id=136187
- Act No. 758 of 29 June 2011, https://www.retsinformation.dk/Forms/R0710.aspx?id=137963, cf. Bill No. L 210, 2010-11 of 30 May 2011, https://www.retsinformation.dk/Forms/ R0710.aspx?id=137410
- Act No. 883 of 6 July 2011, https://www.retsinformation.dk/Forms/R0710.aspx?id=138039, cf. Bill No. L 212, 2010-2011 of 1 June 2011, https://www.retsinformation.dk/Forms/ R0710.aspx?id=137644

EU Residence Order: Executive Order No. 474 of 12 May 2011, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=137179

Act on *Active Social Policy*: Consolidation Act No. 946 of 1 October 2009, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=127214

267 All links provided in this Section have been accessed in July 2011.

Act on *Prohibition against Discrimination on the Labour Market:* Consolidation Act No. 1349 of 16 December 2008, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=122522

Act on *Civil Servants:* Consolidation Act No. 488 of 5 May 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=130606

Act on *Civil Servants' Pension:* Consolidation Act No. 489 of 6 May 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=130607

Act on *Pay-as-you-earn Taxation:* Consolidation Act No. 1403 of 7 December 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=134306

Act amending the Act on *Pay-as-you-earn Taxation:*

- Act No. 1565 of 21 December 2010, https://www.retsinformation.dk/Forms/R0710.aspx?id=135249, cf. Bill No. L 81, 2010/1 of 17 November 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=134305

Planning Act: Consolidation Act No. 937 of 24 September 2009, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=127131

Act on *the Danish International Register of Shipping:* Consolidation Act No. 273 of 11 April 1997, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=84441

Acts amending Act on Act on the *Danish International Register of Shipping*:

- Act No. 214 of 24 March 2009, https://www.retsinformation.dk/Forms/R0710.aspx?id=123994, cf. Bill No. L 83, 2008/1 of 3 December 2008, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=121595

Act *on the State Educational Grant and Loan Scheme* ('SU-loven'): Consolidation Act No. 661 of 29 June 2009, https://www.retsinformation.dk/Forms/R0710.aspx?id=125699

Act amending Act on the State Educational Grant and Loan Scheme:

- Act No. 416 of 6 June 2002, https://www.retsinformation.dk/Forms/R0710.aspx?id=23944, cf. Bill No. L 177, 2001/2 of 20 March 2002, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=90994

Executive Order *on the State Educational Grant and Loan Scheme* ('SU-bekendtgørelsen'): Executive Order No. 455 of 8 June 2009, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=125363

Act on *Danish Courses for Adult Aliens et al.:* Consolidation Act No. 1010 of 16 August 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=133131

Act amending Act on Danish Courses for Adult Aliens et al.:

- Act No. 462 of 18 May 2011, https://www.retsinformation.dk/Forms/R0710.aspx?id=137162, cf. Bill No. L 149, 2010/1 of 23 February 2011, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=135954

Act *on Integration:* Consolidation Act No. 1062 of 20 August 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=133194

Acts amending Act *on Integration:*

- Act No. 462 of 18 May 2011, https://www.retsinformation.dk/Forms/R0710.aspx?id=137162, cf. Bill No. L 149, 2010/1 of 23 February 2011, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=135954
- Act No. 571 of 31 May 2010, https://www.retsinformation.dk/Forms/R0710.aspx?id=132119, cf. Bill No. L 187, 2009/1 of 26 March 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=130973

Act on *Unemployment Insurance etc.:* Consolidation Act No. 838 of 4 July 2011, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=137825

Executive Order on *Unemployment Insurance for Workers within EEA and Additional Countries:* Executive Order No. 470 of 29 April 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=131665

Circulars

The Integration Ministry's Memorandum on *the Access to Expulsion and Refusal of EU/EEA Citizens on Grounds of Destitution or Considerations on Public Order* of 30 June 2011, available at http://www.nyidanmark.dk/NR/rdonlyres/61DCE98A-7FA0-4D6A-8CB5-D9627B444428/0/notat_om_adgangen_til_ud_og_afvisning_af_eu_eos_statsborgere_30062011.pdf

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Guidance on *Residence under the EU Residence Order to the Regional State Administration* issued by the Danish Immigration Service to the Regional State Administration, published on 25 May 2009, available at www.nyidanmark.dk/NR/rdonlyres/BB2D02FD-6E1F-4E09-878A-C059BF80ED54/0/vejledning_til_statsforvaltningerne_vedr_ophold_efter_eu_opholdsbekendtgoerelsen.pdf

Guidance to *Section 12 a in the Act on Active Social Policy etc.* No. 33 of 4 May 2004, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=30071

Guidance on *EU/EEA Citizen's Access to Social Security and Starting Assistance* No. 19 of 4 April 2008, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=115636

Guidance on *Executive Order on Unemployment Insurance for Workers within EEA and Additional Countries* No. 36 of 29 April 2010, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=131666

Guidance on *Personnel Administration*, June 2011, issued by the State Employers' Authority, an agency within the Ministry of Finance, to public employers, available at www.pav.perst.dk

Guidance on *Danish Courses for Adult Aliens et al.* No. 9242 of 21 June 2011, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=137817

Circular 210 of 11 December 2000, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=5181

Circular No. 9111 of 15 April 2011, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=136871

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Ombudsman inquiries

Inquiry of the Practice of the Board of Appeal for Danish Educational Support within Selected Areas, 2008-3784-980, www.ombudsmanden.dk/sager/egen_drift/projekter/Undersoegelse_af_Ankenaevnet_for_Uddannelsesstoettens_praksis_inden_for_udvalgte_omraader/

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- *Skatteværn og EU-frihed: Værnsregler i dansk skatteret konfronteret med fællesskabsrettens frihedsrettigheder som dynamisk udviklet af EF-domstolen* by Thomas Rønfeldt, 1st edition, 1st print, Copenhagen 2010
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Working paper from the *Blurring Boundaries project* which was undertaken at the Law Department, Copenhagen Business School, in the period from 2007 to 2009. It looks at the sustainability of the Danish welfare state in an EU law context and on the integration of welfare functions into EU law both from an internal market law and a constitutional law perspective. The main problem areas covered by the Blurring Boundaries project were studied in sub-projects on: 1) Internal market law and welfare services, 2) Fundamental rights and non-discrimination law aspects, and 3) Services of general interest, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618758; 3 conferences were held within the project in 2009.

Research project within 'EU Labour Law' at CBS in cooperation with 8 other research institutes in the Nordic countries, available at http://www.cbs.dk/Forskning/Institutter-centre/Institutter/LAW/Menu/Forskningsprojekter#BB1

As part of the cooperation, the newsletter 'EU and Labour Law' (EU & Arbetsrätt') is published, available at http://arbetsratt.juridicum.su.se/euarb/10-1/default.asp

Seminar on 9 February 2010 at CBS: 'Do attitudes towards immigrants matter?'

Associate Professor Birthe Larsen, Department of Economics – CBS, presented research on the consequences of negative attitudes towards immigrants' welfare based on regional variation in negative attitudes towards immigrants to Sweden.Arranged by the Interdepartmental Research Group on Diversity and Discrimination at CBS, available at http://www.cbs.dk/Forskning/Institutter-centre/Institutter/LAW/Menu/Seminarer

Seminar on 'Roma, expulsions and EU Law' ('Romaer, udvisninger og EU-ret') on 3 December 2010 at University of Copenhagen by WELMA (Legal Studies in Welfare and EU Market Integration) and the course in EU Law, available at http://jura.ku.dk/welma/kalender/kalender_gammel/roma_seminar/

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Research project 'The free movement of workers in a Nordic perspective' (Arbejdskraftens fri bevægelighed i et nordisk perspektiv') by Martin Gräs Lind at Centre for International Business Law, Aarhus University, available at http://pure.au.dk/portal/da/projects/arbejdskraftens-frie-bevaegelighed-i-nordiskperspektiv(2800b5f7-fb3b-4e3a-899d-a6df43e2f5b9).html.

Chapter IX: Follow-up of case law of the Court of Justice

C-138/02 Collins, C-456/02 Trojani, C-22/08 and C-2/08 Vatsouras and Koupatantze

As mentioned in Chapter IV.2 of the Report, in particular two provisions of the Act on Active Social Policy[268] should be considered in the light of these judgments. According to Section 12 a, EU/EEA citizens residing in Denmark as *first-time jobseekers* on the basis of Community law, as well as persons with a right to stay until 3 months without administrative formalities, are entitled to no other economic assistance than coverage of costs related to the return to their home country. Furthermore, Section 3 (2) of the Act makes it a precondition for entitlement to *benefits of longer duration* – defined as more than half a year, cf. Section 3 (3) – that the recipient be either a Danish citizen or an EU citizen or a family member who has a right of residence under EU law, or have such entitlement under an international agreement.

The decisive question is whether these provisions are administered on the basis of a correct understanding of the EU rules on residence right, in particular the criteria for acquiring the *status of worker* and the delimitation of the category of 'first-time jobseekers'. If so, this legislation should not give rise to violations of Arts. 24 (2) or 27 of Directive 2004/38 or of Art. 7 (2) of Regulation No. 1612/68. Against the background of these CJEU judgments there would seem to be situations in which certain benefits under the Act on Active Social Policy could be considered as facilitating access to employment, so that extensive application of Section 12 a on the basis of a wide understanding of 'first-time jobseekers', resulting in refused applications for social assistance, might not be compatible with EU law.

According to the National Labour Market Authority ('Arbejdsmarkedsstyrelsen'), the Danish authorities have analysed the impact of the *Vatsouras and Koupatantze* judgment and reached the conclusion that it will not necessitate any modifications of the Danish social assistance system, and therefore no amendment of Section 12 a of the Act on Active Social Policy is foreseen. As part of their assessment the Danish authorities have been in contact with the German authorities who informed them that the CJEU judgment did not cause any changes of German legislation or practice concerning the SG II benefit in issue in the case that gave rise to the judgment. As regards social assistance ('kontanthjælp') under the Act on Active Social Policy, the National Labour Market Authority holds that this benefit must likewise be considered as 'social assistance' within the meaning of Art. 24 (2) of Directive 2004/38.[269]

While it falls outside the scope of this Report to analyse this ministerial assessment in detail, it appears to be appropriate as far as the general social assistance system under the Act on Active Social Policy is concerned. Thus, provided that Section 12 a of the Act is applied exclusively to genuine 'first-time jobseekers', this provision does not affect those jobseekers having established 'real links with the labour market' in Denmark. At the same time, it should be mentioned that certain benefits under the Act on Active Social Policy, or under related legislation providing for activation measures for unemployed persons, may be con-

268 Consolidation Act No. 946 of 1 October 2009.

269 Memorandum on the *Vatsouras* judgment and its possible consequences for the social assistance system, prepared by the National Labour Market Authority, received by email of 4 August 2011 from the Ministry of Employment.

sidered as facilitating access to employment in the Danish labour market, cf. *Vatsouras and Koupatantze* paras. 37-43, and may therefore be accessible also to EU jobseekers who established such links.

As the impact of the abovementioned CJEU judgments on the application of the Act on Active Social Policy has apparently not yet been considered in cases decided by the National Social Appeals Board, there may be need for clarification towards the municipalities in charge of the administration of the Act.

C-212/05 Hartmann

As mentioned in Chapter VI.1 of the Report, the Ministry of Refugee, Immigration and Integration Affairs considers the case to concern issues of social security under Regulation 1612/68 which, according to the Ministry, do not apply directly to the rules concerning rights of residence of EU citizens and their family members under Directive 2004/38. The Ministry further states that frontier workers residing in Denmark and working in their home country are considered to be persons of sufficient resources in terms of Directive 2004/38. As a justification of this, the Ministry refers to COM (2009) 313 p. 4.[270] There appear to be no cases or other information suggesting that this assessment of the judgment should not be appropriate.[271]

C-287/05 Hendrix

According to the Ministry of Employment, the judgment in *Hendrix* did not require any changes to Danish legislation.[272] There appear to be no cases or other information suggesting that this assessment of the judgment should not be appropriate.

C-1/05 Jia, C-127/08 Metock

While the *Jia* judgment had limited influence on Danish practice concerning residence right for third-country family members, given that the requirement of previous lawful residence in an EU/EEA Member State had been introduced against the background of the *Akrich* judgment, the *Metock* judgment resulted in significant change of administrative practice. In addi-

270 Cf. email of 11 May 2010 from an official within the Ministry of Refugee, Immigration and Integration Affairs.

271 It should be noted, however, that while the Ministry is right in assuming that *Hartmann* concerns social security issues in the operative part 2 of the judgment (paras. 21-38), the operative part 1 of the judgment (paras. 15-20) concerns the concept of 'migrant worker' and whether a frontier worker can claim the status of migrant worker for the purposes of Regulation No. 1612/68. Given the fact that Art. 39 EC (Art. 45 TFEU) is the primary legislation on the free movement of workers, and Regulation 1612/68 (as well as Directive 2004/38) is secondary legislation, and as the judgment rules on whether the situation of a frontier worker such as Mr. Hartmann falls within the scope of the Treaty on the freedom of movement for workers (paras. 17 and 19), the operative Part 1 of the judgment is also of relevance to EU citizens and their family members under Directive 2004/38. This is caused by the fact that while Directive 2004/38 covers all EU citizens, workers enjoy a more beneficial status under the Directive, yet making the concept of 'migrant worker' relevant.

272 Cf. email of 15 July 2009 from an official within the Ministry of Employment.

tion to abolishing the requirement of previous lawful residence, the *personal scope* of application of the EU rules concerning residence right for third-country spouses of Danish citizens was widened (see Chapter II.1 of the Report).

At the same time various measures were taken to *prevent abuse* of the EU rules on residence rights, in particular those concerning third-country national spouses.[273] As regards Danish citizens returning from another Member State, it is stipulated that the principal person applying for registration certificate or residence card for family members must declare to have established *genuine and effective residence* in the host country. If there are reasons to assume that this is or was not the case, the Danish citizen is required to submit evidence of the residence established in the other Member State. A non-exhaustive list of possible documentation has been laid down in administrative guidelines,[274] and in principle the requirement should not become unreasonable or insurmountable. In practice, however, in some cases forms of documentation appear be requested that can be difficult to meet (see Chapter II.3 of the Report).

C-291/05 Eind

Whereas past administrative practice concerning residence right for third-country family members required that the Danish citizen be *economically active* upon return to Denmark, or returning to Denmark for retirement upon such activity in the host Member State, this requirement was modified as a result of the *Eind* judgment. According to the amended guidelines, the returning Danish citizen will be entitled to bring his or her family back to Denmark even if he or she is not employed or carrying out other economic activity at the time of return from abroad.[275]

In respect of other legislative matters, the judgment does not appear to have been taken into account. Thus, despite an exemption expressly referring to EU law, the residence requirement under the Act on Active Social Policy is interpreted by the National Social Appeals Board so as to require that Danish citizens, in order to invoke this exemption, must have *acquired the status of worker* in Denmark upon return from another Member State, regardless of their past EU residence in the host country. As it results in significantly reduced social cash benefits, this interpretation and application of the residence requirement in Danish legislation raises further issues of reverse discrimination contrary to EU law (see Chapter IV.2.1 of the Report).

C-527/06 Renneberg

According to information obtained from the Ministry of Taxation, the CJEU judgement in *Renneberg* did not require any changes to Danish tax legislation, as the rules on frontier

273 Cf. Sections 22, 23 and 26 of the EU Residence Order.

274 Internal guidelines on the processing of applications for family reunification under the EU rules where the principal person is a Danish citizen, Danish Immigration Service, Family Reunification Information No. 5/10, 1 July 2010, para. 4.1.4.

275 Press release of 15 January 2008 from the Ministry of Refugee, Immigration and Integration Affairs. and memorandum of 10 April 2008 from the Ministry of Refugee, Immigration and Integration Affairs.

workers introduced in Danish legislation upon the CJEU judgement in *Schumacker,*[276] such as the Act on *Pay-as-you-earn Taxation* ('Kildeskatteloven') Section 5 B,[277] allows tax relief in situations similar to the situation in *Renneberg* (cf. Chapter VI.1. of the Report).[278]

There appear to be no cases or other information suggesting that this assessment of the judgment should not be appropriate.

C-94/07 Raccianelli

According to information obtained from the Ministry of Employment, the judgment in *Raccianelli* did not require any changes to Danish legislation. The reasoning behind this is that the general rules on interpretation of the concept of workers apply, as no rules on the interpretation of the concept of worker apply specifically to researchers and artists (cf. Chapter VI.4 of the Report).[279]

There appear to be no cases or other information suggesting that this assessment of the judgment should not be appropriate.

C-310/08 Ibrahim, C-480/08 Teixeira

These recent judgments have resulted in adjustment of administrative practice concerning residence right for children in education as well as the parent having actual custody. The adjustment may also impact the derived residence right of third-country spouses of Danish citizens upon return from another Member State.[280] The precise scope of the adjustment does not seem to have been officially clarified, just as the criteria for reconsideration of applications rejected under the past practice appear less than clear.[281]

It should be noted that Section 14 (4) of the EU Residence Order already provides for the residence right of the child and the parent in such situations. Against this background, the adjustment might seem to affect primarily the issue of requirements of sufficient resources. Furthermore, the judgments may have to be taken into account in the administration of Sections 3 and 12 a of the Act on Active Social Policy (see above, and Chapter IV.2.2 of the Report).

Bressol (C-73/08)

There is currently no information available on possible developments.

276 CJEU judgment of 14 February 1995 *Schumacker* (C-279/93).
277 Consolidation Act No. 1086 of 14 November 2005 and amendments.
278 Cf. email from an official within the Danish Ministry of Taxation of 9 July 2009.
279 Cf. email of 15 July 2009 from an official within the Ministry of Employment.
280 News release of 7 May 2010 from the Danish Immigration Service and the Ministry of Refugee, Immigration and Integration Affairs.
281 Memorandum of 3 May 2010 from the Ministry of Refugee, Immigration and Integration Affairs.

Zambrano (C-34/09)

According to the Ministry of Refugee, Immigration and Integration Affairs, the CJEU judgment will only in exceptional cases necessitate the issuance of a residence permit under EU law in Denmark, since children as a general rule only obtain Danish citizenship at birth if at least one of the parents is a Danish citizen.[282] This assessment reflects the view that the judgment is based on the assumption that residence right under EU law should be granted to a third-country national having a minor child being a Union citizen, only in case the minor child is dependent on the third-country parent, and they are residing in the Member State of which the child is a citizen.

Thus, the Ministry assumes that residence right under EU law will only have to be granted in such situations where the third-country national is the only parent on whom the minor child is dependent, and there is no other parent residing in the Member State who is capable of taking care of the child. In other words, the minor child will only have to be considered as deprived of the genuine enjoyment of the substance of the rights attaching to his or her status of Union citizen, if refusal of residence to the third-country parent would in effect require the child to follow the parent to his or country of origin.

282 Memorandum of 11 May 2011 from the Ministry of Refugee, Immigration and Integration Affairs.