

**REPORT**  
**on the Free Movement of Workers**  
**in Poland in 2010-2011**

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October 2011

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## Introduction

From the last Report, 4 major achievements and developments shall be mentioned, however, all of them are connected with year 2011.

1. The Act on entry that implements Directive 2004/38 has been amended and new provision which directly implements the Ibrahim and Teixeira judgment has been added (the analysis of this amendment is in Chapter II – Members of the family, point 5 – access to work). In the explanation to the draft of the Act, the direct reference to this CJEU judgment has been made as a sole reason to include new art. 19a. Additionally, the amendment repealed the obligation to pay for residence cards as a consequence of an amendment to Act on evidence which repeals such an obligation in respect to Polish citizens. Lastly, the provision on expulsion has been changed since the previous provision caused misinterpretations of the relevant authorities. There is now a clear provision which states that expulsion decision shall oblige EU citizen or his/her family members who are third country nationals to leave the territory of the Republic of Poland within the period no longer than 31 days. However, if national defence, national security or public security and order so require, expulsion decision may order that they shall be transported under escort to the border of Poland, or to the border of the country to which he/she is expelled, or to the airport or marine port of such country and such a decision may not precise the date of its execution or may indicate the date of its execution shorter than 31 days.

2. Additionally as from May 1, 2011 Germany and Austria have opened their labour markets for Polish citizens. The majority of available estimates show that around 100 000 Polish citizens will migrate to either Germany or Austria every year. Experts also highlight that probably many Polish citizens who until May 1, 2011 stayed in these countries illegally, will decide to legalize their hitherto illegal stay. Of course it is now too early to predict the impact on Polish labour market of opening German and Austrian labour markets.

3. There is a visible trend in Poland to thoroughly tackle the issue of migrants from third country nationals (other than family members of EU citizens). Therefore the important document ‘Migration Policy for Poland’ has been prepared by experts appointed by Minister of Administration and Internal Affairs. The document not only analyses current state-of-play, but also proposes future legislative solutions. The further analysis of the Policy is made in Chapter VIII – Miscellaneous, point 3.2 Immigration policies for third-country nationals and the Union preference principle. In line with this new strategy towards third country nationals, on June 22, 2011 the Government accepted drafts of several acts concerning third country nationals, which main aim is to legalize and facilitate stay of these foreigners (in the form of abolition) in Poland.

4. On July 1, 2011 for the first time the Polish Presidency has been launched. It is an important political and social event for Poland which aim is to use this half-year period to strengthen its political position in EU. However, analyses of governmental strategies and aims connected with Polish Presidency leads to conclusion that the issues of migrating EU citizens is not on high political agenda for the forthcoming 6 months.

5. Lastly, still there is a low level of EU migrants that choose Poland as their destination countries. Poland is the most popular country for citizens from Eastern Europe – mainly Ukraine and Belarus, however, also citizens from Vietnam or China chose Poland and its destination country.

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

### *Main texts in force:*

1. Act on entry into, residence in and exit from the Republic of Poland of nationals of the European Union Members and their family members of July 14, 2006 that implements Directive 2004/38,
2. Act on Higher Education of July 27, 2005,
3. Act on promotion of employment and labour institutions of April 20, 2004,
4. Act on evidence of people of September 24, 2010.

### 1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

The Act of July, 14 2006 on entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members (ustawa o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin, hereinafter: ‘the Act on entry’),<sup>1</sup> is the main act that implements provisions of Directive 2004/38 into Polish legal order.

Below transposition of each of provisions listed in the table of contents will be analysed:

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

According to Article 16.1.1 of the Act on entry, employees and self-employed individuals are entitled to stay in Poland for a period longer than 3 months. In order to register and lawfully reside an applicant – economically active EU citizen shall proof that he/she is employer or self-employed person. According to the Regulation of Minister of Administration and Internal Affairs of August 24, 2006 on applications and documents on the right of stay at the territory of Poland of EU citizens and members of their families (rozporządzenie Ministra Administracji i Spraw Wewnętrznych w sprawie wniosków i dokumentów w sprawach pobytu na terytorium Rzeczypospolitej obywateli Unii Europejskiej i członków ich rodzin),<sup>2</sup> employers and self-employed persons shall submit written declarations of employer or entitled entity either confirming the fact of being employed or eagerness to employ the applicant or copy of entry into the National Court Register, if separate regulations require such entry into the register, or a certificate of entry into the records of economic activity (in case of self-employed applicant).

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

Moreover, analysis of applications that shall be filled in order to register for stay according to templates issued in the Regulation requires such data as names of parents, PESEL number (if applicable), height, special marks, colour of eyes.

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<sup>1</sup> *Journal of Laws* of 2006, no. 144, item 1043.

<sup>2</sup> *Journal of Laws* of 2006, no. 154, item 1105.

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

Art. 17 of the Act on entry implements art. 7 (3 a-d) of the Directive. According to this provision, EU citizen who is no longer employed or does not undertake self-employment any more shall keep the rights of employees and self-employed persons in following cases:

1. where he/she does not undertake employment or any other gainful activity in his/her own name and on his/her own behalf because he/she is temporarily unable to work as the result of an illness or accident;
2. where he/she is in duly recorded involuntary unemployment in accordance with the unemployment register kept by the Poviast Employment Office;
3. where he/she embarks on education or vocational training.

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

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

As regards an expulsion from the territory of Poland of employed EU citizens or those EU citizens that have entered territory of Poland in order to seek employment, the Act on entry concerns only cases where an expulsion decision is taken when an individual behaviour constitutes a threat for defence policy or national security, as well as for public safety, public order or public health (Part V of the Act on entry). The Act on entry does not contain provisions specifically implementing Art. 14 (4a-b) of the Directive 2004/38. Art. 70 of the Act on entry lists circumstances that shall be taken into consideration when issuing decision on expulsion. These circumstances are as following: previous period of residence at the territory of the Republic of Poland, age and state of health, family and economic situation, social and cultural integration with the country of stay and links with the country of origin.

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

As was analysed in the Report 2010, in Poland the rule is that until obtaining the right to permanent stay, students and EU jobseekers are excluded from the general rule of equal treatment as regards access to social assistance. Maintenance aid during studies for economically inactive EU citizens and members of their families are excluded according to Article 43 para 5 of the Act of July 27, 2005 on Higher Education (*Ustawa o szkolnictwie wyższym*).<sup>3</sup> This provision states that EU citizens and members of their families (as well as citizens of Switzerland and European Economic Area Member states), that are not economically active, but possess sufficient resources for maintenance during studies, shall have a right to study at the territory of Poland on the same rules as are applicable to Polish citizens. However, they shall not have a right to social assistance – i.e. maintenance aid for students, special maintenance aid for disabled, accommodation grant, meals grant and aid payment. This provision implements the wording of Art. 24 para 2 of the Directive 2004/38.

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3 *Journal of Laws* of 2005, no. 164, item 1365.

## 2. SITUATION OF JOBSEEKERS

There are no special provisions concerning jobseekers in the Act on entry. Jobseekers are covered by general rules according to which, periods of stay of EU citizen or members of his family up to 3 months are not subjected to any requirements other than requirement to possess valid identity card or passport (and in case of third country national visa where necessary).

There is still in force Art. 16.2 of the Act on entry that is not currently applicable. According to this provision, if the purpose of residence in Poland is to undertake gainful employment, EU citizen against whom the limitations in the access to labour market apply pursuant to international agreements shall be granted the right to reside for a period longer than three months after obtaining a promise of employment permit in that territory. However, as Poland does not make use of any transitional measures, there are no such limitations to access to employment for EU citizens. As regards Art. 14.4.b of the Directive 2004/38, it has to be emphasized that Act on entry does not contain any provisions that directly relate to this provision. Conditions to be expelled from the territory of Poland are collectively described in Chapter 5 of the Act on entry. EU citizens may receive an expulsion decision in the case when their territory constitutes a threat for defense policy or national security as well as for public safety, public order or public health. The state of play in this regard has not changed since last Report.

The status of jobseeker according to Act of April 2004, 20 on promotion employment and labour institutions (*ustawa o promocji zatrudnienia i instytucjach rynku pracy*),<sup>4</sup> does not entitle to receive any financial benefits. Only those who qualify for the status of unemployed, i.e. those who have worked out a certain period (generally period of 365 days within the last preceding 18 months) and are eager to take up further employment shall be qualified to receive unemployment benefit. Jobseeker, who has not fulfilled this requirement, after registering in the relevant Poviát Office, shall be entitled to non-financial forms of support, such as in general assistance to find a job or to attend various workshops and vocational trainings that aim at raising his qualifications in order to find a job. No financial assistance can be granted. Therefore only those having a status of unemployed and seeking for a job may receive financial assistance. A jobseeker may be deprived a status of jobseeker for a period of 120 days if inter alia he/she does not confirm within period of 90 days the eagerness to look for a job. Additional cases which causes lost of jobseeker status are as follows: a jobseeker has not attended meeting organized by Poviát Employment Office and has not informed the Office about justified reasons of the absence; he/she has not taken up or resign from taking part in individual plan of activation, training, postmaster studies (as regulated in this Act), vocational training or special programme or has not taken an exam aiming at gaining additional competences. In such a case, as a condition to prove a real possibility to take up employment, as stated in Art. 14.4.b in the Directive 2004/38 is not fulfilled, therefore such an individual may not demand any facilities at the territory of Poland stemming from the status of person looking for employment.

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4 *Journal of Laws* of 2008, no. 69, item 415.

As regards the definition of unemployed and jobseeker, there is an important difference. Definition of jobseeker covers also family members of EU citizens, whereas definition of unemployed does not cover family members of EU citizens. According to Art. 2.1.8 of the Act, the member of family shall cover a spouse of inter alia EU citizen or also Polish citizen as well as descendants of Polish citizen or foreigner who is under 21 years old or are dependants. The definition does not cover dependant direct relatives in the ascending line.

There are several explanatory memoranda and administrative guidelines, especially on web pages of each Poviats Employment Office. There are plenty practical issues concerning jobseekers and unemployed status as well as scope of rights and duties and ways of executing them. Also the differences between unemployed who searches for a job and jobseeker who has not fulfilled requirements to be granted also a status of unemployed and in consequence the right to receive financial support are explained in such documents.

Finally it shall be underlined, that as regards obtaining status of unemployed and jobseeker, that are no discrimination provisions between Polish citizens and EU citizens. If both categories of individuals fulfill requirements that are applicable to either unemployed or jobseeker, then all these categories of applicants shall be granted relevant status, irrespective of nationality. Additionally as regards employment agencies which shall provide support for inter alia jobseekers in the form of job brokerage, personnel consultancy and occupational guidance, art. 19c of the Act of promotion clearly states that they shall not discriminate persons for whom they seek employment or other paid work on ground of sex, age, disability, race, religion, ethnic origin, nationality, sexual orientation, political views, religious persuasion or trade union membership.

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

### 3. OTHER ISSUES OF CONCERN

The new Act of September 24, 2010 on evidence of people (ustawa o ewidencji ludności) will enter into force on August 1, 2011.<sup>5</sup> Chapter V of the Act concern the issue of the obligation of registration in Poland by foreigners, including EU citizens and members of their families. It shall be underlined that the term of registration as defined in the Act (in Polish ‘obowiązek meldunkowy’) is a different institution than the term of registration within the meaning in the Act on entry and Directive 2004/38 (in Polish ‘rejestracja’). Art. 41 of the Act on evidence requires from EU citizens and members of their families to register its place of residence (i.e. in the place where they permanently or temporary stay) not later than after 30 days from the day of arrival to Poland. But according to art. 6 of the Directive, the right to stay for a period up to three months shall be granted to both EU citizens and members of their families without the need to fulfill any requirements other than obligation to hold valid identity card or passport (for EU citizens) and passport (for non EU citizens). However, art. 5.5 of the Directive entitles Member States to require from these individuals to report their stay in Member States within a reasonable period, but it shall be understood as being applicable in cases of stay longer than 3 months. This interpretation is based on Art. 8.1 of the Directive, which refers to Art. 5.5 and which lists requirements concerning the stay at the

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5 *Journal of Laws* of 2010, no 217, item 1427.

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territory of Member State, but solely for a period longer than 3 months. Art. 8.1 requires to register with relevant authorities, however, this registration is a different institution that obligation to register according to the Act on evidence. The Art. 8.1 has been implemented in the Act on entry in Art. 20 which states that if the residence in the territory of the Republic of Poland lasts for more than 3 months, the Union citizen shall be obliged to register his/her residence and the family member who is not a Union citizen shall be obliged to obtain the Union citizen family member residence card.

Therefore the obligation to register (in the meaning of ‘obowiązek meldunkowy’) according to the Act on evidence not later than within 30 days from the day of arrival to Poland may be treated as incompatible with EU law. Consequently this period of 30 days from the day of arrival shall be changed at least into the period of 3 months, after which there are according to the Directive, certain requirements as regards registration of EU citizens and members of their families.

As regards on the other hand, the compatibility with EU law the obligation of registration within the meaning of Polish ‘obowiązek meldunkowy’ and not ‘rejestracja’, it can also raise some doubts as to conformity with Directive 2004/38. Art. 8 and 9 list requirements that are necessary in order to register the stay of both EU citizens and members of their families. Within these requirements there is no obligation to register within the meaning of ‘obowiązek meldunkowy’. However, on the other hand it is possible to explain such a requirement in the light of Art. 5.5 of the Directive, which entitles Member States to require incomers to ‘report’ their stay. The meaning of this ‘report’ of stay in the light of the wording of Art. 8.1 of the Directive which refers to this Art. 5.5 may be understood as possibility to ‘report’ the stay for the purposes of evidence of registration within the meaning of ‘obowiązek meldunkowy’. The best solution, however, would be to require from EU citizens and members of their families just to indicate in the relevant application form their place of stay, without the need to formally register within the meaning of ‘obowiązek meldunkowy’ according to Act on evidence.

Also in this part of Report it is worth to show the scale of migration to Poland of EU citizens in 2010. As can be seen, the level of migration is not significant.

NATIONALITY	applications	decisions
	6 405	6 871
including most popular:		
GERMANY	1 771	1 825
ITALY	527	611
UNITED KINGDOM	520	591
FRANCE	494	541
BULGARIA	407	441
<b>TOTAL:</b>	<b>3 719</b>	<b>4 009</b>

According to information obtained from Polish authorities, the main reason of issuing negative decisions for EU citizens is lack of required documents that shall accompany an application for stay.

In comparison, below there is a list of the most popular third country nationals who applied in 2010 for a stay for a temporary period in Poland:

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NATIONALITY	Applications	permissions
	35 514	30 726
including most popular		
UKRAINE	9 844	8 477
VIETNAM	2594	2243
BELARUS	2442	2274
CHINA	2542	2260
ARMENIA	1437	1166
<b>TOTAL:</b>	<b>18 859</b>	<b>16 420</b>

***Opening of labour markets for Polish citizens in Germany and Austria:***

Germany and Austria opened their labour market for Polish citizens in May 2011, making use of whole permissible transitional period. Due to this fact, there have been many analysis on the possible impact on migration of Polish citizens to these countries. All available prognosis predict that around 100 000 Polish citizens will migrate to either Germany or Austria every year due to open labour market. Experts highlight that also many Polish people who until May 1, 2011 stayed in these countries illegally, will decide to legalize their hitherto illegal stay. Surely, a very important factor that will influence the scale of migration is proximity to Poland of these two countries. This shall be seen especially in provinces directly neighbouring with Germany. Additionally, there are strong migration traditions in Poland to work in Germany and Austria. The hindrance for making use of open labour market may be lack of knowledge German language. Enough to mention that participation of Polish citizens in the overall amount of foreign seasonal workers in Germany was in 2009 at the level of 64% in comparison with 70% in 2008. However, statistics show that there is a need for Germany to have high skilled migrant workers in such sectors as IT, medicine or various constructions rather than low skilled migrant workers. The substantial difference in salaries especially in the medicine sector may make it attractive for Polish doctors to move to Germany or Austria. However, as the labour market has been entirely opened since May 2011, there have been no statistics so far.

**4. FREE MOVEMENT OF ROMA WORKERS**

There is a growing awareness of the problem with Roma minority in Poland from the perspective of Polish government. The situation of Roma population not only in Poland, but also globally in the EU is one of the important issues for Polish presidency in EU as from 1 July. Poland would like to share with other EU Member States with its experience regarding integration of Roma population that is undertaken in the Governmental Programme on Roma society in Poland. There is also a joint Committee of Government and National and Ethnic Minorities where there is a special subcommittee devoted solely to Roma issues and which regularly meets (on monthly basis) to discuss the most important issues concerning Roma population in Poland.

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It is estimated that there are around 30 000 Roma representatives that live in Poland (according to last national census of population that took place in 2002 there were 13 000 of them; as in 2011 the new census will be published these figures will surely be amended).

The Roma community is regarded in Poland as one of national and ethnic minorities according to the Act of January 6, 2005 on National and Ethnic Minorities and Regional Language (ustawa o mniejszościach narodowych i etnicznych oraz o językach regionalnych)<sup>6</sup> and Poland shall give them full legal protection and assistance. The main element of support to the Roma community was adopted by resolution of the Council of Ministers of August 19, 2003 on introduction of the Programme for the Roma community in Poland. The program has been implemented for the period 2004-2013 with the possibility to continue it in subsequent years. The priority is given to education. Moreover the Programme includes tasks aiming at combating unemployment, guaranteeing security, supporting culture and disseminating of knowledge about the Roma community in Poland. Every year more than 10 million PLN (circa 2,5 million EUR) is devoted to the Programme.

Additionally there is a special activity within Human Capital Programme (that is funded by EU funds) solely devoted to Roma issue. These priorities of the Human Capital Programme are connected with identification of main problems of the Roma community in Poland (which are probably also similar in other Member States) such as: a very low level of education, poor material situation, very high unemployment rate, lack in social integration with Polish citizens, health problems. Additionally there are plenty of negative stereotypes of Polish citizens concerning Roma community. The most serious problem is the very low level of education of Roma community. The most important needs of the Roma community in education include, among others improvement of education among the Roma people, by increasing the rate of participation of Roma children in primary and secondary schools as well as to make incentives for them to continue further education. It shall stop the increasing number of unemployed Roma people as well as those having no professional qualifications in order to stop the inheritance of poverty for the next generations. Lack of proper education generates a low professional qualifications of the representatives of the Roma community, and thus their non competitiveness at the labour market and high unemployment rate. Therefore it is necessary to organise vocational training which will enhance the competitiveness on the labour market and will activate Roma population (especially in self-employment), inspiring them to actively seek employment, stimulate their motivation to raise the level of general knowledge and to prepare for work in certain professions and to support businesses and other initiatives of Roma.

However, the majority of Roma people in Poland are unemployed and make use of social support given by country. Additionally, the awareness of the Roma situation and community in Poland is still quite low and recently there have been cases that were widely discussed in media of discrimination of Roma population even in the form of not allowing Roma representatives to reserve a place in Polish restaurants (especially in Poznan).

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6 *Journal of Laws* of 2005, no 17, item 141.

## Chapter II: Members of the family

*Main texts in force:*

1. Act on entry of July 14, 2006,
2. Act on civil acts of September 29, 1986,
3. Act on aliens of June 13, 2003.

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

According to the Act on entry the family member of EU citizen covers:

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

Therefore the Act on entry implements Art. 2.2 of the Directive 2004/38. As in Poland the legislation does not provide for a possibility to enter into registered partnership by partners of different or same sex, the definition of family member according to the Act on entry does not cover partner with whom the EU citizen has contracted a registered partnership. However, the Polish left party has recently announced that it wants to introduce to Polish parliament draft of the act on registered partnerships. However, as in the autumn there are elections in Poland it is obvious that the draft does not have any chances to come into force until that time. Moreover, there is no majority in Parliament that could pass such an act and probably taking into account current prognosis, also in the next term of the Parliament it would be very difficult to pass an act on registered partnerships.

The Act on entry does not contain any provisions that implement Art. 3.2 of the Directive which states that host Member States shall in accordance with its own legislation, facilitate entry and residence for other members of family, that do not qualify as members of family according to Art. 2.2 of the Directive 2004/38.

However, according to art. 53 a of the Act of June 13, 2003 on aliens (*ustawa o cudzoziemcach*),<sup>7</sup> temporary right to stay shall be granted to those aliens who are eager to accompany either Polish or EU citizen because of family ties that are between them.

Currently there is a debate on the Act of September 29, 1986 on civil acts (*Prawo o aktach stanu cywilnego*)<sup>8</sup> in the light of the possibility to enter into not only marriages but also into other forms of registered partnerships abroad. The rule is that in order to be able to enter into such a relationship abroad, the applicant shall obtain a certificate on the possibility to enter into marriage according to Polish law. The certificate is issued by the chief of civil status office relevant to the place of residence of applicant. However, the practice shows that applicants are denied the right to obtain such a certificate if they plan to enter into same sex

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<sup>7</sup> *Journal of Laws* of 2003, no. 128, item 1175.

<sup>8</sup> *Journal of Laws* of 2004, no 161, item 1688.

relationship abroad. The reason is that there is a place in a certificate to put data on the future husband/wife together with his/her citizenship. Therefore, if an applicant declares that he/she would like to enter into relationship with same sex partner, than the relevant chief denies to issue such a document. However, such a practice is contrary to the wording of the Art. 71 of the Act on civil status, as this provision entitles only to check if an applicant is eligible to enter into marriage according to Polish law. It is not permissible to check when and with whom an applicant would like to enter into marriage. This case is now on high political agenda, as there was an intervention of Polish Ombudsman addressed to the Minister of Internal Affairs and Administration.<sup>9</sup> According to the Ombudsman current practice is against the rule of democratic legal system which is one of the Polish constitutional principles and is against the law on equal treatment as especially defined in the Act of December 3, 2010 on implementation of several EU provisions on equal treatment (ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania).<sup>10</sup> The problem is also within the sphere of interest of Viviane Reding, EU Commissioner for Justice, Fundamental Rights and Citizenship, who in the interview for Polish newspaper expressed the view that everyone shall have a right to receive document on his/her civil status.<sup>11</sup> Additionally the topic was on the agenda of Petition Committee of the European Parliament during its meeting on February 1, 2011. According to information from the Ministry of Internal Affairs and Administration, the Minister is working on the amendment to the specimen of certification in order to remove the obligation to insert information of future partner. Such a change is also in line with the judgment of Voivode Administrative Court in Gdansk, who claimed that the purpose of the certification by the applicant shall not influence any activities of the authority which obligation is to issue such a document, since an individual shall have a right to receive such a certification without giving any statements of reasons and the reason to deny to issue such a document shall not be motivation of the applicant.<sup>12</sup>

As regards the issue of reverse discrimination, despite the fact that Act on entry regulates only situation when there is in general transnational factor, i.e. it is applicable when EU citizen has made use of free movement rights. However, there is also additional provision in the Act on entry that applies to the EU citizen – spouse of Polish citizen (beyond the scope of this provision are non EU citizens). According to the Art. 16.4 of the Act on entry, EU citizen shall have a right to reside for a period longer than 3 months if he/she is a spouse of Polish citizen. In this situation it is enough that such a spouse (and not Polish citizen) has made use of free movement rights. Additionally, in the Act on aliens there are provisions that facilitate exploring residence rights for members of families of Polish citizen who do not qualify to the scope of the Act on entry. According to art. 53 a of the Act on aliens, temporary right to stay shall be granted to those aliens who are eager to accompany either Polish or EU citizen because of family ties that are between them. This provision does not contain any indications what does the reference to family ties shall mean. Additionally Art. 64 of the Act on aliens states that the permit to settle shall be granted inter alia for those aliens, who have been married with Polish citizen at least for 3 years if directly before submitting the application he / she had resided continuously on the territory of the Republic of Poland for at least 2

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9 Intervention of the Polish Ombudsman Irena Lipowicz of March 15, 2011, no. RPO-660930/10/MO.

10 *Journal of Laws* of 2010, no, 254, item 1700.

11 Newspaper Rzeczpospolita of February 2, 2011.

12 Judgment od August 6, 2008, III SA/Gd 229/08.

years on the basis of the residence permit for a fixed period or is a minor child of the citizen of Poland, if the parent exercises parental authority over the child.

Consequently, in cases where due to its scope of application the Act on entry cannot be applied (except for art. 16.4 of the Act on entry), there are other Polish provisions, mainly Act on aliens, which facilitate stay and residence rights at the territory of Poland for those Polish citizens who do not make use of free movement rights and members of their families.

Additionally, according to the Act on employment and labour institutions, also family members (foreigners) of Polish citizens shall be exempted from the obligation to have a work permit. This exemption applies also to spouse of the Polish citizens who has a right to stay for a defined period of time which right was granted as a result of marriage with Polish citizen. Additionally, such exemption is applicable to descendants under 21 years old or being dependant of the Polish citizen.

## **2. ENTRY AND RESIDENCE RIGHTS**

Entry and residence rights of family members of EU citizens, irrespective their nationality are regulated mainly in the Act on entry. In 2011 two important amendments to the Act have entered into force, which is further analysed in this Chapter (i.e. abolishing of the obligation to pay for registration documents and the right to reside at the territory of the host Member State of children of EU citizen).

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

### ***Entry***

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

Art. 7a of the Act on entry enables EU citizens and members of their families, irrespective of their nationality, in cases where it is impossible to present valid travel document or identity card, to prove their identities by other proves than showing official documents only if it is possible to confirm in such a way their identity and nationality without any doubts.

According to Art. 10 of the Act on entry, non EU citizen shall be granted Schengen or domestic visa in order to enable such a person to join or stay with EU citizen in Poland. The refusal to grant such a visa is only admissible if their data are included in the special list of not welcomed individuals according to the Act on aliens and if their stay may possess a threat to the defense or security of Poland and public order or health. Art. 11 of the Act on entry state reasons when EU citizen and members of their families are refused to enter to Poland – except for reasons that are grounds for refusal of visa, also the fact of not having relevant identity documents and visa in case of third country nationals may cause such a

decision. However, if the applicant may in this last situation, i.e. despite not having identity documents, prove without doubts that he/she is entitled to make use of free movement rights, he shall be entitled to enter Poland.

Moreover, according to art. 11 a of the Act the decision on refusal of both granting visa and entry to Poland shall be preceded thorough examination if personal conducts of applicants may pose a threat for public safety, public policy or public health in the light of the proportionality test. Only if an individual behaviour represents genuine, present and sufficiently serious threat affecting interests of society such a negative decision may be issued. Additionally, as regards lack of having identity documents, the new provision has been entered into force as from May 21, 2011. Before issuing the decision refusing the right to enter Poland, both EU citizens and members of their families shall have 72 hours to either collect requested documents or to prove in an unquestionable way the right to free movement.

### ***Residence***

Family members (both EU and non EU) may reside in the territory of Poland for a period up to 3 months without the need to meet any requirements other than having a valid identity cards, passports and visas where applicable. However, see analysis in the Chapter I 'Other issues of concern' as regards incompatibility between Act on entry and Act on evidence of people as regards the obligation to register a stay (within the meaning of 'obowiązek meldunkowy').

As regards residence rights for a period longer than 3 months for family members irrespective of nationality, they have a right to accompany EU citizen, who is either an employee, self-employed person in Poland or is covered by the general health insurance or is entitled to health insurance and is in possession of enough funds to provide for them and himself enough funds in order not to ask for social insurance benefits. The same right to accompany EU citizen by his/her family members does apply to family members of EU citizen who is no longer employed or does not undertake self-employment as a result of temporarily inability to work as the result of an illness or accident or in case of involuntary unemployment in accordance with the unemployment register kept by the Poviát Employment Office (when the period of engagement in gainful activity has amounted to less than one year, the Union citizen shall retain then the right to reside for period of 6 months from the date of registration in the Office). Lastly, the right to accompany by his family members applies to EU citizen who has decided to finish engagement in gainful activity in order to embark on educational or vocational training. As regards EU citizen who studies or undergoes vocational training in Poland and is covered by general health insurance or is a person entitled to health insurance scheme or is in possession of enough funds for himself and for them in order not to make use of social insurance benefits, he may be accompanied by the spouse and dependent children accompanying him/her in Poland (therefore in this last case, only limited categories of family members may join studying EU citizen).

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

Additionally, the new Art. 19 a of the Act on entry that implements the right of stay for studying children and their parent who has custody over them as defined in the judgment

Ibrahim and Teixeira has entered into force as from May 21, 2011 – see analysis of this provision in the part devoted to analysis of CJEU judgments.

As regards a definition of person entitled to health insurance scheme, the definition is covered by the Act of August, 27 2004 on health insurance benefits financed from public funds (*Ustawa o świadczeniach opieki zdrowotnej finansowanej ze środków publicznych*).<sup>13</sup> According to Art. 5.23, a person entitled to health assistance on basis of coordination rules shall be understood as a person not insured in the Polish Health Fund but insured on basis of EU or EEA (but other than Polish legislation) legislation and subjected to coordination provisions.

If the residence in the territory of Poland is longer than 3 months, the Union citizen shall be obliged to register his/her residence and the family member who is not EU citizen shall be obliged to apply for residence card of EU family member. The right of permanent residence is certified by a document certifying the permanent residence right in case of EU citizen. In case of non EU citizen, he/she is obliged to apply for residence card.

Application for abovementioned cards as from May 21, 2011 are free of charge, since articles requiring payment for these documents have been repealed. The reason for such a change is the fact that new Act of August 6, 2010 on identity cards (*ustawa o dowodach osobistych*)<sup>14</sup> for Polish citizens has repealed the obligation for payment for identity cards for Polish citizens. And according to Art. 25.2 of the Directive 2004/38, such documents shall be issued free of charge or for charge not exceeding that imposed on nationals for issuing similar documents. As the obligation for payment for identity card for Polish citizens has been repealed, this new regulation is in full conformity with the Directive 2004/38.

Additionally, family members of EU citizens shall be granted a right to permanent stay after five years of continuous stay in Poland while fulfilling during this time conditions for legal stay. When, according to the Act on entry (which provisions fully implement relevant provisions of Directive 2004/38), the EU citizens shall be granted a right to permanent stay before the general requested period of 5 years of legal stay in Poland, also consequently, their family members who reside with them in Poland shall acquire such a right.

Moreover, there is possibility for family members to be granted a right to permanent stay, if such applicants retained the right to stay in case of divorce, annulment of marriage with EU citizen or his death and during this time of stay have fulfilled all obligations for legal stay. Art. 44 of the Act on entry directly refers to this case (as regulated in Art. 19 of the Act on entry). However, it has to be mentioned, that there is a lack of similar provision, referring to new Art. 19a, which has been analysed in a part devoted to analysis of CJEU judgments – in case Ibrahim and Teixeira. Together with entering into force this new provision 19a, which gives a right to stay for child of the EU citizen, who has been working at the territory of Poland but has not retained the right of stay on basis and who stays in order to learn or study in Poland shall have a right to stay until the end of learning or studies. In such a case, a parent who has custody of the EU citizen's child, shall have a right to accompany the child until reaching by him maturity or even longer, if the child still needs assistance of the parent in order to continue and finish learning and studies. No reference as a right to be granted a right for permanent stay in such situation by not amending Art. 44 by making a reference to Art. 19a may lead to consequence, that in cases defined in Art. 19a, beneficiaries

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<sup>13</sup> *Journal of Laws* of 2008, no. 164, item 1027.

<sup>14</sup> *Journal of Laws* of 2010, no. 167, item 1131.

of this provisions will not be able to be granted a right for permanent stay in Poland, which is incompatible with the aim of the Directive 2004/38. However, as this new Art. 19a has entered into force in May 2011, there have been not reported cases on the possible problems while executing this provision. It shall be, however, assessed that in such a case a EU interpretation of Polish law shall be done b both Polish administrative authorities as well as by courts in order to guarantee full compatibility of the Act on entry with Directive provisions.

### **3. IMPLICATIONS OF THE *METOCK* JUDGMENT**

The Act on entry ad regards family members of EU citizen does not require for its application any requirement to have previous lawful residence in Poland. Therefore, the Polish Act implements Art. 3 para 1 and Art. 2 point 2 of the Directive 2004/38 correctly. According to Art. 9 para 1 and 2 of the Act, Union citizen may enter the territory of Poland on the grounds of a valid travel document or other valid documents confirming their identity and citizenship. Family member who is not Union citizen may enter the territory of the Republic of Poland on the grounds of a valid travel document and visa (except for cases where visa is not required). Art. 10 para 1 of the Act on entry states that a family member who is not a Union citizen shall be issued an entry visa for stay or to join a national of the Member State. The Polish Act does not require that a family member shall previously lawfully reside in another Member State before entering Poland.

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

The Act on entry contains comprehensive regulation on sham marriages (marriages of convenience. According to Art. 25 of the Act, if during the proceedings concerning the issue of a residence card of a member of a Union citizen's family, the circumstances point to the fact that:

1. one of the spouses accepted a financial benefit in return for the consent for contracting a marriage, unless it results from a custom established in a given state or a social group;
2. the spouses do not fulfil the legal responsibilities arising from the marriage;
3. matrimonial cohabitation is not maintained;
4. the spouses have never met before their marriage;
5. the spouses do not speak a language understood by both;
6. the spouses are inconsistent about their respective personal details and about other important circumstances concerning them;
7. one or both of the spouses had contracted a marriage of convenience in the past,

the authority which conducts the proceedings (i.e. relevant Voivodes) shall establish whether the marriage with the Union citizen is not a marriage of convenience.

If the fact of the marriage of convenience has been proved, than following consequences according to the Act on entry shall apply:

1. refusal of granting residence card or a document certifying right for permanent residence for a non EU family member,
2. cancellation of residence card for the family member of Union citizen

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Additionally, the Act on aliens entitles voivodes to check, before making decision on granting the residence permit for a fixed period to an alien being a spouse of Polish citizen or of an alien residing in Poland, if a marriage has not been conducted for a purpose to abuse the Act if there are following circumstances:

1. one of the spouses has accepted material profit in return for expressing a consent to conclude the marriage unless it is an established custom in the state or social group concerned
2. there is the lack of an appropriate contribution to the responsibilities arising from the marriage;
3. the spouses do not maintain matrimonial cohabitation;
4. the spouses have never met before their marriage;
5. the spouses do not speak a language understood by both;
6. the spouses are inconsistent about their respective personal data and other important personal information concerning them;
7. the past history of one or both of the spouses contains evidence of previous marriage of convenience

If the marriage according to Act on aliens has been declared as a sham, an alien is refused the residence permit for a fixed period. According to the judgment of District Administrative Court (Wojewódzki Sąd Administracyjny) in Warsaw of May 25, 2006,<sup>15</sup> conditions listed above shall not automatically prove that there is a marriage of convenience. They shall only be a basis to institute administrative proceedings to check if there is a case in a given situation. According to the same court in Warsaw of September 26, 2006<sup>16</sup> the fact that spouses are not familiar with general family situation of each other, means of income and they do not live with each other entitle to claim that the marriage has been concluded in order to abuse or evade the Act on Aliens regarding granting a permit for stay. On the other hand, as the Court also stated, the fact that there is a child in the marriage, taking into account rules of logic and life experience leads to conclusion that such a marriage constitutes a real, functional relationship and not fictitious one.<sup>17</sup>

Additionally, according to the Act on aliens, the decision on expulsion shall not be rendered or this rendered shall not be executed if the foreigner is a spouse of Polish citizen or of the foreigner possessing permit to settle or the long-term resident's EU resident permit and his / her does not constitute a threat to state security and defence or public security and policy, unless the marriage has been concluded in order to avoid expulsion. Therefore in such a situation, Polish authorities (i.e. relevant voivodes acting in 1<sup>st</sup> instance and the President of the Office for Foreigners acting in 2<sup>nd</sup> instance) are obliged to check whether the marriage shall not be declared as sham one, taking into account conditions set above.

According to Office for Foreigners, in 2010 8000 foreigners put motions for legalisation of stay as a result of marriage with Polish citizen. 185 were declared as being marriages of convenience. Mainly Polish citizens enter into marriage of convenience with citizens of Pakistan, Nigeria and Vietnam. Polish citizens are paid up to 30 000 PLN (circa 7500 EUR) for such a marriage. Main reasons why the marriage have ultimately been declared as sham were as follows: they did not leave together, they did not speak any common language and finally

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15 Files no. V SA/Wa 352/06.

16 Files no. V SA/Wa 956/06.

17 Files no. V SA/Wa 189/09.

they did not know anything about themselves. The problem of marriages of convenience is also pointed out in the document Migration Policy for Poland and the issue is defined as one of most frequent cases of illegal migration in Poland.

Except for consequences that are defined in both Act on entry and Act on aliens, also consequences are defined in Polish Penal Code. A person who, in order to gain personal or property benefits, facilitates or enables third person stay in Poland unlawfully, is liable to penalty of imprisonment between 3 months to 5 years. This provision may also contain cases of marriage of convenience. Additionally such a person shall be liable for attestation of untruth which is punishable on conviction of fine, restriction of liberty or imprisonment between 3 month to 5 years.

Polish authorities are particularly sensitive on issue of sham marriages, as they are aware that Poland, as a border EU country is an attractive place to contract such a marriage in order to facilitate free movement throughout the whole European Union. Therefore, the issue is on high agenda of the President of the Office for Foreigners. There are seminars and workshops for relevant departments of voivodes (i.e. foreign affairs departments) where officials are trained how to tackle and combat the problem with cooperation with Border Guard. Additionally, the President initiates audits in foreign departments of voivodes in order to check correctness of proceedings granting the residence permit for a fixed period to an alien on basis of being a spouse of Polish citizen or of alien being resident in Poland.

## **5. ACCESS TO WORK**

Family members of EU citizen according to Act on promotion employment and labour institutions shall be treated in the same way as regards access to work in Poland as EU citizens. According to Art. 87 of the Act, they are released from the obligation to obtain work permit in order to take up employment in Poland. The definition of family member contained in Art. 87 of the Act on employment is compatible with definition contained in Directive 2004/38 (in consequence, as there are no registered partnerships in Poland, the registered partner is not covered by the definition of family member, see however a remark to the definition of member of family as regards jobseeker in the point 6 below). Additionally, the Act gives a right to take up employment for those family members, who irrespective of death or divorce with EU citizen, have retained the right to stay in Poland, since provision regarding groups of individuals who do not need to have work permit in Poland directly refers to Art. 19.2-3 of the Act on entry.

However, as a result of Ibrahim and Teixeira judgment, the Act on entry has been recently amended and new provision – i.e. Art. 19a has been added. It states that child of the EU citizen, who has been working at the territory of Poland but has not retained the right of stay and who stays in order to learn or study in Poland shall have a right to stay until the end of learning or studies. In such a case, a parent who has custody over the EU citizen's child, shall have a right to accompany the child until reaching by him maturity or even longer, if the child still needs assistance of the parent in order to continue and finish learning and/or studies. Therefore, consequently, also the right to take up employment without obligation to receive permission shall be granted to abovementioned categories of beneficiaries. However, the amendment to Act on entry has not simultaneously added this reference to the provision of Art. 87 of the Act on promotion employment and labour institutions. It shall be reiterated once more, that as the amendment has entered into force on May 25, 2011, there have been

not reported cases so far if those categories of family members as added in new Art. 19 a have been denied a right to take up employment without obligation to obtain work permission.

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

## **6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS**

Family members of job seekers do not benefit from special treatment according to Act on entry. Like migrating EU citizens who look for a job in Poland, they do not have to fulfill any conditions for legal stay up to 3 months (except for having valid identity card or passport and visa where applicable). In case of stay longer than 3 months, if EU citizen has a right to stay due to having sufficient financial means and being covered by general health insurance system, than such a right also shall be granted to members of his family (according to definition contained in Directive 2004/38 and implemented in the Act on entry).

Additionally, according to Act on promotion of employment and labour institutions, family members of EU citizens as well as family members of Polish citizens (not having Polish citizenship), shall also be treated equally as regards support in finding a job if they have registered as job seekers. Art. 2.1.22 of the Act in connection with Art. 1.3.3 covers also within the definition of job seeker also family members of EU citizens. Therefore they can be qualified as jobseekers. The support for jobseekers according to Polish law contains inter alia: right to help to find a job, right to attend in trainings or attend in seminars, workshops or vocational trainings. However, as has been stated in the Report above about migrating EU citizens – jobseekers, under Polish, jobseekers, irrespective of nationality, do not have a right to any kind of financial allowances (unless they have status of unemployed person who is looking for a job). Therefore the lack of financial allowances applies to both Polish and EU job seekers and members of their families without any distinction on basis of nationality.

However, the problem occurs as regards the definition of family member as is applicable in the Act on promotion of employment. According to Art. 2.1.8 of the Act, the member of family shall cover a spouse of inter alia EU citizen or also Polish citizen as well as descendants of Polish citizen or foreigner who is under 21 years old or are dependants. The definition does not cover dependant direct relatives in the ascending line. Therefore the definition of the family member in the Act on promotion of employment is not identical as in the Act on entry and consequently in the Directive 2004/38.

## Chapter III: Access to employment

### *Main texts in force:*

1. Labour Code of June 26, 1974,
2. Act of April 20, 2004 on promotion of employment and labour institutions,
3. Act of November 21, 2008 on civil service,
4. Act of November 21, 2008 on self-government employees,
5. Chart on Teacher of January 26, 1982,
6. Act of March 18, 2008 on the rules governing recognition of the professional qualifications obtained in EU Member States,
7. Act of July 27, 2005 on higher education.

### 1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

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

The Act on promotion of employment and labour institutions regulates rules and conditions of taking up employment in Poland.

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

EU nationals do not need work permit in order to take up employment in Poland. This is explicitly excluded in Art. 87.1.7 of the Act on promotion of employment. As Poland does not apply any transitional periods, the open access to work in Poland is applicable for all EU citizens, together with citizens of Bulgaria and Romania.

It is worth to mention here also the regulation concerning access to Polish educational institutions such as schools and higher educational institutions such as universities. Regulations concerning the access to higher educational institutions apply without distinction to public and non public entities, therefore the same remark shall apply also as regards access to public sector. According to Art. 109.3-4 of the Act of July 27, 2005 on higher education (*ustawa o szkolnictwie wyższym*),<sup>18</sup> a non-national (including EU citizen) may be employed as an academic staff member in a higher educational institution. A requirement to obtain permission or consent of an employment authority is not obligatory. Such a person shall be subjected to compulsory social security and health insurance and shall be eligible for entitlements provided in the Act on higher education as well as other entitlements pursuant to rules applicable to employees who are Polish nationals.

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<sup>18</sup> *Journal of Laws* of 2005, no. 164, item 1430.

As regards, however, primary and secondary education, see remark in part concerning access to public sector.

### ***1.2 Language requirements***

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

According to Art 30.1.2 of the Banking Act of August 29, 1997 (Ustawa Prawo Bankowe),<sup>19</sup> there is a language requirement as regards members of management board. In order to establish a bank in Poland, at least two members of management board shall prove their knowledge of Polish language. However, it is possible that Komisja Nadzoru Finansowego (the Polish Financial Supervision Authority – the supervisory institution) in the form of decision issued at request of the founders, will depart from the requirement concerning proven knowledge of Polish language provided it is unnecessary for prudential supervision, taking into account in a particular level of permissible risk or the scope of the activity of bank. The same rule applies to appointment of two members of management board, including president during the normal activities of functioning bank (i.e. not at the time of founding a bank). The Act does not precise ways how the language knowledge may be proved. Therefore it shall be assumed that all means shall be acceptable, especially diplomas of graduating Polish language courses awarded in other Member States.

Additionally, there shall be a possibility to check Polish language in other professions, even if there is no direct obligation enshrined in law. An employer shall have a right to communicate with his/her employee in Polish language. However, such foreigners, including EU citizens shall have a right to prove knowledge of language by various possible means, not only restricted to showing relevant certificates.

The same remark shall be made as regards teachers. According to Chart on Teacher of January 26, 1982 (Ustawa z dnia 26 stycznia 1982 Karta Nauczyciela),<sup>20</sup> there is no citizenship requirement. Therefore, there are no obstacles to hire EU citizen as a teacher, not only as a foreign language teacher, i.e. native speaker. It is understandable that a director of employing school may demand proving of Polish language. The Chart on Teacher and relevant regulations, however, only define methods of proving knowledge of foreign languages, that are taught by such teachers. Therefore, in the light of these provisions, all possible tools of proving knowledge of Polish language shall be acceptable. The Chart on Teacher applies both to employment in public and private schools.

The Act of October 7, 1999 on Polish language (Ustawa o języku polskim)<sup>21</sup> shall be mentioned. In Article 11a there is a possibility to certify the knowledge of Polish language before a state exam commission. Such a possibility is open to foreigners or Polish citizens permanently residing outside territory of Poland. On basis of this provision, Minister of Education and Sport has issued on 15 October 2003 the Regulation on exams on Polish language as a foreign language (Rozporządzenie w sprawie egzaminów z języka polskiego jako obcego).<sup>22</sup> However, in order to be compatible with EU law this Art. 11 a shall not be understood

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<sup>19</sup> *Journal of Laws* of 1997, no. 140, item 939.

<sup>20</sup> *Journal of Laws* of 2006, no. 97, item 674.

<sup>21</sup> *Journal of Laws* of 1999, no. 90, item 999.

<sup>22</sup> *Journal of Laws* of 2003, no. 191, item 1871.

as the only way of proving knowledge of Polish language for categories of individuals listed in the Act.

As regards medical sector, midwives and nurses are not obliged to present any certificate of language knowledge. They shall only prove that their knowledge of Polish language is enough to communicate with patients and to understand written text as well as ability to write in Polish.<sup>23</sup> The regulation on midwives and nurses applies only to EU/EEA and Swiss Confederation citizens.

Also there is a regulation concerning level of knowledge of Polish language for doctors.<sup>24</sup> As the regulation, unlike regulation concerning midwives and nurses applies to all foreigners that execute the profession of doctors at the territory of Poland, it make a distinction between EU/EEA/Swiss Confederation citizens and other foreigners – i.e. third country nationals. Only the last group is obliged to pass a special language exam that is organized by the Polish Medical Council. It shall be assessed as being compatible with EU law, since EU citizens shall have the possibility to prove knowledge of Polish language not only through passing special exam before Polish commission, but also in other, even less formalistic ways (for example by interview with employer).

However, there has been a change as regards language requirement that apply to pharmacists. There is no similar regulation as concerning doctors no more.<sup>25</sup> Now both EU and third country nationals are obliged to pass exam before Polish Pharmacy Council without any distinction. This new regulation shall be assessed as questionable according to EU law, as currently there is not a possibility to prove knowledge of Polish language in a different way than by passing a special language exam.

As regards barber-surgeon, the Act of July, 20 1950 on barber-surgeon (Ustawa z dnia 20 lipca 1950 o felczerach)<sup>26</sup> in Art. 1.3 states that for EU citizens it is enough to make a statement confirming knowledge of Polish language. Exams are only required to third country nationals.

The same rules applies to veterinary doctors – ways of proving by EU citizens knowledge of Polish language are not listed, therefore all possible ways are acceptable.<sup>27</sup>

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23 The regulation of Ministry of Health of April, 30 2004 on the level of knowledge of Polish language necessary to carry out a profession of a nurse, midwife by nationals of EU Member States, EEA Member States and Swiss Confederation (Rozporządzenie Ministra Zdrowia w sprawie szczegółowego zakresu znajomości języka polskiego, koniecznego do wykonywania zawodu pielęgniarki, położnej przez obywateli państw członkowskich Unii Europejskiej, państw członkowskich Europejskiego Porozumienia o Wolnym Handlu (EFTA)- stron umowy o Europejskim Obszarze Gospodarczym lub Konfederacji Szwajcarskiej), *Journal of Laws* of 2004, no. 104, item 1102.

24 Regulation of Minister of Health of June, 23 2009 on the extent of the oral and written knowledge of Polish language necessary to carry out a profession of a doctor or dentist within the territory of the Republic of Poland (Rozporządzenie Ministra Zdrowia w sprawie zakresu znajomości języka polskiego w mowie i piśmie koniecznego do wykonywania zawodu lekarza lub lekarza dentystry na terenie Rzeczypospolitej Polskiej), *Journal of Laws* of 2009, no. 108, item 908.

25 The Act of April 19, 1991 on Pharmacy Councils (Ustawa o izbach aptekarskich), *Journal of Laws* of 2008, no. 136, item 856; Regulation of Minister of Health of March 23, 2011 on the level of knowledge of Polish language necessary to carry out profession of pharmacists and on exams of Polish language (Rozporządzenie Ministra Zdrowia w sprawie zakresu znajomości języka polskiego koniecznego do wykonywania zawodu farmaceuty na terenie Rzeczypospolitej Polskiej oraz egzaminu z języka polskiego), *Journal of Laws* of 2011, no. 75, item 406.

26 *Journal of Laws* of 2004, no 53, item 531.

27 The Regulation of Minister of Agriculture and Rural Development of August 25, 2004 on the level of the knowledge of Polish language necessary to carry out a profession of veterinary doctor (Rozporządzenie Min-

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There are also several statutory provisions that regulates certain professions that do not require having Polish citizenship. Instead, requirement to know Polish language is necessary. Such an obligation refers inter alia to certified auditors and patent counsels.<sup>28</sup>

Last remark shall be done in this point concerning the Act of October 7, 2010 on Polish language (ustawa o języku polskim).<sup>29</sup> The rule is that in relations with consumers as well as in case of employment matters, the Polish language shall be used. However, there is an important exception to this rule that applies to foreign nationals, including EU citizens. Labour contract may be prepared and signed in different than Polish language, on application of a foreign employee (but not employer), if such an employee has been previously informed about the possibility to prepare such a contract in Polish. This amendment obviously makes it easier for foreigners, including EU citizens, to exercise the right to free movement at the territory of Poland.

## 2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

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

The general rules concerning access to employment in the public sector have been analysed in the Prof. Ziller's report. The general right to access on equal footing to employment in this sector is guaranteed by Polish constitution solely to Polish nationals (art. 60). However, where access to certain posts is not restricted to Polish nationals only, there shall be the same rules applicable to access to the public sector by both Polish and EU citizens. However, the problem arise as to the scope of nationality requirement as a prerequisite to the possibility to apply for certain posts by EU nationals, which will be analysed in point 2.1 below. When there is no nationality criteria than in general, EU citizens shall be treated in a same way as Polish citizen. However, in majority of cases they have to additionally prove knowledge of Polish language in order to be possible to communicate and fulfill employee's obligations. There is a wide regulation in the Labour Code of June 26, 1974 (ustawa Kodeks pracy)<sup>30</sup> on prohibition of discrimination of employees. These provisions apply on equal footing to both Polish and EU citizens. Art. 18<sup>3a</sup> para 1 of the Labour Code prohibits any discrimination on grounds of inter alia nationality as regards not only working conditions but also as regards access to employment. Therefore different treatment as regards access to employment on basis of nationality is unconditionally prohibited.

However, as regards access to public sector in the sphere of education, situation of teachers shall be mentioned. First of all it shall be emphasized, that teachers in Poland are subjected to a separate act, that form a *lex specialis* to Labour Code, that is the Teacher's

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istra Rolnictwa i Rozwoju Wsi w sprawie zakresu znajomości języka polskiego koniecznego do wykonywania zawodu weterynarza.), *Journal of Laws* of 2004, no. 205, item 2100.

28 The Act of May 7, 2009 on certified auditors and their self-governing bodies, entities entitled to control financial reports and public supervision (Ustawa o biegłych rewidentach i ich samorządzie, podmiotach uprawnionych do badania sprawozdań finansowych oraz o nadzorze publicznym), *Journal of Laws* of 2009, no. 77, item 649 and the Act on patent counsels of April 11, 2001 (Ustawa o biegłych rewidentach), *Journal of Laws* of 2001, no. 49, item 509.

29 *Journal of Laws* of 1999, no. 90, item 999.

30 *Journal of Laws* of 1998, no. 21, item 94.

Chart. Therefore the Labour Code does apply only if a certain issue concerning teachers is not regulated by the Chart (the Chart applies both to teachers employed in public and private sector). According to the Teacher's Chart in case of so called appointment (qualified employment contract) there is a nationality criteria in order to become a teacher in Poland, however, this requirement does not apply to EU citizens, who shall have a free access to teachers posts in Poland. Such a requirement does not apply to normal employment contracts with teachers. However, according to the Regulation of October 30, 1992 of Minister of Education on principles and conditions on hiring teachers who are not Polish citizens in public schools and entities (rozporządzenie Ministra Edukacji Narodowej w sprawie zasad i warunków zatrudniania w szkołach i placówkach publicznych nauczycieli niebędących obywatelami polskimi),<sup>31</sup> there is a possibility to engage foreign teachers (including EU citizens) if there is an organizational need of a given school, but foremost on posts of foreign languages teachers (para. 2). Such a provision leads to conclusion that there is a preference for Polish citizens over EU citizens and such a provision cannot be explained by qualifying teachers posts as exercising public authority, therefore it shall be questionable under EU rules. However, there is no information available if any EU citizen has invoked this provision as incompatible with EU law so far. Additionally, this regulation may be interpreted in the light of EU provisions and also in the light of Teacher's Charter, which does not contain any restrictions as regards employment of teachers from EU (unlike third country nationals to whom restriction as so called appointments apply). Consequently it can be maintained that this Polish citizen preference does not apply to EU citizens.

Moreover, as is compatible with interpretation of Art. 45(4) TFUE, not all public posts shall be opened only to Polish citizens, however, as will be mentioned in point 2.1, the scope of nationality requirement is according to rapporteur to wide in Poland. For instance, except for situation for teachers, according to the Act on promotion of employment and labour institutions, there are 6 categories of employees of public employment services (of course there are also plenty of private employment services, but rules of exercising by them their duties are not regulated in the Act) such as: employment agents, employment counselors, specialists of the professional development, specialists in relevant programmes, leaders of employment clubs and EURES counselors and assistants (Art. 98 and of the Act on promotion). Except for specialists of professional development and specialists in relevant programmes, there is a general requirement to have Polish nationality (except for EU citizens) or enough knowledge of Polish language. Additionally there are different levels of particular posts and there is a requirement to have a required professional experience to be engaged in particular posts. These requirements do not apply to EU citizens when they have a decision on recognition of professional qualifications issued according to relevant legal provisions. However, if EU citizen does not have such a decision, he can first prove knowledge of Polish language in any possible form and second, the requirement to prove having enough period of professional experience in public employment services shall also be fulfilled by presenting a proof of being engaged in such services in other Member States than Poland. There is a direct provision that put the obligation on employer to recognize such qualifications collected abroad – art. 86 of the Act on promotion that applies to both engagement in public and private sector. As regards the obligation to have experience only in public sector when applying for certain posts in public employment services in Poland, it shall be stated that such a requirement shall

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31 *Journal of Laws* of 1992, no. 85, item 432.

be assessed as compatible with EU law as the case concerns application to public and not private posts and this requirement apply to both Polish and EU citizens without any distinction.

As regards access to certain medical posts, such as doctors, midwives, nurses, veterinary doctors, they shall, irrespective if they apply to public or private entity, be treated on an equal footing as Polish applicants. However, they shall prove knowledge of Polish language – in this respect see point 1.2 above. The same remark shall be done to certified auditors and patent counselors.

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

Some preliminary remarks have been made in point 2 above as the issue of access to public sector is in majority cases connected with the requirement of having Polish nationality. However, access to positions in public sector shall not be automatically understood as exercising public authority within the meaning of Art. 45 (4) TFUE.

As has been reported in the last year Report and also in the Report of Prof. Ziller, the new Act of November 21, 2008 on civil service was introduced in 2009 (ustawa o służbie cywilnej).<sup>32</sup> However, a preliminary remark shall be done – this act does not cover the entire employment in public service, but only a specific part of employment in general in central public offices such as ministries or other central institutions.

The Act on civil service opened the possibility to apply for posts that are not directly connected with exercising directly or indirectly public powers or protection of fundamental states interests (art. 5 of the Act). These provisions apply equally to EU citizens as well as third country nationals who on basis of international agreements or EU law have a right to employment in Poland, if they prove knowledge of Polish language according to rules defined in special regulation as defined in point 2.2 below. The decision if certain posts are not connected with exercising public powers is taken by the General Director of the Civil Service Office after granting consent by the President of the Civil Service. There is an official list of accessible posts for both Polish and foreign nationals available on the website of the Civil Service ([www.dsc.kprm.gov.pl](http://www.dsc.kprm.gov.pl)). Currently (as of June 2011) on 141 announcements only 3 are accessible for foreign nationals, including EU citizens – these are senior specialists and main specialist in departments of the Ministry of Labour and Social Policy and specialist in Statistical Office. Analysis of remaining 138 posts that are opened solely to Polish citizens leads to conclusions that plenty of them are not indeed connected with exercise of public powers and shall be opened to other than Polish citizens. Among them there are such as IT specialist or specialists or other lower clerks in voivode and central authorities. Surely, they shall not be qualified as exercising public power that explains restricting these posts to Polish citizens only. Therefore it shall be stated that in fact although the Act on civil servants formally opens access to this public sector for EU citizens, in fact the vast majority of such posts are closed for them and reserved only to Polish citizens.

It would be preferable to either change the practice and really open certain posts for EU citizens, when there is no real exercise of public power or to change Art. 5 of the Act in such a way that it would open the possibility to access to civil service only to EU citizens, exclud-

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<sup>32</sup> *Journal of Laws* of 2008, no. 227, item 1505.

ing at all third country nationals (other than family members of EU citizens) and then really check if certain posts art. 45.4 of the TFUE may be applied. These 3 posts that are currently opened to foreigners are not restricted only to EU citizens, but are also opened to third country nationals.

Similar regulation as in the Act on civil service is in the Act of November 21, 2008 of self-government employees (*ustawa o pracownikach samorządowych*).<sup>33</sup> According to Art. 11 of the Act, the head of a relevant office, when publishing information on free posts, shall decide and consequently indicate posts that can be opened to EU citizens and third country nationals who on basis of international agreements and EU law have a right to employment in Poland, provided that a particular post is not connected with exercise of public powers within the meaning Art. 45(4) TFUE. In such a case, obligation to prove knowledge of Polish is based on the same rules as in case of Act on civil servants, which will be analysed below in the section language requirements in point 2.2 below.

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

Moreover, in the Act of September 16, 1982 of public authorities employees (*ustawa o pracownikach urzędów państwowych*)<sup>34</sup> there is a nationality requirement. According to Art. 3 of the Act, only Polish citizens have access to these posts. According to the Act, public authorities employees are employed in such institutions as Presidium of Sejm, Senat, President of Poland, the Supreme Court, in the Bureau of Constitutional Tribunal, Ombudsman, Child Ombudsman, National Elections Bureau, etc. The act applies to all clerks employed in these offices, irrespective of the character of executed activities in the particular post. Such a strict regulation, without making any differentiation as to the scope of activities in the light of Art. 45(4) TFUE is questionable under EU law. It shall be also clarified that the above-mentioned posts are only administrative ones and not connected for instance in case of Supreme Court or Constitutional Tribunal with activities connected with judicial activities.

The requirement to possess Polish citizenship applies additionally *inter alia* to military forces and law enforcement agencies, such as Army, the Police, Prison Guard, Border Guard, Customs Officers, as well as Internal Security Agency and Central Anti-Corruption Office and Commune Guards. Additionally prosecutors and judges are reserved only to Polish nationals (however, unlike employees of public authorities, according to the Act of December 18, 1998 on courts and prosecutors offices – *ustawa o pracownikach sądów i prokuratury*), employees of these offices do not have to be Polish nationals).<sup>35</sup> However, these kind of posts as mentioned above, unlike civil servants shall be deemed as connected with execution of public powers that entitles state to reserve such post solely to Polish citizens.

Lastly, the obligation to possess Polish nationality applies to notaries without any exceptions, which may be in the light of be questionable under EU law in the light of the CJEU judgment of May 24, 2011 in combined cases 47/08, 50-54/08 and 61/08. On the other hand, legal counselors and advocates do not have to be of Polish nationality.

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<sup>33</sup> *Journal of Laws* of 2008, no 223, item 1458.

<sup>34</sup> *Journal of Laws* of 2001, no. 86, item 214.

<sup>35</sup> *Journal of Laws* of 1998, no. 162, item 1125.

## ***2.2 Language requirements***

As regards groups of employees in the medical sector, such as doctors, nurses, midwives, veterinary doctors – the same rules concerning ways to prove knowledge of Polish language apply in case of employment in public sector.

However, as regards access to civil service and to self-government administration, rules concerning proving knowledge of Polish language by EU nationals still raise doubts as to the conformity with proportionality principle in the context also of CJEU judgments in that sphere (such as Antonissen case C-281/98). Still, there is a special regulation of the Prime Minister issued on 23 April 2009 regulation on list of acceptable documents proving knowledge of Polish language by foreigners that apply for posts in civil service and respectively to self government employees<sup>36</sup> which releases from the obligation to pass an exam before a state commission. The Regulation has not changed since last Report. It contains the exhaustive list of documents that may be presented in order to prove knowledge of Polish language while applying for posts in civil service and self-government authorities. These documents are as follows:

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

Therefore, according to the Regulation, any other certificate, especially the one granted in other than Poland Member State is insufficient to prove Polish language while applying for posts in civil service. Consequently, also other means of proving knowledge of Polish language such as an interview with an applicant is not sufficient and the exam before state commission is required. This provision seems to be therefore incompatible with EU law in the light with the proportionality principle.

As regards access to other public posts, that are opened for EU citizens, it is generally enough when candidate proves knowledge of Polish language in all possible ways, since there is no restriction as to the way a showing that such a requirement is fulfilled.

## ***2.3 Recognition of professional experience for access to the public sector***

Length of service (seniority) is an applicable common factor of professional experience. In public offices a length of service may be a prerequisite for a promotion to a higher post or raise of a salary. Additionally, the Labour Code determines the length of paid leave on basis of length of employment. This indicator shall also be taken into account while counting number of free days for the employee. These rules apply equally to employment in public and private sector.

As regards recognition for professional experience in the recruitment procedure, if there are certain requirements as to the length of such experience (such as for instance in case of employment in public employment agencies) in order to apply for certain posts, than in gen-

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<sup>36</sup> *Journal of Laws* of 1009, no. 64, item 539.

eral periods of employment in other Member States shall be taken into account for counting these required periods of previous employment. However, as regards granting additional points, there are no general statutory acts that regulate such a possibility. Such previous employment may be taken into account as additional requirement that is preferable for the future employer.

There are specific regulations issued by Prime Minister or relevant ministers that regulate the necessity to prove a particular experience for particular posts. Moreover, there is also a general Regulation of Prime Minister of December 16, 2009 on the way to conduct qualification procedure in civil service (Rozporządzenie Prezesa Rady Ministrów w sprawie przeprowadzania postępowania kwalifikacyjnego w służbie cywilnej). These rules shall apply without any difference for Polish and EU citizens. As regards recognition of professional experience, according to the Regulation of Prime Minister of December 12, 2009 on description of civil service posts, required professional qualifications, level of civil service grades, multipliers for salary levels and particular rules on granting other benefits for civil service corpus (rozporządzenie Prezesa Rady Ministrów w sprawie określenia stanowisk urzędniczych, wymaganych kwalifikacji zawodowych, stopni służbowych urzędników służby cywilnej, mnożników do ustalania wynagrodzenia oraz szczegółowych zasad ustalania I wypłacania innych świadczeń przysługujących członkom korpusu służby cywilnej),<sup>37</sup> groups of certain grades are listed in the appendix with required experience for certain posts. However, in vast majority of cases, reference is made to other specific regulations (of certain ministers to whom there is a recruitment procedure). There are, however, certain posts for which a specific experience is required as to the length of service. For example, in order to apply for legislative specialist post, 4 years of practice in formulating legal acts is necessary. In such a situation also similar practice obtained in other Member State shall be taken into account.

In general, as regards recognition of professional experience in public sector, the prohibition of discrimination as regards employment conditions is stated in the Labour Code (art. 11<sup>3</sup> of the Labour Code). This provision equally applies to all employees, not only Polish but also EU citizens.

Moreover, Art. 86 of the Act of promotion of employment and labour institutions states that previous periods of employment abroad shall be added to periods of employment in Poland for purposes of employees rights (for instance such as a full time leave, additional remuneration, higher grades).

Therefore for instance, as regards the requirement to have previous professional experience in public employment services before promotion to higher posts in these services according to the Act on promotion of employment and labour institutions, also periods of work in comparable services in other Member States shall be taken into account on the principle as regarding employment in Poland.

As regards recognition of qualifications, the Act of March 18, 2008 on the rules governing the recognition of the professional qualifications obtained in EU Member States (ustawa o zasadach uznawania kwalifikacji zawodowych nabytych w państwach członkowskich Unii Europejskiej) for the pursuit of the regulated professions implements provisions of Directive 2005/36.<sup>38</sup> As a rule diplomas or certificates concerning qualifications to carry out regulated

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<sup>37</sup> *Journal of Laws* of 2009, no. 211, item 1630.

<sup>38</sup> *Journal of Laws* of 2008, no. 63, item. 394.

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professions should be recognized in Poland on the same principles as regards diplomas and qualification obtained in Poland. Admission to some professions can depend upon probationary period or on passing an aptitude test. There are numerous enacting regulations issued by the relevant ministers.

There is no reported practice of judicial decisions as to different treatment on basis of place of previous employment practice.

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

All issues of the access to employment has been reported in point 2.3 above.

## **Chapter IV: Equality of treatment on the basis of nationality**

### *Main texts in force:*

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

### **1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION**

#### *Specific issue: Working conditions in the public sector.*

First of all, as underlined in the Report, according to Polish law, it is prohibited to make any difference as to the treatment of employees taking into account solely their nationality. This principle is equally applied in public and private sector.

As regards working conditions in public sector, EU-citizens has been employed in public service, then, according to Act on civil service, Act on self-government employees and Act on promoting employment and labour institutions, such EU citizens shall be treated equally with Polish citizens as regards ways of promotion and determining working conditions in the sphere or salary, grade, recognition of diplomas. It is also consequence of obligation to equal treatment as state in the Labour Code.

According to relevant acts, the salary of civil servants and self-government employees is based on basic salary and certain benefits that are subjected to length of service. In such a situation, also the length of employment in civil service in another Member State shall be taken into account. Also when there are requirements to have a certain employment experience, but not necessarily connected with employment in public service, than also periods of employment in other Member States shall be taken into account.

Allowance for long term employment and jubilee prize shall be awarded to those public service or self-government employees who has a respective professional experience. The length of employment in other Member States shall be taken into account on a same basis as time of employment in Poland, according to the same rule that applies to civil servants and self-government employees. This rule states that to the periods of entitlement to certain allowances any previously completed periods of employment and other periods, if relevant regulations state that such periods of employment shall be qualified as periods of employment qualifying for employee's rights, shall be included, This provision shall be understood as covering also period of employment abroad. The same rule applies in case of employees in court and prosecutor offices according to the Act on employees of courts and prosecutor offices.

The same rule applies in case of teachers according to Chart on Teacher that regulates principles of employment in public school and educational institutions other than higher schools. According to Regulation of Ministry of Education and Sport of October 30, 2001 on detailed rules of counting periods of employment and other periods that entitle teachers for

jubilee award (w sprawie szczegółowych zasad ustalania okresów pracy i innych okresów uprawniających nauczyciela do nagrody jubileuszowej oraz szczegółowych zasad jej obliczania i wypłacania),<sup>39</sup> all finished periods of employment shall be taken into account while establishing the right and the level of such an award. Therefore, while counting jubilee awards and other benefits based on periods of employment, periods of employment not only in Polish schools but also abroad, i.e. in other Member States shall be taken into account.

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

As regards equal treatment in trade union rights, the Act on Trade Unions of May 23, 1991<sup>40</sup> (ustawa o związkach zawodowych) the rule of equal treatment is fully applicable. First, the right to create trade union and to become its member is not connected with any nationality requirement. Such a right is vested on all employees, irrespective of nationality and type of employment. Also employees that are employed by agency contracts shall have a right to access the trade union. The Act on Trade Unions equally applies to employment in private and public sector. According to Art. 3 of the Act, nobody may be discriminated on basis of trade union membership or executing special functions in a given trade union. Especially, membership in trade union shall not have any role while establishing or closing employment contract as well as while deciding on certain promotions.

There are no reported cases as to the unequal treatment of Polish and EU citizens as regards recognition of profession experience for the purpose of determining working conditions.

## 2. SOCIAL AND TAX ADVANTAGES

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

The labour law contains provisions prohibiting discrimination between employees. According to art. 11<sup>2</sup> of the Labour Code, employees shall enjoy equal rights for the same performance of the same duties. This applies in particular to equal treatment of men and women in employment. Moreover, Art. 11<sup>3</sup> of the Labour Code prohibits any discrimination in employment, either direct or indirect, in particular on grounds of sex, age, disability, race, religion, nationality, political beliefs, as well as the fact of having fixed or unfixed, full or part time employment. Additionally there is whole chapter in the Labour Code (II a) that is entitled Equal treatment in employment and which contains various provisions that shall guarantee equal treatment between employees. Art. 18<sup>3a</sup> states that employees shall be treated equally as regards entering, terminating of employment, terms of employment, rules of promotion and access to training in order to improve their qualifications irrespective of circum-

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<sup>39</sup> *Journal of Laws* of 2001, no 128, item 1418.

<sup>40</sup> *Journal of Laws* of 2001, no. 79, item 854 .

stances listed in art. 11<sup>3</sup> of the Labour Code. One of the examples of breach of the equal treatment principle is *inter alia* unfavourable treatment as regards remuneration at work or other work conditions as well as disregarding in case of promotion or granting other employment benefits. As regards remuneration, further rules are contained in Art. 18<sup>3c</sup> of the Labour Code. According to this provision, employees shall have the right to equal remuneration for the same work or work of the same value. Remuneration shall cover all elements of remuneration, not only basic salary, but also other employment-related benefits, not only granted in the form of money but also in other forms. Therefore social and tax advantages within the meaning of art. 7.2 of Regulation 1612/68 (and respectively 492/2011) shall be also included within this meaning. The work of the same value shall be understood as work which requires comparable professional qualifications, certified by appropriate documents or practice and professional experience and similar level of responsibility and effort.

However, as regards particular social and tax advantages within the meaning of Art. 7.2 of the Regulation 1612/78, although there are general rules requiring to treat all employees in similar or comparable situations in the same way (as listed above), in practice there are residence clauses that may affect situation of migrant workers, including frontier workers. As is analysed in part on study grants, there is a residence clause as regards migrant workers and members of their family in order to be enrolled or be able to follow education or training courses and participate in research and development work pursuant to rules applicable to Polish nationals, including study grants. And study grants shall be understood as social grants within the meaning of Art. 7.2 of the Regulation 1612/68. Also residence requirements apply in case of family benefits, benefits that are granted on basis of Act on social assistance and Act of June 27, 2003 on social rent (*ustawa o rencie socjalnej*).<sup>41</sup> These provisions which make it possible for EU citizens to benefit from specific financial benefit, however, conditional upon having a residence in Poland may influence the situation of migrant workers.

Moreover the Act of March 4, 1994 on the company benefit fund (*ustawa o zakładowym funduszu świadczeń socjalnych*) shall be mentioned.<sup>42</sup> Employers that hire at least 20 employees (based on full-time posts) are obliged to create a company fund, which can be a source for financial benefits for employees (such as holiday allowances or financing of sport carts, etc). There shall be special rules (in the form of internal regulation) of distribution of money collected in the fund. The Act on the company benefit does not make any differentiation between beneficiaries as to their citizenship. It therefore applies to EU migrant workers on the same footing as to Polish workers.

As regards tax advantages, the Act of July 26, 1991 on personal income tax (*ustawa o podatku dochodowym od osób fizycznych*)<sup>43</sup> regulates rules of taxation as regards individuals. According to the Act not citizenship, but the place of residence is material when determining tax rights and obligations. Article 3 of the Act states that all individuals, whose place of residence is in Poland, are subject to unlimited tax liability in Poland, which means that they shall be liable to pay Polish taxes on the total of their income, irrespective of where it was generated. Individuals who do not have their place of residence in Poland are subjected to limited tax liability, which means that they are liable to pay taxes only on income gained

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41 *Journal of Laws* of 2003, no. 135, item 1268.

42 *Journal of Laws* of 1996, no. 70, item 335.

43 *Journal of Laws* of 1991, no. 80, item 350.

at the territory of Poland. Other rules may be subject to international agreements on elimination of double taxation.

A taxpayer is regarded as having place of residence at the territory of Poland provided that:

1. he/she has established at the territory of Poland centre of personal or economic interests ('centre of live interests'), or
2. he/she stays at the territory of Poland longer than 183 days during a fiscal year.

As regards tax advantages, special rules apply to spouses. According to Art. 6.3a of the Act, spouses may be subjected to common income tax, provided that they have stayed in a marital relationship and community of property for an entire fiscal year subjected to settlement. Such a possibility applies also to cases where spouses:

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

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

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

The analysis of situation of jobseekers, together with the issue of entitlement to financial support during the period of looking for a job is made in Chapter 1 point 2. It shall be repeated that in Poland no jobseekers allowances in the form of financial support are available neither to Polish citizens nor to foreigners, including EU citizens and members of their families. Jobseeker according to Polish legislation cannot be treated as a worker within the meaning of the Act on entry. According to the Act on promotion of employment and labour institutions, there are several means of support for jobseekers, but only for those jobseekers who worked out a certain period and then lost the job and would like to find a new job again, certain financial support in the form of unemployment benefit can be provided. This regulation applies irrespective if the applicant is of Polish or of another Member State citizenship. However, as has been pointed out in the part of the Report on the situation of family members of jobseekers, the definition of family member does not cover directive dependant relatives in ascending line.

Therefore there are no such problems as were the focal point of analysis in *Ioannidis*, *Collins* or *Vatsouras* cases. Also as regards *Ioannidis* there are no such provisions that make certain benefits applicable conditional upon completing secondary education in another Member State.

Rights of jobseekers, who cannot be qualified as unemployed, because they have not worked out a certain period are inter alia as follows: support of centres of information and planning careers, attending in various activation activities, making use of employment agencies which aim is to provide services of job brokerage, personnel consultancy and occu-

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pational guidance, participate in various workshops and vocational trainings organized by training institutions. Additionally, poviats employment offices may prepare for jobseekers individual action plan which aim at facilitation of finding employment for them. Those forms of support are available for jobseekers from other Member States on the same footing as for Polish citizens.

As regards on the other hand the situation of unemployed who may be entitled to certain financial benefits, according to the Voivode Administrative Court in Wroclaw of September 10, 2008, granting the status of unemployed shall be subjected to coordination system within the meaning of the regime of Regulation 1408/71 (as of time of judging – i.e. 2008).<sup>44</sup> According to the Court, in the procedure of granting the status of unemployed, the relevant administrative authorities shall take into account periods of insurance or employment in other Member States in the same way as periods of insurance finished under applicable Polish legislation, however under condition that these periods of employment would be qualified as periods of insurance under Polish legislation.

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<sup>44</sup> File no. IV SA Wr 289/08.

## **Chapter V: Other obstacles to free movement of workers**

All provisions or practices that may constitute obstacles to free movement of workers have been analysed in Chapters I-IV respectively.

However, one additional remark shall be made. There may be practical problem for EU workers and members of their families to communicate with Polish authorities. Representatives of various institutions who have contact with foreigners still very often do not know foreign language, especially English at satisfactory level. However, there is a growing awareness as to the necessity to invest in learning especially English by officials.

## Chapter VI: Specific Issues

### *Main texts in force:*

1. Act of November 28, 2003 on family benefits,
2. Act of March 12, 2004 on social assistance,
3. Act of November 9, 2000 on maritime safety,
4. Act of November 18, 2001 on Maritime Code,
5. Act of May 23, 1991 on work at maritime commercial vessels,
6. Act on Higher Education July 27, 2005,
7. School Education Act of November 19, 2004,
8. Act of July 17, 1998 on students loans and credits,
9. Act of October 13, 1998 on Social Security System,
10. Labour Code of June 26, 1974.

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

There are no separate provisions concerning frontier workers in Polish legislation. However, there are certain acts that entitle to financial support which may influence the situation of frontier workers. There are also residence clauses that may influence the position of frontier workers,

According to Act of November 28, 2003 on family benefits (*ustawa o świadczeniach rodzinnych*)<sup>45</sup> following financial support may be granted: family benefits and attachments to family benefits, custody benefits: nursing benefits and nursing allowances; commune benefits and one-off benefits for a newly born child. However, in order to be entitled to these benefits, both Polish citizens and foreigners (including EU citizens which are not differentiated from third country nationals and are in one group of foreigners) must reside in Poland during the period of receiving entitlement. According to the judgment of the Voivode Administrative Court in Gliwice, the obligation of residence shall be understood in the light of Polish civil code and it cannot be understood as the requirement to stay physically for the entire period in Poland. Temporary leaves from the territory of Poland shall not exclude the right to the entitlement, provided that the applicant still treats Poland and his main place of residence.<sup>46</sup>

Additionally, Act of March 12, 2004 on social assistance (*ustawa o pomocy społecznej*) may also influence the situation of frontier workers<sup>47</sup>. The act applies in cases where listed beneficiaries are in need and are unable to overcome this situation without external (i.e. state) support. The Act provides material and non- material benefits. According to Art. 7 of the Act, the social assistance shall be granted *inter alia* in cases of poverty, homelessness, unemployment, orphanhood, disability, long-term illness, alcoholism, violence in the family, fortuitous events, natural disaster, etc. The main criteria of applicability is income per capita. The act applies to *inter alia* EU citizens and members of their families who have place of residence in Poland and who stay in Poland and have a right to stay or to permanent stay.

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<sup>45</sup> *Journal of Laws* of 2003, no. 228, item 2255.

<sup>46</sup> Judgment of October 9, 2007, no. of file IV SA/GI 1509/06.

<sup>47</sup> *Journal of Laws* of 2009, no. 175, item. 1362.

The obligation to both have place of residence and factually stay in Poland applies equally to Polish citizens, foreigners and EU citizens and members of their families.<sup>48</sup>

Additionally, the provision on higher education shall be mentioned. According to art. 43.2.4, the right to enroll on and follow education or training courses as well as participate in research and development work pursuant to the rules applicable to Polish citizens applies to migrant workers who are EU nationals and members of their families if they reside in Poland. Therefore there is a residence requirement in this respect.

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

## 2. SPORTSMEN/SPORTSWOMEN

Sportsmen and sportswomen are subjected to specific legal regime. On the one hand Polish mandatory law applies to them such as Labour Code and in case of third countries requirements to obtain work permit and on the other hand specific regulations of relevant sport associations are also applicable. As regards EU citizens, they do not have to obtain any work permit, as the general prohibition on discrimination on grounds of nationality apply to them. As regards third country nationals, the general rule is that they have to possess work permit, unless they as sportsmen/sportswomen perform work in the form of representing in sport competition an entity that has its registered seat in Poland, provided that such an activity is of occasional nature (Par. 2.10 of the Regulation of Minister of Labour and Social Policy of August 30, 2006 on the performance of work by foreigners without the obligation to have work permits – rozporządzenie Ministra Pracy i Polityki Społecznej w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę).<sup>49</sup>

As regards particular regulations concerning different sport disciplines, they are as follows.

Generally no home grown players rule is applicable.

### Football

As regards football, according to the Resolution of Polish Football Union Board number III/39 of July 14, 2006 on the status of the Polish football players and the change of the club membership (with several amendments to this regulations), each team may have unrestricted number of foreigners players (both EU and non-EU). The same rule applies to cup and championship matches. However, as regards players from third countries, they shall comply with Polish mandatory law as regards their employment and legalization of stay in Poland. There are no special provisions regarding EU citizens. However, para. 63.8 requires that in each club there have to be at least 8 confirmed and entitled football players that have Polish citizenship. Therefore nationality condition applies in this respect. Additionally, there are different transfer rules as regards transfers to Polish and foreign football clubs (therefore in such a situation on nationality is decisive factor, but place of transfer) – foreign transfers are

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48 Judgment of Voivode Administrative Court in Wroclaw of November 5, 2009, no. of files IV SA/Wr 283/09.

49 *Journal of Laws* of 2006, no. 156, item 1116.

regulated directly by FIFA regulations, whereas special regulations of Polish Football Union Board apply to domestic transfers.

### **Handball**

As regards handball, there are restrictions as to the permissible number of foreign players – in the superleague up to 3, in 1<sup>st</sup> league up to 2 and in the 2<sup>nd</sup> league up to 1. However, these limits do not apply to EU and EEA players. Therefore they are treated as Polish players and no limitations apply to them.

### **Volleyball**

According to regulation on volleyball, in the so called Plus League of Men and Women Volleyball, at the same time there must be during competition at least 3 players with Polish citizenship. As regards 1<sup>st</sup> League of Men and Women, there must be at least 4 players with Polish citizenship at the same time and in case of 2<sup>nd</sup> Leagues of men and Women – 5 Polish citizens. As regards regional competition – the decision is In hand of relevant regional volleyball associations.

### **Basketball**

Regulation of Polish Association of Basketball entitles to introduce limits of participation in certain basketball competitions of foreign players. According to relevant regulation on men and women basketball, during competition there must be at least 2 players with Polish citizenship. If this requirement is not fulfilled, the game must be immediately stopped in order to change a foreign player. Additionally as regards men basketball, in the game protocol there must be 6 players of Polish citizenship (in case of teams not taking part in European competitions) and 5 players of Polish citizenship (in case of teams taking part in European competitions). In the women basketball, in the game protocol there must 5 players of Polish citizenship and 6 when 11-12 players are registered.

### **Ice-hockey**

According to hockey regulations, in one team during competitions there may be 3 foreign players, but the goalkeeper shall be counted as 2 players. Additionally there may participate in the game 3 foreign players treated as domestic ones, who are players who:

- I.
- 1) have played during at least one season;
- 2) present document of relevant Voivod Authority confirming acceptance of complete application for granting Polish citizenship
- 3) at the moment of making application for citizenship in the season 2011/12 they have not finished 29 years and in forthcoming seasons – 28 years
- 4) host club will put an application for treatment such a player as domestic one not later than August 15 of each year

or

II. who have proved that at least one of their parents or grandparents or both great-grandparents were of Polish nationality or possessed Polish citizenship.

### Rugby

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

## 3. THE MARITIME SECTOR

According to data collected by rapporteur, there are not many international agreements between non-EU countries. Many agreements (except for international conventions which are not analysed in this point) that are available to the rapporteur, were concluded before II World War.

In the agreement between Poland and Croatia of February 12, 2001 on maritime transport,<sup>50</sup> there are no specific provisions on equal treatment as regards employment and working conditions. There is only a general rule that provisions of the agreement shall not contravene provisions of international agreements that bind both parties and general provisions on rules on entry or departure, which, however, in general permit to enter territory of two parties on basis on sailor card (but visa shall be also obligatory where applicable).

According to Agreement of November 16, 1978 between Poland and Japan on commerce and shipping<sup>51</sup>, citizens of these two parties shall benefit from national treatment and on reciprocal rules, the most preferential treatment as regards person and property, the same preferential treatment shall also be applicable to all matters connected with right to establishment.

According to Agreement of May 20, 1999 between Poland and Marocco on maritime transport,<sup>52</sup> members of commercial vessels of parties that are third country nationals, shall have the right to equal treatment in comparison with members of parties to the Agreement according to applicable legislation.

The agreement of October 4, 2002 between Poland and Tunisia in the sphere of maritime transport, as regards members of commercial vessels states that legal rules of relevant party shall apply to such individuals as regards rules of entry, stay and departure (however, visas may be required when applicable).

As regards general rules that apply to maritime sector in Poland, there are 3 main acts: the Act of November 9, 2000 on maritime safety (Ustawa o bezpieczeństwie morskim),<sup>53</sup> the Act of November 18, 2001 on Maritime Code (Ustawa Kodeks morski),<sup>54</sup> the Act of May 23, 1991 on work at maritime commercial vessels (Ustawa o pracy na morskich statkach hand-

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50 Monitor Polski of July 31, 2002.

51 *Journal of Laws* of 1981, no. 7, item 29.

52 Monitor Polski of July 19, 2004.

53 *Journal of Laws* of 2006, no. 99, item 693.

54 *Journal of Laws* of 2009, no. 217, item 1689.

lowych).<sup>55</sup> According to the last Act, it shall not be applicable if international agreement concerning rules of employment relations at vessels contain more favourable treatment for employers, however, if the act is more favourable for employees, the act shall prevail. According to the Act, a foreign employee is an employee who permanently resides outside Poland. Such an employee may be employed if he/she possesses a document issued by other state document certifying its identity and hitherto experience on vessels. The Act does not make any difference in ways of treatment between EU and non-EU citizens, including access to work, rules of taking into account hitherto experience.

#### 4. RESEARCHERS/ARTISTS

EU researchers and artists have the same legal status as national ones. There are no cases of infringement of equal treatment rules. As regards artists, there are no separate provisions concerning rules on exercising their activities.

As regards researchers, according to the Act on Higher Education, employment of a non-national as an academic staff member in a higher education institution shall not require permission or consent of an employment authority. Neither shall permission or consent be required in order to assign a non-national to other paid work within the scope of following tasks: teaching and educating students; conducting research and development work and contributing to the development of science or artistic creation, participating in the performance of organisational tasks in their higher education institution. Non-national, including EU citizen, shall be subjected to compulsory social security and health insurance, and shall be eligible for entitlements provided for in the Act on Higher Education on the same rules that apply to Polish nationals.

As regards EU researchers that are enrolled at Polish universities as PhD students, they are also entitled to certain social benefits according to the Regulation of Minister of National Education and Sport of May 25, 2005 on doctoral and postdoctoral scholarships (*Rozporządzenie Ministra Edukacji Narodowej i Sportu w sprawie stypendiów doktorskich i habilitacyjnych*).<sup>56</sup> These benefits may be divided into two groups - the first group covers social support that is established by respective rectors of universities and the second group of scholarships shall be treated as form of remuneration for working on doctoral dissertation. There is a possibility to apply for doctoral or postdoctoral (*habilitacja*) scholarship provided that: doctoral dissertation procedure has been instituted, the supervisor has issued either a positive opinion on dissertation or opinion confirming advanced phase of the dissertation and a doctoral student does not have any additional employment (except for individuals that work at hospital or veterinary clinic and they conduct activity in medical or veterinary sciences).<sup>57</sup> Similar rules apply to postdoctoral (*habilitacja*) scholarship. Granting such a scholarship is conditional only upon academic achievements, therefore it may be granted both to Polish and EU citizens – no residence and no nationality requirement is applicable in this case.<sup>58</sup>

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<sup>55</sup> *Journal of Laws* of 1991, no. 61, item 258.

<sup>56</sup> *Journal of Laws* of 2005, no 115, item 965.

<sup>57</sup> Para 2 of Regulation of Minister of National Education and Sport of 25 May 2005 on doctoral and postdoctoral scholarships, *Journal of Laws* of 2005, no. 115, item 965.

<sup>58</sup> *Journal of Laws* of 2005, no. 115, item 965.

It shall be just mentioned, that Poland also facilitates stay of third country nationals that are researchers and artists. According to the Regulation of Minister of Labour and Social Politics of August 20, 2006 on performance of work by foreigners without necessity to obtain work permits (Rozporządzenie Ministra Pracy i Polityki Społecznej w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę)<sup>59</sup> that also applies to sportsmen, artists that perform artistic activities or researchers that give lectures in Poland provided that their activities last no longer than 30 calendar days during a year are not obliged to receive work permit.

## 5. ACCESS TO STUDY GRANTS

The access to study grants for pupils and students is regulated respectively in the School Education Act of November 19, 2004 (Ustawa o systemie oświaty)<sup>60</sup> and in the Act on Higher Education and in the Act of July 17, 1998 on students loans and credits (Ustawa o pożyczkach i kredytach studenckich).<sup>61</sup>

As regards the right to attend to primary education in the form of kindergartens, public primary schools including gymnasia, it is granted to all kinds of foreigners. As regards, however, access to post secondary schools, public artistic schools and schools for vocational training of teachers, the right to attend on the same rules as are applicable to Polish citizens is granted to EU/EEA/Swiss Confederation migrant workers and members of their families that possess residence right or permanent residence right. The definition of ‘family member of an EU national’ is the same as in the Act on entry (and consequently Directive 2004/38). It shall be mentioned, however, that art. 94 a.2.1 of the Act listing the group of foreigners entitled to attend to abovementioned category of public schools was amended. As from 1 January 2010, the requirement of residence at the territory of Poland in order to be eligible for treatment according to rules applicable to Polish citizens in such a case has been deleted.

The School Education Act provides for financial support for students (pupils) in a form of social benefits or benefits that are defined as ‘motivating’. The first group includes school grant and school benefit. The second group consists of scholarship for learning and sporting achievements, Prime Minister scholarship, scholarship of Minister of National Education, scholarship of Minister of Culture. Both kinds of support may be granted for the same applicant simultaneously. Moreover, there is a possibility to be granted financial support for students in difficult life situation or for disabled students for acquiring handbooks.<sup>62</sup> Additionally, children of Polish citizens that temporarily reside outside territory of Poland shall have a right to attend abroad to primary, secondary schools as well as gymnasia that are located in consular or diplomatic units in given states. There is also a possibility for children of Polish citizens that permanently reside outside territory of Poland as well as for children of non-Polish citizens to attend such schools provided that there is a free place. For all kinds of stu-

59 *Journal of Laws* of 2006, no. 156, item 1116.

60 *Journal of Laws* of 2004, no 25, item 2572.

61 *Journal of Laws* of 1998, no 108, item 685 with further amendments.

62 Para 1 of Regulation of 28 May 2010 on specific conditions on financial support for students on acquiring handbooks and on paying flood benefit for educational purposes – *Journal of Laws* of 2010, no. 95, item 612.

dents, attending to such school is without any fee.<sup>63</sup> Additionally, if a pupil does not know Polish language on a sufficient level, he/she is entitled to have additional language lessons which shall be organized by a relevant school (Art. 94a.4).

As regards system of higher education, the right to enroll and pursue higher studies, PhD studies and other forms of education as well the right to participate in development and research studies pursuant to the rules that apply to Polish citizens, shall apply also inter alia to:

- i. migrant workers who are EU/EEA nationals and members of their families, provided that they are or have been employed in Poland and they reside at the territory of Poland<sup>64</sup> and to
- ii. EU/EEA and Swiss Confederation nationals and members of their families that have a right for permanent stay at the territory of Poland.<sup>65</sup>

Therefore there is a residence clause as regards migrant workers and members of their family in order to be enrolled or be able to follow education or training courses and participate in research and development work pursuant to rules applicable to Polish nationals. Definition of family members refers to definition listed in the Directive 2004/38.<sup>66</sup>

EU citizens and members of their families that are not economically active, but possess sufficient resources for maintenance during studies (and before period entitling to have a right for permanent stay) shall also have a right to study in Poland on the same rules that apply to Polish citizens (however, without the right to financial support). These not economically active EU citizens and members of their families are not entitled to be granted (i) maintenance grants, (ii) special grants for disabled persons, (iii) accommodation grants, (iv) meals grants or (v) aid payments. They also have a right to enroll or follow study programmes pursuant to rules laid down for other (not privileged) groups of foreigners.<sup>67</sup> The abovementioned provision implements the right enshrined in Art. 24 para 2 of Directive 2004/38, i.e. the right to exclude the obligation for equal treatment as regards access to social assistance prior to acquisition of the right of permanent residence, in the form of granting maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Foreigners holding EU citizenship (and members of their family, irrespective of nationality) shall be treated according to Act on Higher Education as Polish citizens. Consequently, they are excluded from the obligation to pay an entrance fee on basis of the Ordinance of Ministry of Science and Higher Education of October 12, 2006 on access and conditions of studies and training, researches or other academic works by foreigners (*Rozporządzenie Ministra Nauki I Szkolnictwa Wyższego w sprawie podejmowania I odbywania przez cudzoziemców studiów i szkoleń oraz ich uczestniczenia w badaniach naukowych I pracach rozwojowych*).<sup>68</sup>

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63 Par. 1 and 5 of Regulation of Minister of National Education of 31 August 2010 on education organization of for children of Polish citizens temporary residing outside territory of Poland – *Journal of Laws* of 2010, no. 170, item 1143.

64 Art. 43 para 2 point 4 AHE.

65 Art. 43 para 2 point 7 AHE.

66 *Journal of Laws* of 2006, no 144, item 1043 with further amendments.

67 Art. 43 para 5 AHE.

68 *Journal of Laws* of 2006, no. 190, item 1406.

According to Act on students' loans and credits, there is a possibility for individuals studying in Poland to be granted student loans and student credits that are co-financed by Polish budget (what results in decrease of the interest rate). Such loans and credits are granted by some commercial Polish banks. Such a support may be granted to all kinds of students (including PhD students), irrespective of the kind of the higher school (public or private) provided that such beneficiaries start their studies before age of 25. The general rule according to Art. 6.1. of the Act is that credits and loans are limited to Polish citizens. The nationality requirement according to Art. 6.3 does not apply, however, inter alia in case of:

- a) migrant workers and members of their families that are EU citizens and reside in Poland
- b) workers and their children that are EU citizens and are employed in Poland.

The credit or loan may be granted to students having low income per capita in their families. According to Regulation of Minister of Science and Higher Education of 18 May 2010 on detailed rules, procedure and criteria for granting, paying and remitting credit loans and credits (*Rozporządzenie Ministra Nauki i Szkolnictwa Wyższego w sprawie szczegółowych zasad, trybu i kryteriów udzielania, spłacania oraz umarzania kredytów i pożyczek studenckich*),<sup>69</sup> the Minister of Science and Higher Education is competent to declare a maximum threshold of income per capita in order to be eligible for such a loan or credit. As for 2011, the maximum income per capita has been established at the level of 2100 PLN (circa 525 euro). Income of (i) applicant, (ii) spouse, (iii) minor dependant children or studying children under 26 years old (including those who are 26 years old and who are at their last year of studies) and disabled children irrespective of age, (iv) parents or guardians of applicant together with their children as described in (iii) shall be taken into account.<sup>70</sup>

The loan or credit is granted for the period of studies, including doctoral studies. It is paid maximally for the period of 6 years (in case of doctoral studies for the period of 4 years). The credit is paid during 10 months a year in the maximum amount per month of 600 PLN (circa 150 euro).

The beneficiary is obliged to start paying the credit not later than within 2 years from the date of graduation. There is a possibility to have the credit remitted up to 20% of its value, provided that a creditor is within the group of 5% of best graduates. Moreover, the possibility of partial or even entire remittance of credit is possible in case of difficult life situation (illness, accident) or permanent loss of eligibility to pay obligations (disability).

There is no information how many EU students have applied and have been granted with the credit. As regards the general access system to study grants, according to information obtained in the Ministry of Science and Higher Education, there have been no reported cases concerning challenging the study grants schemes in Poland by EU citizens and members of their family.

## 6. YOUNG WORKERS

The criterion to define young worker in Poland is based on age and not on nationality and residence. Consequently, special rules that apply to this category of workers aim at protect-

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<sup>69</sup> *Journal of Laws* of 2010, no. 87, item 560.

<sup>70</sup> Para 5 point 2.

ing their health, provide them with sufficient rest time and holiday as well as to enable them to continue education where applicable. Additionally the special rules on termination of employment contracts, remuneration and conditions of work do apply. Therefore these special rules which aim is to protect young workers while working, may constitute obstacles to free movement rights, however, they are not based either on nationality nor on residence criteria, therefore they shall be deemed as not incompatible with EU free movement rights.

The definition of young worker is contained in art. 190 of the Labour Code. According to this provision, a young worker shall be understood as person who is over 16 and under 18 years of age. The Labour Code reiterates constitutional provision, that employment of workers (children) under 16 years old shall be prohibited. However, there are certain exceptions that enable younger people to be employed (i.e. in jobs connected with cultural, artistic, sports or advertising activities provided that both statutory guardian of such a child and relevant labour inspector will give obligatory consent and when the aim of the undertaken job is to have a vocational training and conditional upon making a special application on behalf of the young worker by his statutory guardian).

Additionally, there is a possibility for an employer to have a refund of both salary and social security contributions of the young worker (up to the minimum rates as defined in applicable provision), provided that such an employer has put a relevant application, the work forms part of vocational training and a given young worker exercises one of jobs as listed by voivode governments). The refund is not conditional upon residence or nationality of young employer.

There is also additional incentive for employers to engage into economic activity young workers, not only up to 18 years old but also older. According to Art. 6.4 of the Act of October 13, 1998 on Social Security System (*ustawa o systemie ubezpieczeń społecznych*)<sup>71</sup> pupils of gymnasia and other schools as well as students up to 26 years old are exempted from obligation to pay pension and annuity contributions provided that they exercise their work on basis on not employment contract (since such a contract is not exempted from obligation to pay above mentioned contributions), but agency or mandatory agreement. This provision make hiring students very attractive to the employer. Such a right is not conditional upon nationality or residence requirement.

Additionally, special rules apply to young workers (however the definition is different than in the Labour Code as regards age) in football regulation. According to the Resolution of Polish Football Union Board number III/39 of July 14, 2006 on the status of the Polish football players and the change of the club membership, football players below 18 years old are entitled to conclude a sport contract with a football club only for a limited period up to 3 years, whereas older players may enter into contract for up to 5 years. Moreover different rules apply to players that are professionals (i.e. who are paid for their work) and amateur (whose travel or maintenance costs during football competitions are only reimbursed). If a player gets back again a status of amateurs and is below 23 years old, and then within 30 months he again gets the status of professional, the football club who 'bought' (gained) such a player shall pay compensation for training to the home club of such a player. The same compensation is applicable if a professional player finished its career before 23 years old and who would like to continue the career later on or if the player decides to change the club before 23 years old (in this last case another fee is applicable in case of transfer of the player

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71 *Journal of Laws* of 1998, no. 137, item 887.

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between 23 and 28 years old). Moreover, the football club is obliged to enable the player who is younger than 21 years old the possibility to continue his learning. There is a requirement to have parents consent for engaging player who is under 18 years old. And lastly, 19 years old and older players may be transferred only to senior clubs and there are no limits as to the frequency of temporary transfers for players that are below 28 years old.

There is also a special regulation concerning young workers in the maritime sector. According to the Act of May 23, 1991 on work on commercial vessels, there is a general rule prohibiting employment young workers, i.e. under 18 years old on vessels, unless the aim of such employment is to provide him/her with vocational training and prepare for the post of seaman or fisherman.

## **Chapter VII: Application of transitional measures**

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

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

Reciprocal measures were applied until 17 January 2007 towards nationals of the EU15 Member States as long as they applied restrictions for Polish nationals. However, from 17 January 2007 until 1 May 2011 (i.e. the day of opening the German and Austrian labour market for Polish citizens) no restrictions as regards access of EU nationals to the labour market apply in Poland, regardless the possibility of access of the Polish nationals to respective labour market.

### **2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA**

Poland has decided to fully open its labour market for workers from Bulgaria and Romania as from day of their accession to EU. Therefore there are no transitional measures are applicable. However, according to statistics of the Office for Foreigners, the number of foreigners from Bulgaria and Romania is not very considerable. Among EU citizens that registered their stay in Poland between 2008 and 2010, there were 1203 Bulgarian citizens (5.9% of EU citizens staying in Poland) and 548 (2,7%) of Romanian citizens. However, what is interesting, the number of negative decisions on registration of stay was in the top three – only behind German (however, there were 6417 registration of stay of German citizens, that is much more than Bulgarian and Romanian) – i.e. between years 2008 and 2010, 45 negative decisions were issued for Bulgarian applicants and 37 for Romanian.

## Chapter VIII: Miscellaneous

### *Main texts in force:*

1. Act of October 13, 1998 on Social Security System,
2. Act of August 27, 2004 on health care benefits financed from the public sources,
3. Act of June 23, 2003 on social pension,
4. Act of November 28, 2003 in family benefits,
5. Act of March 12, 2004 on social assistance,
6. Act of April 20, 2004 on promotion of employment and labour institutions,
7. Act of May 29, 1974 on provision for war and military invalids and their families,
8. Act of May 31, 1996 on financial benefits for individuals deported to forced labour and imprisoned at labour camps by the Third Reich and USSR,
9. Act of November 16, 2006 on financial benefits and rights for civil, blind war victims,
10. Act of June 13, 2003 on aliens,
11. Act of September 7, 2007 on the Charter of Polish National.

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

As regards the relationship between Regulation 1408/71-883/04 and Article 45 TFEU and Regulation 1612/68 (and Regulation 492/2011) there are no specific provisions that regulates their mutual relationship and consequences of possible interaction. Therefore focus shall be put on a legal nature of particular benefits. The contributory benefits which are in general financed by contributions paid by employees and/or employers as a rule are covered by EU coordination provisions. Social advantages in the meaning of art. 7(2) of Regulation 1612/68 cover a very broad range of various benefits. They can be provided both by employers or state institutions. Usually such advantages are financed by public funds, without prior contributions of potential beneficiaries.

Polish citizens and EU nationals engaged in economic activity at the territory of Poland are subjected to a Polish social security statutes. The Act on social security system, divides social security into following branches: retirement scheme, pension scheme, maternity and sickness scheme, accidents at work scheme. Art. 2a of the Act on social security system stipulates the right to equal treatment. Discrimination based on family, civil status and sex is forbidden. Despite the fact that discrimination based on nationality is not listed, it does not exclude the prohibition to discriminate on grounds of nationality.

The Act of August 27, 2004 on health care benefits financed from the public sources (*ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*)<sup>72</sup> defines rules of general public health care system. Moreover, according to Art. 1.5 of the Act, it regulates rules of application Regulation 1408/71 (reference to new regulation has not been made yet). According to Art. 3, the insured person shall cover inter alia EU/EEA/Swiss Confederation citizens and members of their families if they are covered by obligatory or facultative insurance system. According to art. 51 of the Act, in order to confirm the right to health care services available to the recipient or the person entitled to health care services according

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<sup>72</sup> *Journal of Laws* of 2004, no. 210, item 2135.

to regulations on coordination, in accordance with regulations on coordination, on the territory of EU or EEA Member States other than Poland, a regional branch of the National Health Fund shall issue the European Health Insurance Card or a certificate of right to health benefits. According to Art. 52 of the Act, for a person entitled to health care services under the regulations on coordination, in order to use the benefits of health insurance in Poland, a regional branch of the Fund issues a certificate confirming the right to health care services.

Social advantages that are described in Art. 7 para 2 of the Regulation 1612/68 covers variety of benefits of financial and non-financial dimension. Therefore the group of social advantages will be in most cases financed by public funds, without contributions of potential or future beneficiaries. However, to social advantages in the meaning of Art. 7 para 2 of the Regulation shall also be qualified such advantages as the possibility to recognize prior employment periods in order to gain additional benefits, certificates proving knowledge of Polish language awarded in different Member State that Poland, etc...

As regards financial benefits that shall be covered by Art. 7 para 2 of the Regulation 1612/68, following acts are relevant in this respect: Act of June 23, 2003 on social pension<sup>73</sup> (ustawa o rencie socjalnej), Act of November 28, 2003 on family benefits (Ustawa o świadczeniach rodzinnych),<sup>74</sup> Act of March 12, 2004 on social assistance (ustawa o pomocy społecznej).<sup>75</sup> It shall be mentioned that as regards the Act on social assistance and the Act on social pension, there are rules entitling to receive non-contributory benefits (where no prior economic activity and paying contributions are obligatory). Both Polish and EU citizens (not restricted to workers) are entitled to receive such non-contributory benefits.

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

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

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

The requirement to have a place of residence in Poland in order to be eligible for social pension was analysed in 2010 by Polish Court of Appeal in Lublin.<sup>76</sup> According to the court, after accession to EU, Polish citizens acquired the right to free movement throughout the whole EU. Therefore granting social pension conditional upon having residence and domicile in Poland, discriminates Polish citizens, who consequently have a limited right to make use of this fundamental freedom to move and reside in other Member States. Therefore Art. 2.1 of the Act, which requires from Polish citizen to be resident in Poland for the purposes of granting social pension constitutes according to the court violation of EU free movement rights. However, the court only analysed (according to present factual situation) the require-

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<sup>73</sup> *Journal of Laws* of 2003, no. 135, item 1268.

<sup>74</sup> *Journal of Laws* of 2006, no. 139, item 992.

<sup>75</sup> *Journal of Laws* of 2004, no. 64, item 593.

<sup>76</sup> Judgment of May 13, 2010, file no. III AUa 335/10.

ment to have residence in Poland as regards Polish citizen, the same remark may be done as regards EU citizens and members of their families who are listed in Art. 2.3 and to whom also the obligation to have place of residence in Poland applies.

The Act on family benefits in Art. 2 provides for family benefits and attachments to family benefits, custody benefits; nursing benefits and nursing allowances; commune benefits and one-off benefits for a newly born child. These benefits may be granted to Polish citizens and EU citizens who are covered by social security coordination schemes and provided that these two groups of individuals reside at the territory of Poland, unless coordination system or relevant international agreements provides otherwise.

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

As regards benefit for incapacity to work as a war consequences, the Law of May 29, 1974 on provision for war and military invalids and their families (Ustawa o zaopatrzeniu inwalidów wojennych i wojskowych oraz ich rodzin)<sup>77</sup> does not have any more the requirement for the applicant to have a residence place in Poland (as a result of Nerkowska ruling). On basis of Nerkowska ruling, the Polish Supreme Court has entirely changed his position as regards these types of benefits. On December 8, 2009 the Court stated that the requirement to have a place of residence in Poland in order to be entitled to benefits granted by the Act would be manifestly inappropriate in the light of free movement rights.<sup>78</sup> This judgment is entirely different form the judgment of the same Supreme Court of April 7, 2005 (i.e. issued almost 1 year after Polish accession to EU) in which at that time the Court stated that requirement to have residence in Poland is acceptable taking into account the character of the benefit in question.<sup>79</sup>

Additionally, in the Law of May 31, 1996 on financial benefits for individuals deported to forced labour and imprisoned at labour camps by the Third Reich and USSR (ustawa o świadczeniu pieniężnym przysługującym osobom deportowanym do pracy przymusowej oraz osadzonym w obozach pracy przez III Rzeszę i Związek Socjalistycznych Republik Radzieckich)<sup>80</sup> also residence clause has been deleted. Unfortunately in the Act of November 16, 2006 on financial benefits and rights for civil, blind war victims (Ustawa o świadczeniu pieniężnym i uprawnieniach przysługujących cywilnym niewidomym ofiarom działań wojennych) Polish citizens in order to be entitled to receive financial benefits shall have a permanent residence at the territory of Poland. Therefore the residence clause is this case still applies.

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<sup>77</sup> *Journal of Laws* of 2010, no. 101, item 648.

<sup>78</sup> File no. I BU 6/09.

<sup>79</sup> File bo. I UK 313/04.

<sup>80</sup> *Journal of Laws* of 1996, no. 87, item 395.

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

As reported in 2010, the Act on entry does not have special provisions regarding frontier workers. Therefore they benefit from the same rights and are subjected to the same duties as regular workers according to the Act on entry. However, there are specific provisions concerning entitlement of financial and non-financial benefits which contain residence requirement and consequently may influence the situation of frontier workers – such as the Act on family benefits or the Act on social assistance and Act on higher education.

## **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***

According to the document Migration Policy for Poland (see point 3.2. below), Polish government would like to improve cooperation and service for foreigners, including both EU citizens and third country nationals. The aim of the program is to facilitate access to information (on legal issues as well as stages of running administrative procedures, possibilities to redress in a given case).

Polish government would like to financially support legal service for foreigners which shall be provided by nongovernmental organizations. Additionally, within the vocational training available for representatives of Polish administration, they shall participate in seminars and workshops devoted to better understanding of foreigners cases and importance of intercultural dialogue. computerization and electronic circulation of documents shall help in better service for foreigners. Additionally, Polish government has been working on a special IT system called ‘Pobyty’ (‘Stay’).

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

#### ***Immigration policies for third-country nationals***

There is an evolving interest in creating comprehensive approach towards third country nationals. An important document ‘Migration policy for Poland’ was announced in April 2011 and sent to public consultations. The document was prepared by a special panel of experts appointed by Minister of Internal Affairs and Administration. The aim of the document is to analyse the political, legal and social situation of third country nationals (EU citizens and members of their families are only mentioned in the Policy) and in result to adopt such legal tools that enhance and help foreigners to integrate with Polish society. The general aim of the document is to define future steps to create Poland as friendly and worth coming country.

According to the Migration Policy, special treatment shall be granted to the following categories of migrants: (1) people of Polish origin whose origin has been confirmed by a statute and who consequently have a right to settle permanently in Poland according to Art. 52.5 of the Polish Constitution (i.e. anyone whose Polish origin has been confirmed in accordance with statute, (2) students, scholars and foreigners pursuing studies or vocational

training at the territory of Poland, (3) foreigners running their own business as well as economic migrants or those delegated by foreign employers.

Special emphasis is put in the report on third country students and scholars. As Polish universities for 2-3 years now have been facing with the problem of demographic decrease, the possibility to encourage third country students to arrive to Poland and study here is of particular importance. The strong support is given from Ministry of Science and Higher Education. Polish universities prepare special offers for foreign students, including full time programmes of studies in foreign language – especially English. Additionally, university authorities participate in various meetings abroad in order to present offers of universities their represent for international students. This approach towards students and scholars that can be seen in Migration Policy is consequently confirmed in legislative proposals. Ministry of Administration and Internal Affairs has initiated amendments to Act on Aliens in order in general to facilitate all procedures connected with registration and legalization of stay. As regards students new provisions regarding foreign students studying at Polish universities have been proposed. The proposal extends their temporary residence period up to two years instead of the current one year residence permit. Also foreign graduates of Polish universities, who would like to undertake employment in Poland, would also be able to apply for a temporary residence permit. Young people could use that period of time to search for a job.

Additionally in the above mentioned amendment proposals of Act on Aliens, extension of the temporary residence permit by one year and an expedited procedure for the issue of residence permits are included. The draft act provides for an extension of the temporary residence permit for foreigners from two up to three years. Additionally, a foreigner would be entitled to apply for a temporary residence permit during its legal stay in the country at a time convenient for them. Currently foreigners who would like to stay in Poland for a longer period of time are required to submit an application 45 days before the expiry of their residence permit at the latest. The proposal also envisages granting a single permit for residence and employment. Each foreigner working in Poland would be able to apply for a permit for residence and employment in Poland simultaneously. There are also plans to abandon the requirement that a foreigner need to submit a legal title to their place of residence. According to the Ministry of Administration, it would be enough for the foreigner to prove that they have an apartment at their disposal in Poland.

The procedure for granting residence permits would also be shortened and made easier. This has been achieved by shortening the period of time when appropriate services provide information on whether an entry or exit of a foreigner may pose a threat, e.g. to public security or order. The previous deadline of 30 days has been cut by half.

Moreover, on June 22, 2011 the Polish Government has accepted the draft of the Act on legalisation of stay in Poland as well as drafts of amendments to Act on foreigners and Act on granting foreigners protection in Poland. The main aim of granting permit for temporary stay will be the continuous stay in Poland as from December 20, 2007, if a stay is illegal at the moment of entering the relevant act in force. The same right will be granted to those foreigners who have been granted the final decision on refusal to grant refugee status and the decision on expulsion has been issued – such applicants shall stay in Poland as from January 1, 2010 provided also that their stay is illegal at the time of entering the act into force. Moreover, the right to legalise stay shall be granted to those foreigners, whose refugee proceedings were pending as of January 1, 2010. The right for temporary stay in Poland will be in such situations granted for a period of 2 years and within this period a foreigner will have a right to take up employment without the obligation to possess work permit. Moreover, there

will be no requirement to have enough financial resources for stay. Foreigner who would like to make use of these provisions would have to put a relevant application within 6 months from entering into force of the act. There will be a possibility to refuse residence permit on basis of security or safety reasons or when documents filed by the foreigner turned to be faked. Similar conditions (including the fact of permanent departure from Poland) will be base for withdrawal of residence permit.

There will be also new rules concerning reallocation or resettlement of foreigners as well as refugee procedures. As regards refugees, Poland shall support a foreigner in case of his transport to another Member State in order to assess his application for refugee status. Foreigners who do not stay in refugee camp but who make use of social financial support, will have a right *inter alia* to learn Polish language (currently such a possibility is opened only to those foreigners who stay in such refugee camp).

All these amendments are in line with current Polish policy to create Poland as a friendly country for foreigners and finally to enlarge the amount of foreigners working and residing in Poland.

#### *Union preference principle*

The Act on promotion of employment and labour market contains provisions regarding access to Polish labour market for foreigners. The general rule is that EU and EEA citizens and members of their families (as defined by the Directive 2004/38, together with those retaining the right to stay after death or divorce or annulment of marriage with EU citizens) shall have access to employment in Poland without the need to have permission to work. Despite there is no direct Union preference principle, analysis of the Act on promotion leads to conclusion that in practice there is a priority for group of foreigners, including EU citizens and members of their families to be employed before a given post is available for third country nationals. It is the voivode relevant for place of residence or place of stay of future employer that is entitled to issue an employment permit for foreigners. However, as a rule such a permit shall be given only if the starost (local Polish authority) confirms *inter alia*, that basing on the records of unemployed and seeking work there is no other candidate that does not need to have a permit for work or there has been a recruitment procedure for a given employer that has not been finished successfully.

However, in the Act on promotion of employment, there is a wide list of foreigners that are released from obligation to obtain a work permit. This group covers *inter alia* foreigners, who have received a settlement permit or a residence permit for a long-term EC resident in the territory of Poland or have a refugee status, a tolerated residence permit or is subject to temporary protection in Poland. Together with members of their families. Additional group is covered by individuals holding a Charter of Polish National according to Act of September 7, 2007 on the Charter of Polish National (Ustawa o Karcie Polaka).<sup>81</sup> In general the Act covers individuals who live within a territory of ex – Soviet Union, who has Polish origin and who lost Polish citizenship due to events connected with World War II and post – war period.

Moreover, the Act on promotion of employment entitles the Minister of Labour to issue a regulation regarding possibilities for foreigners to take up employment without the obliga-

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81 *Journal of Laws* of 2007, no. 180, item. 1280

tion to receive work permit. The Regulation of 30 August 2006<sup>82</sup> that was mentioned in last year Report is still in force, however it was amended in December 2010 (see below). The regulation lists categories of activities/jobs that do not require work permits. It covers, inter alia, besides groups already mentioned, i.e. sportsmen and artists, also such individuals as: Turkish citizens on basis of EU agreements with this country, employees delegated by foreign employers, who have their places of residence abroad, and stay in Poland for a period not longer than 3 months for a listed in the Regulation physical work; students of stationary studies in Poland — in months of July, August and September; students, who have been sent for professional probations by Member organizations of international student associations; students, who perform work within a cooperation of public employment services and their foreign partners, if a need to entrust the alien with the performance of work is confirmed by appropriate employment authority; performing work as research fellows in subjects mentioned in regulations concerning research and development institutions; graduates of polish upper secondary schools or stationary MA studies or stationary doctorate studies in Polish high schools; students of high schools or vocational schools who have been committed to undergo vocational internships (not longer than 6 months in a calendar year) within an agreement between a foreign high school or vocational school and an employer, which was registered in a district employment agency appropriate for a residence or premises of the employer; students of high schools or vocational schools in European Union Member States or EEA Member States or in Swiss Confederation, who have been committed by the school to undergo vocational internships which was stipulated by the code of rules of the studies or a teaching programme; foreigners taking part in cultural or educational exchange programmes, programmes of humanitarian or development aid, programmes of holiday work for students organized in agreement. The above list is not exhaustive.

Therefore there is not a clear Union preference principle, as the priority towards third country nationals shall be given to all groups of foreigners that are according to the Act on promotion released from obligation to obtain work permit. However, on the other hand it is not possible to be given work permit for third country national if there is EU candidate (or member of his family) who apply for a particular post.

Figures show that the scale of third country nationals seeking employment in Poland is still not very significant. The increased interest of foreigners to stay in Poland can be seen since 2008. As of December 31, 2009 - 97 604 foreigners had valid residence card (19 828 more than in 2008.), 29% of them were citizens of Ukraine. As regards employment, in 2009 29 430 permissions for employment in Poland were granted (almost 10 000 more than in 2008) and 191 524 employers statements of intentions were issued (for those third country nationals covered by a simplified system of employment). The above mentioned figures show that, Poland has not become a country of net immigration and given the scale of emigration will not become such a country in a near future. However, in 2011 there is a considerable interest of Polish employers to employ workers from Ukraine, Belarus, Russia, Moldova and Georgia. These foreigners are particularly needed in agriculture (during fruit and vegetable harvest) where Polish citizens are not eager to work. This work is mainly seasonal, therefore the growth of applications to work can be seen in May-June. The very important factor that encourages Polish employers to hire workers from these East countries is that as from December 14, 2010, the Regulation regarding possibilities for foreigners to take up

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82 *Journal of Laws* of 2006, no. 156, item 1116.

employment without the obligation to receive work permit has been amended. Nationals from abovementioned countries do not need to obtain permission to work if they plan to work for up to 6 months within the period of 12 consecutive months. In such a situation, only declaration of work issued by future employer shall be submitted to relevant poviata labour office.

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

From the time of Polish accession to European Union, scale of dynamic of migration has considerably changed. According to data collected by Polish Statistical Office, in 2008 there were 2.3 million of Polish citizens that migrated abroad, especially to Ireland and United Kingdom. Many of them were qualified workers. The most popular destinations for Polish citizens have been (as from 2004) United Kingdom and Ireland. However, due to worldwide economic crisis, the tendency to return can be seen. However, it is very difficult to estimate how many Polish citizens have decided to come back from economic migration and find a job or engage in other economic activity in Poland. Figures vary depending on public opinion research centers. According to Polish Statistical Office, 213 000 citizens decided to return to Poland in 2007. However, according to the Office, which made a research on situation of migrants and their families, the decision of return was mainly not caused by the economic crisis, but was a planned decision. According to the survey, 38% of Polish migrants declared that they never wanted to leave Poland forever, but only for a limited period of few years, since they treated work abroad only as temporary or seasonal. Only 2% of migrants declared that the decision to return was caused by the economic crisis in host country. However, according to analysis made on the issue and reasons of return indeed deterioration of economic situation in destination countries, recession and rising competition in the labour market force Polish citizens to make decision to come back Poland. Moreover, the economic situation in Poland remains relatively stable and enjoys better prospects than most EU economies<sup>83</sup>. Polish citizens mainly have returned from Germany, United Kingdom and United States<sup>84</sup>. According on the other hand on data gathered from United Kingdom and Ireland by authors of the document Migration Policy for Poland, in 2009 400 000 Polish citizens left these two countries. However, it does not mean that they return to Poland, since they may have moved to another Member States where the labour market was more stable than in United Kingdom and Ireland.

The comprehensive information on a scale of return migration will be available within few months, as in 2011 the national census of population and housing will be finished. The census will also cover the issue of the scale of migration, including returning migration.

Polish government as from 2006 has initiated various programmes for returning Polish citizens, however, without considerable success ( these programs were: in 2006 ‘Blizej Polski blizej pracy’ – ‘Closer to Poland closer to work’ and in 2007 Governmental programme on cooperation with Polish citizens living abroad). The last programme, created by a special working group on returning migrations called ‘Powroty’ (‘Returns’) can be declared as beneficial for Polish citizens. Its aim is to support Polish citizens who decide to turn back to Po-

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83 Presentation of M. Duszczyk during Poland Lithuania Free Movement Conference, Vilnius, October 2008.

84 Information about immigration resources In Poland in 2008, Polish Statistical Office.

land in their re-assimilation and provide them with reliable and comprehensive information on ample of practical issues. The part of the programme consists of information campaign on possible hindrances and ways to overcome them while coming back. The special guide for people decided to return was published called 'Powrotnik' ('Returner') which was distributed with Polish newspapers in mainly Ireland and United Kingdom. There is also a special website <http://powroty.gov.pl> where interested migrants may find practical information concerning their return. Additionally, Ministry of Education is involved in information campaign how children of returning migrants may attend Polish schools after a period of living abroad.

However, the programme is not focused on making incentives or encouraging Polish citizens to come back home since indeed Polish government is not really interested in their return as level of salaries and standard of life in countries of their migration (such as United Kingdom, Ireland or Germany which are the most popular destination for Polish citizens) are unquestionably higher than in Poland. However, as Polish government is aware that in previous few years around 3 million Polish citizens have migrated to other EU Member States, it feels under the duty to support those who definitely decided to return.

The Migration Policy for Poland also, defines main duties that shall be executed in order to minimize negative aspects of return such as running information campaign on possible economic activities in Poland, removing main obstacles for Polish citizens residing abroad (such as for instance amendment to Polish Elections Act in order to enhance participation in Polish political life while being abroad, support reintegration of children of Polish returning migrants into the Polish educational system (together with making possibility to learn mother language abroad), support of children of Polish migrants that have not joined their parents and decided to stay home and finally strengthening cooperation with Polish organizations in order to detect possible cases of discrimination of Polish citizens living and working abroad in order to combat them. Main problems for returning Polish citizens concern rules of transferring social benefits, ways of paying taxes from income earned outside Poland. There are also more practical issues such as problems to register in Poland a car bought abroad or to take (import) animals to Poland. Additionally many returning Polish citizens wonder how hitherto abroad education of their children shall be assessed in Polish educational system. For many Polish citizens the fact of return to Poland is assessed by them as kind of failure. Therefore such persons very frequently are not eager to come back to their home place and they decide to move to a different place in Poland in order to start entirely new life after migration.

#### ***4. National organizations or non-judicial bodies to which complaints for violation of Community law can be launched***

The situation in this respect has not considerably changed since Report 2010.

Therefore following organization shall be mentioned with the same categories of competences as defined in the report 2010:

- a) Rzecznik Praw Obywatelskich (Ombudsman) – [www.rpo.gov.pl](http://www.rpo.gov.pl)
- b) Fundacja Uniwersyteckich Poradni Prawnych (Legal Clinics Foundation) – [www.fupp.org.pl](http://www.fupp.org.pl)
- c) Poradnia Prawna dla Cudzoziemców (Legal Bureaux for Aliens) – [www.law.law.diplomacy.pl](http://www.law.law.diplomacy.pl)

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- d) Helsińska Fundacja Praw Człowieka (Helsinki Foundation for Human Rights) – [www.hfhrpolwaw.pl](http://www.hfhrpolwaw.pl)
- e) Instytut Spraw Publicznych (Institute for Public Affairs) – [www.isp.org.pl](http://www.isp.org.pl)
- f) Związek Biur Porad Obywatelskich (Union of Citizens Advice Bureaux) – [www.zbpo.org.pl](http://www.zbpo.org.pl)

Additionally, it is worth to mentioned:

- g) Foundation Polish Migration Forum ([www.forummigracyjne.org](http://www.forummigracyjne.org))

Its aim is to work for respect of the rights of migrants in Poland. The aim of the Forum is to support and develop initiatives that lead to dialogue of people representing various cultures. The Forum is particularly interested in promoting dialogue between Poles and foreigners who arrive to Poland to seek protection, however, it also support migrants from EU countries to enhance acclimatization in Poland.

It must be pointed out, that there are plenty of organizations that aim at supporting refugees in Poland. As Poland is not particularly attractive country for EU migrants and members of their families, there is in practice no particular need to have various organizations that are focused on solely situation of EU migrants.

## 5. SEMINARS, REPORTS AND ARTICLES

### *Seminars:*

- 10 years of Office for Foreigners – July 3, 2011 Warsaw
- Migration Researches In Poland – state of art, methods and future steps – March 24-25, 2011, Jachranka
- Migrations from Eastern countries of Europe to EU In the light of visa Policy – January 26, 2010, Warsaw

### *Publications:*

Godfried Engbersen, Marek Okólski, Cristina Panțiru (eds), *A Continent Moving West? EU Enlargement and Labour Migration from Central and Eastern Europe*. Amsterdam: Amsterdam University Press 2010

Grabowska-Lusińska Iza, Górny Agata, Magdalena Lesińska, Marek Okólski (ed.), Warszawa 2010

Skomerska-Muchalska Izabela, Wyrozumski Anna, *EU citizen*, Warszawa 2010

Hajn Zbigniew, *Free movement of workers*, Warszawa 2010

Adamska Lidia, Krzyżewska Joanna, *Coordination of social security systems in EU*, Warszawa 2010

Sanetra Walerian, Labour law after Lisbon Treaty, *European Judicial Review* 2/2010

Wollenschläger Ferdinand, EU citizenship and its dynamics in the integration process, *European Judicial Review* 6, 7, 9/2010

Szafrański Dariusz, Foreigner as an entrepreneur in Polish legal system, *European Judicial Review*, 7/2010

Lesińska Magdalena, *Return migrants policy. Theory and practice*, Warszawa 2010

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Grabowska-Lusińska Izabela (ed.) *Post-accession returns of Polish migrants*, Warszawa 2010

Ministry of Administration and Internal Affairs, *Policy migration for Poland, working document*, Warszawa 2011