

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

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Chapter I

The Worker: Entry, Residence, Departure and Remedies

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

As regards provision specific for workers, the Act of 14 July 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 z dnia 14 lipca 2006 o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin),¹ generally implements provisions of Directive 2004/38 regarding conditions of stay for workers.

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

According to Article 16 of the Act on entry, employees and self-employed person in the territory of Poland shall have a right to stay for a period longer than 3 months. The only condition is to be registered and possess the certificate on the registration of the residence of EU citizen. Such a certificate shall be issued not later than within 6 months from the date of the submission of the request for its issue. The request, submitted in person, shall be done not later than on the day following day after the expiry of 3 months from the date of entry to the territory of Poland.

In order to receive certificate of residence, according to administrative practice in Poland, EU national should provide:

1. application (1 original + 3 photocopies),
2. photocopy of a valid travel document (the page with personal details) or another document confirming his/her identity and citizenship,
3. confirmation of a temporary stay registration,
4. documents or written declarations confirming that the foregoing conditions of stay have been met.

It is rather questionable if a confirmation of a temporary stay registration is compliant with EU law, as the Directive 2004/38 does not contain such an obligation. However, the obligation to either registry for temporary or permanent residence in a given place in Poland does apply without any differences to EU, non EU and Polish citizens. However, in the light of Art. 37 of the Directive 2004/38 which states that only provisions that are more favourable to the persons covered by the Directive shall be permitted on basis of the Directive, there can be some doubts as regards the necessity to present confirmation of a temporary stay registration. Moreover, analysis of the Act on entry does not lead to conclusion that it is necessary in order to be registered, to show such a registered address. Such an obligation results from Law of 10 April 1974 on evidence and identity card (Ustawa z dnia 10 kwietnia 1974 o

¹ *Journal of Laws* of 2006, no. 144, item 1043, hereinafter: “Act on entry”.

ewidencji ludności i dowodach osobistych).² Therefore there is an inconsistency between wording of the Act on entry and the Law on evidence. First, art. 21.3 of the Act on entry clearly states that the request to register stay by an employee shall be accompanied by documents confirming the fulfillment of residence requirements laid down in the Chapter 3. Analysis of Chapter 3 leads to a conclusion that no registered address either temporary or permanent is required. Moreover, Art. 28 of the Act on entry clearly states that as a rule, registered address of the place of permanent residence within the territory of Poland or in case there is none – registered address of temporary residence for period exceeding 3 months. However, Art. 28 of the Act in entry finally states that in case there is not any registered address of the place of permanent or temporary residence exceeding 3 months, these data shall not be included. The abovementioned analysis leads to conclusion that here is inconsistency between these two legal Acts. As there is a general rule for Community interpretation of national legal provisions, it may be claimed, that the precedence shall be taken by the Act on entry that implements Directive 2004/38. Therefore EU national shall not be obliged to present registered address. Such an interpretation shall be moreover supported by the application forms. In part D of the application for register of stay, there is information that registered address in the territory of Poland shall be filled provided that the applicant has the registered address. This lead to conclusion that relevant Polish institutions shall not require to inform about registered address. However, analysis of administration practice leads to conclusion that in practice registration of temporary or permanent stay is required during register procedure.

Besides an employee should also provide a written declaration of an employer or an entity authorised to provide an EU national with work about the intention to provide the EU national with work or a certificate of performing a work.

Moreover, analysis of applications that shall be filled in order to register for stay according to templates issued in Regulation of requires to list more data than required by the Directive 2004/38, such as names of parents, PESEL number (if applicable), height, special marks, colour of eyes.

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

There is the right to retain a status of migrant worker by individuals that are no longer engaged in economic activity. Art. 17 of the Act on entry makes a possibility for such an individual to retain status of worker, in case of temporary inability to work as a result of illness, in case of involuntary unemployment provided that he/she has registered in the unemployment register kept by the Poviats Employment Office in case when he/she starts education or vocational training. As regards involuntary unemployment, the Act on entry differentiates the situation of such individuals on basis of periods of previous employment at the territory of Poland. According to Art. 17.2 of the Act on entry, if the period of employment preceding unemployment referred to above has been shorter than one year, the EU citizen shall retain the right to reside granted to an employee for a period of 6 months from the date of registration in Poviats Employment Office.

² *Journal of Laws* of 2006, no. 139, item 993.

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. However, the amendment to the Act on entry made in 2007 approximated the wording of the Act on entry with Art. 7 para 1 of the Directive 2004/38 by replacing words “without the need of making use of social assistance benefits” by the words “in a way to avoid becoming a burden on social assistance system” in cases of individuals who are not engaged in economic activity. This may lead to a conclusion that the mere fact of making use of social assistance benefits shall not be an enough reason for expulsion of EU citizen and members of their families. Moreover, it is important to mention Art. 70 of the Act on entry which 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.

As regards exemptions for EU individuals no longer working in the host Member State as well as their family members (as described in Art. 17 of the Directive 2004/38), these situations are covered by Art. 45 and 46 of the Act on entry. Therefore, the Act on entry implements provisions of Art.17 of the Directive correctly.

Art. 24.2. of the Directive 2004/38:

Polish legislator has made use of right to exclude from the general rule of equal treatment, for students or EU citizens looking for a job. As regards the issue of maintenance aid during studies for economically inactive EU citizens and members of their families, Article 43 para 5 of the Act of 27 July 2005 on Higher Education (Ustawa z dnia 27 lipca 2005 o szkolnictwie wyższym)³ 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 for disabled, maintenance for housing (accommodation), food allowance or other allowances. This provision implements the wording of Art. 24 para 2 of the Directive 2004/38.

2. SITUATION OF JOBSEEKERS

EU citizens may reside in Poland for a period up to 3 months without the need to meet residence requirements that are applicable in case of stay longer than 3 months. They are only required to possess valid travel document or any other document that may prove their iden-

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

tity. According to Art. 16.2 of the Act on entry, 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, this Article shall be understood in the light of transitional measures that have been finally repealed in 2007 in Poland. Therefore now, 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.

Jobseekers are obliged to register in the Poviats Employment Office run by starost. If a jobseeker does not fulfill requirements that are listed in the Act of 20 April 2004 on promoting employment and labour institutions (ustawa z dnia 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy),⁴ he/she may be deprived of a status of jobseeker for a period of 120 days. 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. An individual shall be deprived status of jobseeker, when an individual does not contact with Poviats Employment Office at least every 90 days in order to confirm that he/she is still interested in receiving support accessible according to the Act on promoting; he/she has not kept an appointment with Poviats Employment Office and has not informed the Office about justified reason; 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. Such exams are financed by State budget up to average monthly salary and finally status of jobseeker is lost when a person concerned has put a motion to resign from assistance offered by the Poviats Employment Office on basis of the Act on promoting employment.

As regards explanatory memorandum or administrative guidelines, there are many such memoranda on relevant 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.

As regards entitlement to social assistance and other benefits, it shall be pointed out that in case such as Ioannidis (C-258/04), there are no Polish provisions that make conditional granting allowances on completion any secondary or different type of school at the territory of Poland. The similar case applies as regards the Collins case. In situation that applied to Mr. Collins (C-138/02), it is not possible to define him as a worker according to Act on entry. As has been analysed above, jobseekers from Member States are entitled to all forms of support that are granted to jobseekers of Polish nationality. However these forms of support do not cover entitlement to financial support. In order to receive financial support, an applicant shall have to fulfill special conditions, i.e. he/she should work in Poland or other Member State for a certain period. Finally, taking into account Vatsouras and Koupatanze case

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

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(C-22, 23/08), the same remarks shall apply as Polish legislator does not provide for any financial support for jobseekers. As regards unemployment benefit which is provided in the Act of promotion of employment and labour institutions (art. 71), in order to be entitled for such a benefit, an applicant (also EU citizen) shall be previously employed for at least 365 days within the period of 18 months preceding the time of registration as an unemployed. Certain periods of leaves (for instance as a consequence of military service or parental leave shall be taken into account).

Chapter II

Members of the Family

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

According to Art. 2.4. of the Act on entry the family member shall signify:

- a) the spouse
- b) the descendants of the Union citizen who are under the age of 21 or are dependants and those of the spouse or living in the common household with the Union citizen
- c) dependent direct relatives of the Union citizen in the ascending line and those of the spouse or living in the common household with the Union citizen

Therefore the Act on entry implements Art. 2.2 of the Directive 2004/38. As in Poland the legislation does not provide possibility to enter into register 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 Union citizen has contracted a registered partnership. Moreover, according to Polish constitution, the marriage shall be understood as an union of a man and woman. There are plans to present a draft of law on registered partnerships, but taking into account current situation at Polish Sejm and Senat (Polish parliament), chances for such a draft to enter into force are very low. However, the Act on entry does not cover any provisions that implement Art. 3.2 of the Directive 2004/38, i.e. provisions aiming at facilitation of entry and residence for any other family members, that do not fall into definition of family members for the purposes of the Directive and implementing Act on entry or the partner with whom the Union citizen has a durable relationship, duly attested. Moreover, it shall be emphasized, that it is important for Polish administrative authorities responsible for issuance of a residence card of a member of a Union citizen's family to check is a marriage with EU citizens is not a marriage of convenience in order to avoid cases of abuses EU law. It is of particular importance since the Polish border is an external EU border and there may be some concerns that third country nationals especially from Eastern states would like to facilitate their movement and stay at the territory of EU Member States. Therefore Art. 25 of the Act on entry lists circumstances that may lead to conclusion that a marriage with EU citizen has been entered for convenience. Such circumstances take place if 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 social group; the spouses do not fulfill the legal responsibilities arising from the marriage, matrimonial cohabitation is not maintained; the spouses have never met before their marriage; the spouses do not speak a language understood by both; the spouses are inconsistent about their respective personal details and about other important circumstances concerning them; one or both of the spouses had contracted a marriage of convenience in the past. Of course, if abovementioned circumstances have been proved, than it is not only impossible to be granted rights established in the Directive 2004/38 and implemented by Act on entry, but also such situation shall be penalized according to Polish penal code. The provisions of Art. 23 of the Act on entry leads to a conclusion that the Act fully implements Art. 35 of the Directive 2004/38.

As regards the issue of reverse discrimination, the Act on entry clearly states that it applies solely to individuals that have made use of free movement rights (however, see also analysis in Chapter IX). Such a conclusion is based on the definition of both Union citizen and the family member. According to Art. 2 of the Act on entry, Union citizen shall mean only a foreign national – i.e. national of EU, EEA or Swiss Confederation. The same rule applies to family member – it shall cover only also a foreigner that is either EU or non-EU national. Therefore outside the definition of Union citizen for purposes of the application of the Act on entry, are Polish citizens that have not made use of free movement rights and respectively, members of their families. However, to members of families of Polish citizens that have not made use of free movement rights, the Act of 13 June 2003 on aliens applies (Ustawa z dnia 13 czerwca 2003 o cudzoziemcach), which also include provisions regarding entrance and residence for families of Polish national that aim at facilitating their stay with Polish citizens at the territory of Poland. The same rule applies in cases when Polish provisions provide for certain financial or non financial benefits for Polish and EU citizens and members of their families, irrespective if Polish citizens have made use of free movement rights. Moreover, what is very important, Art. 16.4 of the Act on entry gives the right for residence for a period longer than 3 months for EU citizens provided that he is married to Polish national. Art. 16.4 does not contain additional condition that the Polish citizen shall make use of free movement rights in order to make use of such a right of his spouse. However, analysis of Art. 16.4 of the Act on entry leads to some conclusions. First, it does apply only to EU citizens, as Art. 16 of the Act concerns only EU citizens and not non-EU citizens. And second, the right of stay is limited solely to spouse of EU citizen, therefore other family members that are covered by the definition of family members for purpose of application of the Act on entry, cannot make use of the provision. Therefore as regards other family members, in order to have a right for a legal stay for a period longer than 3 months, the Act of aliens shall apply. However, as the Act on aliens contains provisions facilitating making use of residence rights for families of Polish citizens. Art. 53 a of the Act on aliens provides that a right for temporary stay in Poland 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. Therefore, it shall be understood in a possible wide context – surely definition of family ties does not restrict to definition of family members as listed in the Act on entry. Moreover, Art. 64 of the Act on aliens states that the permit to settle shall be granted 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 years on the basis of the residence permit for a fixed period or is a minor child of the citizen of the Republic of Poland, if the parent exercises parental authority over the child. Therefore may lead to conclusion that Poland generally does not apply in this respect reverse discrimination.

2. ENTRY AND RESIDENCE RIGHTS

As regards issue of entry by family members, there is a difference between family members who are and those who are not EU citizens. As regards the first group, they 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 the second group, stricter rules do apply.

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Family member who is not a Union citizen may enter the territory of Poland on the grounds of a valid 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.

However, an important amendment has been made to the Act on entry, that is in line with ECJ judgment in MRAX case (C-459/99). New Art. 7a has been introduced that enables EU citizen or member of family of EU citizen, irrespective of his/her nationality, in cases where it is impossible to present valid travel document or identity card, it is acceptable to prove their identity by other than official document provided that it will be possible to confirm their identity and nationality without any doubts.

There has also been an important amendment to the Act on entry that came into force as from 1 January 2009 as regards conditions for refusal to grant visa for third country family members as well as refusal to entry at the territory of Poland for both EU and non EU member states. New provision, i.e. Art. 11 a of the Act states that it is admissible to refuse both granting visa and entry to Poland only in situations when their personal conducts may pose a threat for public safety, public policy or public health. Moreover such decisions shall respect the proportionality rule and may be issued only if an individual behaviour represents genuine, present and sufficiently serious threat affecting interests of society. Previous criminal convictions shall not in themselves constitute grounds for taking such decisions. Moreover such decisions shall not be issued for economic reasons. This amendment is fully in line with Directive 2004/38 requirements and provisions.

As regards residence rights for family members, the Act on entry fully complies with Directive 2004/38. EU citizen and family member – both EU and non EU citizens may reside in the territory of the Republic of Poland for a period of 3 months without the need to meet the residence requirements. Only valid travel document or another document confirming identity and citizenship or valid travel document in respect to non EU national shall be necessary for legal stay up to 3 months.

As regards residence rights for family members for a period longer than 3 months, according to Art. 18 of the Act on entry, they have a right to stay with EU citizen, provided that EU citizen is an employee or self-employed person in Poland; is covered by the general health insurance or is person entitled to health insurance or 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.

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).

A person entitled to health insurance scheme is defined in Art. 5.23 of the Act of 27 August 2004 on health insurance benefits financed from public funds (Ustawa z dnia 27 sierpnia 2004 o świadczeniach opieki zdrowotnej finansowanej ze środków publicznych).⁵ According to this provision, 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 shall be submitted in person. They are not free of charge, however the fee is very low. For family members such documents cost 30 PLN (circa 7 EUR).

Polish regulation defines what shall be assessed as having sufficient financial sources in order not to be burden for hosting EU state:

EU citizens who enter the territory of Poland and who stay there for the period of time which exceeds 3 days should have the financial means of PLN 100 for each day of the stay or the equivalent of this amount in foreign currencies. In order to confirm that the foreigner has financial means indicated above, the following documents may be presented for instance: traveller's cheque; credit card which can be used in Poland along with a certification of the value of the credit card limit; payment card which can be used in Poland along with a certification of the current amount of financial means of the account or a recent account statement; certification of the possession of financial means kept in a bank or a credit union which are located within the territory of the Republic of Poland, confirmed by a seal and a signature of an authorised officer of the bank or the credit union or document confirming granting a scholarship in case of foreigners entering Poland in order to undertake or continue education, participate in research or trainings.

A foreigner entering the territory of Poland in order to undertake or continue studies, participate in research or training should possess the amount of PLN 1600 or its equivalent in foreign currencies for first two months for covering the expenses of accommodation and food. For his/her family members, additional PLN 450 for every family member is necessary.

Moreover, EU citizens and members of their families, unless they stay in a hotel or other place connected with work, education or medical treatment, shall report their place of stay within 4 days from the day of entering Poland at the latest. Such an obligation is provided in Art. 10 of the Law on evidence of people and identity cards. It is therefore questionable, if such an obligation is in conformity with EU law – Directive 2004/38 which provides that EU citizens and their family members shall stay at the territory of host Member State without any formalities. Theoretically, the Act on entry does not provide any obligation other than

⁵ *Journal of Laws* of 2008, no. 164, item 1027.

those stated in Directive as regards short stay, i.e. for less than three months, but incompatibility occurs when taking into account the Law on evidence that apply to all incomers, irrespective of the aim of their entry and their nationality (it has been also analysed in point 1 of this Chapter).

3. ACCESS TO WORK

According to Article 87 of the Act on promoting employment and institutions of the labour market, members of family of EU citizen shall have a right to take up employment in Poland. The definition of family members is identical as definition in the Act on entry and it also covers members of family, i.e. direct ascendant or descendant of EU spouse. Moreover, Art. 87 covers those family members that are not EU citizens that have a right to retain the right of residence in case of death of EU citizen or in case of divorce, annulment of marriage (provided that conditions defined in Art. 12 of the Directive 2004/38 are fulfilled – these conditions are fully implemented in Art. 19 of the Act on entry).

Art. 87. 2 of the Act on promoting lists groups of individuals there are entitled to take up an employment in Poland without work permission. Family members of EU/EEA citizens as well as descendants of a spouse of abovementioned groups who are under age of 21 or are dependants or ascendants that are dependant on them are not obliged to obtain work permit in order to take up employment in Poland. The release from the obligation to obtain work permit also covers those family members that are listed in Art. 12 of Directive 2004/38. In 2008 the abovementioned group of family members was not covered by the Article 87 listing the group of individuals that are not obliged to have a work permit in order to take up employment at the territory of Poland. The amendment entered into force on 1 February 2009. The extension of categories of family members listed in Art. 12 of Directive 2004/38 has been an important amendment that makes the Act on promoting compatible with Directive 2004/38.

Consequently, EU nationals and those privileged third country nationals – members of family of EU citizens may enjoy the privileged status under regulations concerning access to Polish labour market. Basing on a status of EU family member they may take up employment without the obligation to obtain work permit, unlike their nationals who in principle shall obtain a work permit that is issued by voivoid.

4. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

It can be seen that the status of members of family of EU jobseekers does not qualify an individual to a right for unemployment benefit.

The Act on entry does not give a special status for jobseekers. They may stay at the territory of Poland for a period for up to three months without any formalities (except for holding a valid travel document or document confirming his/her identity). The same rule applies to members of his family (as regards third country nationals – they must possess valid travel document). Union citizens and members of their family shall have the right to reside for a period longer than 3 months if he/she has sufficient funds to provide for himself/herself and his/her family members in the territory of the Republic of Poland without the need to make use of social insurance benefits.

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According to the Act on promotion of employment and labour institutions, the definition of person seeking job covers inter alia Polish and EU citizens and members of their families. Such members of families have all rights that are granted in the Act on promotion for job-seekers (as right to help to find a job, right to attend in trainings, seminars that aim at facilitating to find a job). However, under Polish, jobseekers, irrespective of their nationality, do not have right to any kind of job seekers allowances. As listed above, support is limited to non-financial support, mainly in the form of offering possible posts, organizing special trainings that aim at helping in finding a job, etc. Therefore the lack of financial allowances applies to both Polish and EU job seekers and members of their families.

Chapter III

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

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

a.1. Equal treatment in access to employment

The main statutory Act that regulates conditions concerning access to employment in private sector is established in the Act on promotion of employment and labour institutions.

In principle EU jobseekers are covered by the principle of equal treatment if they cross Polish border in order to find a job. As have been analysed in Chapter I, the Act on entry does not provide special rules for stay for jobseekers. As regards provisions for EU citizens that try to find employment, the rule of equal treatment shall be understood in the widest possible way. Therefore, all benefits that apply to Polish jobseekers also apply to EU citizens. It inter alia concerns an assistance of employment agencies or in recruitment procedure, where no preference shall be made to nationality (except for provisions concerning employment in public sector). There is no obligation to obtain work permit or fulfill other formalities. According to Art. 35 of the Act, main services on the employment market consist of: employment service, job counseling and job information, assistance in active job seeking, organization of training. The abovementioned services shall be conducted by local governments, non-governmental organizations, trade unions, employers organizations, training institutions and employment agencies (therefore public and private institutions). The division between public and private institutions does not influence the obligation of equal treatment of job seekers from EU (and members of their family) and nationals.

Moreover, there is an obligation to equal treatment also as regards employment by agencies of temporary employment according to Act of 9 July 2003 on employment of temporary employees (Ustawa z dnia 9 lipca 2003 o zatrudnianiu pracowników tymczasowych).⁶ The Act entitles agencies of temporary work to conclude employment agreement with an individual and delegate his/her to so called employer-user. These agencies shall not make any differences between Polish and EU nationals.

EU nationals do not need work permit. This is explicitly excluded in Art. 87.1.7 of the Act on promotion of employment. Moreover, it has to be reminded that in January 2007 Poland abolished the restrictions concerning taking up an employment by nationals of all EU Member States. Until 2007 there were legal provisions that had kept in force restrictions against nationals of those Member States which applied transitional measures on the access to their labour markets. Therefore as of 2007, the principle of equal treatment is applicable to all EU citizens.⁷

⁶ *Journal of Laws* of 2003, no. 166, item 1608.

⁷ The regulation repealing those restrictions that applied to nationals of Austria, Belgium, Denmark, France, Luxembourg, the Netherlands, Germany, Italy and Lichtenstein, Norway, Switzerland has entered into force on 17 January 2007 – *Journal of Laws* of 2007, no. 7, item 54.

a.2. Language requirements

As regards employment in private sector in some professions language requirement is applicable. However, unlike employment in public sector, i.e. as regards civil servants and self-governing employees, there are several ways of proving sufficient knowledge of Polish language.

According to Art 30 para 1 point 2 of the Banking Act of 29 August 1997 (Ustawa z dnia 29 sierpnia 1997 Prawo Bankowe),⁸ 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 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, as has been emphasized, such foreigners 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 26 January 1982 (Ustawa z dnia 26 stycznia 1982 Karta Nauczyciela),⁹ 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 Act of 7 October 1999 on Polish language (Ustawa z dnia 7 października 1999 o języku polskim)¹⁰ 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).¹¹ However, in order to be compatible with EU law this Art. 11 a shall not be understood as the only way of proving knowledge of Polish language for categories of individuals listed in the Act.

Language requirements apply also to some regulated professions (advocates, legal counselors, doctors, dentists, midwives, nurses, veterinary surgeons, medical assistants, barber-surgeon). There is no distinctions, where applicable (i.e. mainly as regards medical profes-

⁸ *Journal of Laws* of 1997, no. 140, item 939.

⁹ *Journal of Laws* of 2006, no. 97, item 674.

¹⁰ *Journal of Laws* of 1999, no. 90, item 999.

¹¹ *Journal of Laws* of 2003, no. 191, item 1871.

sions) between private and public sector - language requirements in these two sectors are the same. Several regulations specify what level of language knowledge shall be enough to exercise particular posts.

As regards medical sector, midwives and nurses are not obliged to present any certificate. It is enough to prove that the level of knowledge of Polish language is enough to communicate with patients and to understand written text as well as ability to write in Polish.¹² 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.¹³ 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 division 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). The same situation applies as regards pharmacists. The regulation applies to “aliens”, that are in the Act of Pharmacy Chambers, defined as third country nationals, other than EU citizens.¹⁴ Only third country nationals are obliged to pass exam before Polish Pharmacy Council.

As regards barber-surgeon, the Act of 20 July 1950 on barber-surgeon (Ustawa z dnia 20 lipca 1950 o felczerach)¹⁵ 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.¹⁶

As has been mentioned above, advocates and legal counselors are also obliged to prove knowledge of Polish language. The same rule applies also to foreign lawyers that plan to be put on a list of advocates or legal counselor. As they in general (unless they may prove 3

12 The regulation of Ministry of Health of 30 April 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 z dnia 30 kwietnia 2004 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.

13 Regulation of Minister of Health of 29 June 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 z dnia 23 lipca 2007 r. 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.

14 The Act of 19 April 1991 on Pharmacy Councils (Ustawa z dnia 19 kwietnia 1991 o izbach aptekarskich), *Journal of Laws* of 2008, no. 136, item 856; Regulation of Minister of Health of 10 December 2002 on the level of knowledge of Polish language necessary to carry out profession of pharmacists and on exams of Polish language (Rozporządzenie Ministra Zdrowia z dnia 19 kwietnia 1991 w sprawie zakresu znajomości języka polskiego koniecznego do wykonywania zawodu farmaceuty na terenie Rzeczypospolitej Polskiej oraz egzaminu z języka polskiego), *Journal of Laws* of 2002, no. 219, item 1846.

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

16 The Regulation of Minister of Agriculture and Rural Development of 25 August 2004 on the level of the knowledge of Polish language necessary to carry out a profession of veterinary doctor (Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi z dnia 25 sierpnia 2004 r.), *Journal of Laws* of 2004, no. 205, item 2100.

years of legal practice at the territory of Poland) they are obliged to pass competence test in Polish in order to provide legal services at the territory of Poland, that obviously means that language knowledge requirement shall be fulfilled. The situation differs as regards EU lawyers that want to provide transnational legal services at the territory of Poland. In such a case, that are no legal provisions that directly require from them knowledge of Polish language.

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.¹⁷ As regards patent counsels, a candidate having EU citizenship other than Polish is obliged to pass exam proving Polish language before special Commission of Audit Supervision. No other means of proving knowledge of Polish language is provided according to Act on patent counsels. As regards certified auditors, the rule is that patent counsels shall have a Polish citizenship. However, this requirement does not apply in cases where an international agreement accepts the possibility to apply on a list of patent counsels for foreigners. Therefore, Accession Treaty shall obviously be treated as such an international agreement. Consequently, EU nationals shall have a right to apply for patent counsels. Secondly, as regards foreign candidates, there is a requirement to know Polish language.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

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

Polish law introduces nationality requirement in various posts that are connected directly or indirectly with exercising of public powers. The requirement to possess Polish citizenship applies 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.

Moreover Polish nationality must hold judges, public prosecutors, court executive officers, court appointed curators, notaries, bailiffs, diplomatic and consular missions members.

As was reported in 2008 report, the important amendment to the Act on civil servants entered into force in March 2009.¹⁸ According to the amendment (art. 5), general director of the office, while publishing the information on vacant posts in public service shall list (after having a consent of the Chief of Civil Servant) posts that may be open not only for Polish citizens, but also for EU citizens and citizens from other states, who have a right for employment at the territory of Poland on basis of international agreements or EC law. An individual not holding Polish citizenship may be employed if the post is not connected with direct or indirect exercise of public powers or protection of fundamental states interests.

17 The Act of 7 May 2009 on certified auditors and their self-governing bodies, entities entitled to control financial reports and public supervision (Ustawa z dnia 7 maja 2009 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 11 April 2001 (Ustawa z dnia 11 kwietnia 2001 o biegłych rewidentach), *Journal of Laws* of 2001, no. 49, item 509.

18 *Journal of Laws* of 2008, no. 227, item 1505.

However, the abovementioned Act that has changed the Act on civil servants at the same time amended several acts concerning rules of access to employment in public sector as regards the accessibility for executive posts in certain Polish offices. The analysis of these various legal acts lead to conclusion that in practice access for EU citizens to public sector has not been opened on basis of this 2009 amendment. Still the rule is that managerial posts are restricted solely to Polish citizens. Non-exhaustively such posts, restricted solely to Polish citizens that are questionable according to European law are worth listing here: Principal Inspector of Quality of Foodstuff, Director of Agricultural Consultancy Office, Principal and Poviatic Veterinary Inspectors, Principal Inspector of Plant Protection, President of Measure Office, President of National Board of Water Inspection, Director of Centre of Quality and Compliance Control, President of Rail Transport, President of Polish Travel Agency, President of Polish Agency of Entrepreneurs Development, President of National Foundation of Environmental Protection, Director of Agency Combating Alcoholism. As has been pointed above, this list is not exhaustive and the aim is to show that the citizenship requirement in the way it is interpreted by ECJ may be assessed as too broad in Poland. At least some of the abovementioned posts shall not be regarded as directly or indirectly exercising public powers or connected strictly with protection of fundamental interests of Poland.

The same remark may be repeated with reference to the post of state labour inspector. According to still unchanged Art. 39 of the Act of 13 April 2007 on State Labour Inspection (*Ustawa z dnia 13 kwietnia 2007 o Państwowej Inspekcji Pracy*),¹⁹ such a person must hold Polish citizenship. It is questionable if such a post fulfills requirements put by ECJ jurisprudence as regards strict connection with protection of fundamental interests of a given country or direct or indirect exercise of public powers.

b.2. Language requirements

There may be some doubts regarding compatibility with EU law requirements regarding proving knowledge of Polish language for foreigners – candidates for post in civil service and for posts in self-governing institutions. According to the new Act on civil servants of 21 November 2008, there is a possibility to apply by EU citizens to civil service to so called “lower levels of posts”, i.e. not directly or indirectly connected with execution of state power (this Act was comprehensively analysed in 2008 Report as one of the most important changes in Polish legal order in comparison with year 2007). However, such candidates have to prove sufficient knowledge of Polish language. Art. 5.3 of the Act entitles Prime Minister to issue a regulation listing acceptable documents proving sufficient knowledge of Polish language by EU-candidates to civil service in Poland. 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.²⁰ Analysis of the Regulation leads to conclusion, that its provisions may be declared as incompatible with EU law, especially “Angonese- line” case law. As was clearly stated by ECJ in Angonese ruling (C-281/98), requiring an applicant for a post to have a certain level of linguistic knowledge may be in general legitimate and possession a document proving knowledge of particular language may consti-

¹⁹ *Journal of Laws* of 2007, no. 89, item 589.

²⁰ *Journal of Laws* of 2009, no. 64, item 539.

tute a criterion for assessing that knowledge, the fact that it is impossible to submit a proof of the required linguistic knowledge by any other means that a particular diploma issued by a given Member State, constitutes discrimination on grounds of nationality that shall be assessed as contrary to current Art. 45 TFUE. The Regulation contains the exhaustive list of documents that are acceptable while applying for a post in a civil service. These documents are:

1. Certificate of knowledge Polish language on intermediate level issued by the State Commission Proving Knowledge of Polish Language as Foreign Language
2. Document proving completion of higher education in Polish language
3. Maturity certificate awarded in Polish education system
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. This provision seems incompatible with EU law in the light with general prohibition of discrimination on grounds of nationality. And it must be emphasized, that the Act on self-governing employees contains identical provisions concerning requirements to prove Polish language knowledge, as the Act on civil service.

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

Recognition of professional experience for the purpose of determining the working conditions is provided on basis of Art. 86 of the Act on promotion of employment and labour institutions. According to Art. 86, previous periods of employment abroad shall be taken into consideration when determining special employment rights (such as a full time leave, additional remuneration, higher grades). The Act does not specify documents that shall be sufficient for such a recognition. Therefore, in the line with ECJ case line, all kind of documents proving previous employment shall be taken into account. It must be emphasized that there has been a significant amendment in 2009 regarding this provision. Until February 1, 2009 there was specific preferential treatment for both Polish and EU citizens. Only periods of employment of Polish and EU/EEA citizens must have been recognized for the purpose to determine the working conditions, provided that they had been previously employed at the territory of EU/EEA Member States. As regards other countries, periods of employment there could have been recognized under condition that contribution on Labour Fund had been paid. Moreover, as already mentioned, Art. 86 only applied to Polish and EU/EEA citizens, and not to third country national (i.e. other than from EU/EEA). The amendment that has entered into force as from February 2009 has changed this situation significantly. Now, not only Polish and EU/EEA citizens may benefit from the right of recognition previous employment, but also citizens from other countries and irrespective where such an experience has been obtained. It is remarkably important difference. Also additional diplomas may (but it depends on each employer) be taken into account when determining working conditions

As regards recognition of qualifications, the Act of 18 March 2008 on the rules governing the recognition of the qualifications required in the EU Member States for the pursuit of

the regulated professions implements provisions of Directive 2005/36.²¹ As a rule diplomas or certificates concerning qualifications to carry out regulated 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 a general rule of equal treatment for all employees. Such an obligation has its basis in Polish Constitution²² that generally prohibits inequality before law and puts an obligation on public authorities to treat equally all individuals. This general rule has its continuation as regards situation of employees in Polish labour code. The general rule is that all employees shall enjoy the same rights for exercise of the same duties. Moreover, discrimination is prohibited in connection with such issues as race, sex, religion, performance of trade union rights, political opinion. However, nationality or EU citizenship is not listed in Art. 11(3) of Polish Labour Code.²³ But at the same time, the list contain therein is not exhaustive. Therefore it shall stated that provided that EU citizen performs the same scope of work and has the same scope of duties, unequal treatment in comparison with Polish workers is prohibited. These general rules apply to both EU citizens employed in private or public sector. However, as regards employment in public sector it must be emphasized that Polish legislator tries to define employment in public sector in the widest possible way in order to make use of Art. 45.4 of TFUE in the widest possible way, what is analysed in point b1 of this chapter.

When analyzing working conditions in public sector, also the Act of 21 November 2008 on self-government employees shall be mentioned (*Ustawa z dnia 21 listopada 2008 o pracownikach samorządowych*).²⁴ The Act comprehensively regulates rules of access and exercise of employment in self-governing institutions, i.e. regional governments. The rule is that employment in regional governments shall be restricted to Polish citizens only (art. 3). However, the same as in case of civil servants, according to Art. 11 of the Act, the director of an institution who plans to find candidates for a particular post, including managerial/executive ones, shall lists posts that do not require Polish citizenship form candidates. Such posts, identically as in case of civil service, shall not be directly or indirectly connected with exercising of public powers or protecting fundamental state interests.

Therefore, as can be seen from abovementioned provisions, access for EU citizens to posts in public service is significantly restricted. However, provided that 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.

According to these acts, the salary of civil servants and self-government employees is based on basic salary and certain benefits. As regards civil servants, in addition to basic salary, benefit for long term employment in civil service shall be given. It shall be understood in such a way, that in case of EU citizens, also the length of employment in civil service in another Member State shall be taken into account. As regards self-government employees, except for basic salary, also benefit for long term employment shall be granted. The way of counting periods of employment shall be the same as in case of civil servants. Moreover, in

²¹ *Journal of Laws* of 2008, no. 63, item. 394.

²² *Journal of Laws* of 1997, no. 78, item 483.

²³ *Journal of Laws* of 1998, no. 21, item 94.

²⁴ *Journal of Laws* of 2008, no. 223, item 1458.

case of self-government employees, jubilee award and severance package while retirement or pension (as a result of incapability to work) shall be granted. Unlike civil servants, in case of self-governing employees, benefit for long term employment is not restricted to period of employment solely in civil service. Therefore, all periods of proved employment shall be taken into account when granting such a benefit. The same rule apply as regard jubilee award. Similarly as in case of civil servants, in case of EU citizens, also periods of employment in other EU Member States shall be taken into account when determining the level of particular benefits. No difference as to place of work and nationality shall take place. 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 30 October 2001 on detailed rules of counting periods of employment and other periods that entitle teachers for jubilee award, 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.²⁵

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.

According to Act on Trade Unions of 23 May 1991²⁶ (Ustawa z dnia 23 maja 1991 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 enter 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.

b.4. Other aspects of access to employment

See point b.3 above

²⁵ *Journal of Laws* of 2001, no 128, item 1418.

²⁶ *Journal of Laws* of 2001, no. 79, item 854 .

Chapter IV

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS IN THE PUBLIC SECTOR

All specific issues have been analysed in point b. 3 – recognition of professional experience for access to the public sector.

2. SOCIAL AND TAX ADVANTAGES

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

The principle of equal treatment of workers, irrespective of their citizenship at the territory of Poland has constitutional basis. Moreover the Labour Code contains ample of regulations that aim at providing equal treatment for all employees, irrespective of their nationality. According to Art. 11.2 of the Labour Code, all employees shall enjoy equal rights for performance of the same duties. This applies in particular to equal treatment of men and women in employment, but of course is not restricted to this criteria. Therefore the rule is that both direct and indirect discrimination shall be forbidden under Polish legal order. Therefore according to Polish Labour Law, if a Polish worker is entitled to any social or tax advantages, than such a benefit shall also, on equally basis, be granted to EU workers. According to Art. 18 para 3a of the Labour Code, employees shall be accorded equal treatment as far as the entering into and terminating of an employment relation, terms of employment, promotion and access to training for the improvement of professional qualifications are concerned. Therefore the principle of discrimination as regards equal access to social and tax advantages shall be understood in the broadest possible way. The principles listed in the Labour Code are also respected in the Act on promotion of employment and labour institutions.

As regards tax regulations the main Act in this respect is Act of 26 July 1991 on personal income tax (Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych).²⁷ 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 subjected to unlimited tax liability in Poland, which means that they are 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 at the territory of Poland. Other rules may be subject of international agreements on elimination of double taxation. Therefore, according to Article 3 para. 2a, there is no possibility to cover also income or loses generated outside territory of Poland in cases of individuals subjected to limited tax liability in Poland, ie. individuals whose place of residence is not in Poland (irrespective if of Polish or foreign nationality).

An individual is regarded as having place of residence at the territory of Poland provided that:

²⁷ *Journal of Laws* of 2000, no. 14, item 176.

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- 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, according to Art. 6.3a of the Act on personal income tax, spouses may be subjected to income tax together, provided that they have stayed in a marital relationship and community of property for an entire fiscal year. Such a possibility applies also to cases where spouses:

- 1) who have place of residence for tax purposes not in Republic of Poland but in another Member State of European Union or EEA or Swiss Confederation
- 2) if one of spouse is subjected to unlimited income tax at the territory of Republic of Poland and the other has a place of residence for tax purposes not in Republic of Poland but in another Member State of European Union or EEA or Swiss Confederation

and provided in both circumstances 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.

Art. 6.3a of the Act has entered into force on 1 January 2009, but it applies to gathered income or incurred loss as from 1 January 2008.

Moreover, analysis of specific social benefits is made in Chapter VIII point 1., Relationship between Regulation 1408/71-883/04 and Art 45 TFEU and Regulation 1612/68

2.2 Specific issue: the situation of jobseekers

See Chapter I point 2.

Chapter V

Other Obstacles to Free Movement

As has been reported, the question of obligation for workers to report their place of residence at the territory of Poland within the set period, unless they stay in a hotel or other place connected with work, education or medical treatment shall be understood as an obstacle, that is not directly listed in Directive 2004/38 and in consequence in the Act on entry that implements its provisions to Polish legal order. Such an obligation is provided in Art. 10 of the Law on evidence of people and identity cards.

Additional obstacle, that has been reported in last year Report, are obligations that result from the Act of 7 October 1999 on Polish language (Ustawa z dnia 7 października 1999 o języku polskim).²⁸ However, a very important amendment has been introduced on 15 October 2009 that diminishes the obstacle concerning obligation to prepare documents connected with labour law in Polish language. Before the amendment, Art. 7.1 of the Act required from documents connected with labour law to be prepared in Polish provided a person carrying work resided in Poland at the time of concluding a contract or when a contract was to be performed within the territory of Poland. All documentation connected with employment was to be done in Polish. As from 15 October 2009, the rule still remains that labour law contracts shall be made in Polish, however, an important exception has been provided. Labour contract may be prepared and signed in different than Polish language, on application of an employee that does not possess Polish citizenship, provided that such a person has been previously instructed about the possibility to prepare such a contract in Polish. This amendment obviously makes it easier for foreigners, including EU citizens, exercise the right to free movement at the territory of Poland.

²⁸ *Journal of Laws* of 1999, no. 90, item 999.

Chapter VI

Specific Issues

1. FRONTIER WORKERS

There are no special provisions referring to frontier workers. Therefore in general they are treated in a same way as other workers. However, there may be cases where residence clauses contained in certain statutory provisions may have negative consequences on their situation as employees.

Such situation occurs in case of family benefits, since the Act of 28 November 2003 on family benefits (Ustawa z 28 listopada 2003 o świadczeniach rodzinnych) entitles foreigners, including EU citizens to apply for all types of benefits listed in the Act, however under condition that applicant reside at the territory of Poland (Art. 1.3 of the Act).²⁹

Moreover, the Act of 12 March 2004 on social assistance (Ustawa z dnia 12 marca 2004 r. o pomocy społecznej) may also influence the situation of frontier workers.³⁰ 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 analysis of these circumstances leads to conclusion that it is possible that an economically active person, i.e. worker may be entitled to apply for a social assistance. According to Art. 8 of the Act on social assistance, the right for financial support except for prerequisites listed above is conditional upon the level of income per capita in the given family or in case of a single person – income of this single person. Therefore it may be the case where a worker may be entitled to such a benefit, in cases where his/her remuneration is quite low and he/she has to support other members of his/her families. However it must be emphasized that, characteristics of social assistance leads to conclusion that an applicant shall in the first place cover all expenditure by making use of own financial means. Lack of any financial means to cover such every day expenses shall give only a right to be granted with social assistance to the full extent or limited provided that granting institution due to objective circumstances is not able to grant the social assistance to the full extent.³¹

Therefore in case of such workers as described above, a problem occurs in case of frontier workers. Art. 5 of the Act lists individuals entitled to receive such support. It is granted inter alia to Polish citizens who reside at the territory of Poland and Polish citizens that have place of residence at the territory of Poland and staying in practice at the territory of Poland as well as EU/EEA, Swiss Confederation citizens and their family members who reside and stay at the territory of Poland and additionally are granted a right for stay or a right for permanent stay. In such a case frontier workers as not fulfilling all criteria listed in Art. 5 are not entitled to be granted such an assistance.

29 *Journal of Laws* of 2006, no. 139, item 992.

30 *Journal of Laws* of 2009, no. 175, item. 1362.

31 See judgment of Voivodship Administrative Court in Białystok of 22 February 2005, II SA/Bk 687/04.

Moreover, tax provisions may influence the situation of frontier workers. As has been described in Chapter IV, individuals, irrespective of nationality are subjected to unlimited tax obligation in Poland if they reside at this territory for a period of more than 183 days during a tax year. This may influence the tax situation of frontier workers.

2. SPORTSMEN/SPORTSWOMEN

According to Para 63 of the Resolution of Polish Football Union Board number III/39 of July 14, 2006 amending its own Resolution on the status of the Polish football players and the change of the club membership, 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. Therefore in such situations work permits are obligatory (see also the Regulation on performance of work below).

However, there is an inconsistency in this paragraph, since according to Para 63 point 8 states that in each team there must be at least 8 players holding Polish citizenship. These players shall be entitled to play. Therefore in the same paragraph there are mutually exclusive provisions. It shall be therefore stated that as regards football, there are certain nationality restrictions.

According to Resolution of Polish Ice Hockey Association, there is a possibility for foreign players to play in Polish teams for definite or indefinite period. However, in every match in one team of Polish Ice-Hockey League may play up to 5 foreign players, whereas in 1st League team – 3 foreign players. A goal keeper shall be counted as 2 foreigners.

According to Regulation of Polish Association of Basketball, the Association is entitled to establish limits concerning participation of foreign players in basketball games. According to rules of Polish League of Women's Basketball, at least in one game there must be 50% of Polish players. Moreover, during basketball play there must be at least 2 Polish players playing.

According to Regulations of Polish Association of Handball, foreign player may represent Polish club in the highest level of games only after signing a contract with a particular club.

Moreover, according to a special regulation,³² performance of work at the territory of Poland without the need to obtain employment permit applies to sportsmen/sportswomen who work for an entity with its seat at the territory of Poland and the work shall be based on representing this entity during sport events, provided that a work has an occasional character. However, as the abovementioned regulation concerns only those foreigners, who do not possess EU citizenship and who are not members of families of such individuals, as these group of persons are not obliged to have work permit.

32 Regulation of Minister of Labour and Social Politics of 20 August 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) – *Journal of Laws* of 2006, no. 156, item 1116.

3. THE MARITIME SECTOR

As regards maritime sector, the Act of 9 November 2000 on maritime safety (Ustawa z dnia 9 listopada 2000 o bezpieczeństwie morskim),³³ the Act on Maritime Code of 18 November 2001 (Ustawa Kodeks morski z dnia 18 listopada 2001),³⁴ the Act of 23 May 1991 on work at maritime commercial vessels (Ustawa z dnia 23 maja 1991 o pracy na morskich statkach handlowych)³⁵ shall be mentioned. The last Act is the most important as regards rules of employment at Polish commercial vessels. According to Article 1 para 3, the Act shall not be applicable if international agreement concerning rules of employment relations at vessels contain more favourable treatment for employers. Employment relation is subject to the law of the flag of vessel, unless parties decide otherwise. According to the Act, a foreign employee is an employee who permanently resides outside Poland. Such an employer 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.

4. RESEARCHERS/ARTISTS

The rule of equal treatment does apply to researchers and artists. There are no regulations that in any way hinder exercise of their rights at the territory of Poland. There are no special provisions regarding artists. However, as regards researchers, Art. 109.3 of the Act on Higher education clearly states that no permission is required in order to employ academic researchers at the Polish higher school. The lack of obligation to hire academic researcher that is not Polish citizen concerns all duties that are connected with a post at higher school, therefore it is not restricted to strictly academic duties. Such foreigners may also, on equal rights with Polish citizens, be actively involved in technical and organizational duties of Polish higher school as well as may participate in various research and developments projects. Moreover, according to regulation on doctoral and postdoctoral scholarships, the principle of equal treatment applies also to researchers that are not employed at higher school, but are preparing doctoral and postdoctoral dissertations. They are entitled to receive scholarships provided that they have been positively assessed by their supervisors and they are not engaged in economic activity, i.e. they are not workers. These rules apply irrespective of nationality of applicant.

As regards artists from third countries, according to the regulation that also applies to sportsmen, artists that perform artistic activities that lasts no longer than 30 calendar days during a year are not obliged to receive work permit.

5. ACCESS TO STUDY GRANTS

According to Act on Higher Education, the right to take up and pursue higher studies, PhD studies and other forms of education as well to the right on equal rights to attend in devel-

³³ *Journal of Laws* of 2006, no. 99, item 693.

³⁴ *Journal of Laws* of 2009, no. 217, item 1689.

³⁵ *Journal of Laws* of 1991, no. 61, item 258.

opment and research studies according to the same rules that apply to Polish citizens, shall apply to workers from EU/EEA and Swiss Confederation and members of their families, provided that they have a right of residence at the territory of Poland and to those EU/EEA and Swiss Confederation nationals and members of their families that have a right to permanent stay at the territory of Poland. Other categories of EU citizens, that are covered by the Directive 2004/38, i.e. EU citizens and members of their families that are not economically active, but possess sufficient resources for maintenance during studies, shall have also a right to study at the territory of Poland on the same rules that apply to Polish citizens, except for a right to social assistance – i.e. maintenance aid for students, special maintenance for disabled, maintenance for housing (accommodation), food allowance or other allowances. This provision implements the right enshrined in Art. 24.2 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.

Definition of family members to which the Act on Higher Education refers is established in the Act on entry. If EU citizens or members of their family apply for studies that are conducted in Polish, then there is an obligation to prove their good command of Polish.

Foreigners holding EU citizenship (and members of their family, irrespective of nationality) shall be treated according to the 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 z dnia 12 października 2006 w sprawie podejmowania i odbywania przez cudzoziemców studiów i szkoleń oraz ich uczestniczenia w badaniach naukowych i pracach rozwojowych.³⁶ Paragraph 17 of the Ordinance requires that foreigners shall pay not less than 2000 or 3000 euro (depending on the type of studies) per year. As regards individuals that are of Polish descent, that study on a remuneration basis (since there is a possibility to study without any entrance fees – at public higher schools on stationary MA studies) shall pay 30% less than other foreigners. This rule does not, however, apply to EU citizens, since they shall be treated, on basis of Art. 43 para 2 as Polish citizens. In order to attend studies at the territory of Poland that are held in Polish, it is possible to require knowledge of Polish language. The knowledge of Polish language may be proved in 3 alternative ways – i.e. – if they finished one year of preparation programme held by institutions listed by Minister of Higher Education or they held a certificate issued by the State Commission Proving Knowledge of Polish Language as Foreign Language or the hosting higher school certified that candidates have sufficient level of knowledge of Polish language. It shall be emphasized that the possibility to prove knowledge of Polish language in three different ways shall be assessed as compatible with EU law, unlike requirements as regards knowledge of Polish language that are applicable to civil servants, what has been analysed in Chapter. Hosting higher school shall check knowledge of Polish language by all possible means, therefore for instance, also certificates obtained in other EU countries shall be taken into account.

³⁶ *Journal of Laws* of 2006, no. 190, item 1406.

Moreover, for those EU citizens and members of their families that attend PhD studies or work of post doctoral dissertation, there is a possibility to award them with doctoral scholarship if the doctoral dissertation procedure has been instituted, the supervisor has issued a positive opinion or opinion about advance stage of the dissertation and an individual 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). The similar rules apply to postdoctoral (*habilitacja*). Granting such scholarships depends only on academic achievements, therefore it may be granted both to Polish and EU citizens – no residence and no nationality requirement is applicable in this case.

In order to show the scale of inflow of foreign students to Poland, it is worth to show how many foreign students have recently studied in Poland. According to Ministry of Science and Higher Education there were 10.251 foreign students in Polish public higher schools in academic year 2008 / 2009, 40% of which are of Polish descent.

The right to education on a lower level, that may be exercised in all kinds of public schools is regulated in the Act of 7 September 1991 on the system education (*Ustawa z dnia 7 września 1991 o systemie oświaty*)³⁷. An important amendment concerning EU citizens and members of their families has entered into force on 1 January 2010. As was reported last year, according to article 94a para 2 of the Act, EU/EEA/Swiss Confederation migrant workers and members of their families if they reside at the territory of Poland were entitled to attend to public schools. The same right applied those citizens and their family members, other than economically active, provided that they were granted the right of permanent stay. According to art. 94 a point 2a, the definition of “family member of an EU national” is the same as in the Act on entry.

Other categories of EU citizens and members of their families as listed in the Act on entry are obliged to pay for attending to public schools.

The amendment that entered into force on 1 January 2010, significantly changed the personal scope of the right to attend public school on the same conditions that apply to Polish citizens. Now, not only migrant workers, but all EU/EEA/Swiss confederation citizens and members of their families shall have such a right, provided that they have a right to stay or a right to permanent stay. Therefore, the residence clause has been changed in favour of right of stay. This amendment is in line with ECJ case law. It shall be emphasized that the same amendment shall be made in respect to the Act on Higher Education, as there is still a residence clause that is doubtful in the light of European law.

³⁷ *Journal of Laws* of 2004, no. 256, item 2572.

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

As regards transitional measures imposed on EU-15 Member States on Polish workers, only Austria and Germany still apply restrictions to Polish workers. Other Member States have not make use of the longest possible transitional measures. The rate of unemployment in Poland as of the end of February 2010 according to Polish Statistical Office amounts to 13%. As regards Poland in case of a place for incoming workers from EU-Member States, it is not a very popular place. Additionally, there can be seen that a quite significant amount of Polish citizens that have migrated from Poland after accession in 2004, now decide to come to Poland. Polish workers in 2004 decided mainly to migrate to United Kingdom and Ireland, as inter alia these countries decided not to apply transitional measures. It is estimated that almost 2% of Poles have decided to make use of free movement of persons.

As regards problems and cases of discrimination of Polish workers in EU Members States as well as EU citizens in Poland, there are no significant cases that are worth analyzing.

According to information of the Office of Foreigners, in 2009 (as of 31 December 2009), 6185 applications for registration of stay have been made by EU citizens and 5005 of them have been positively recognized. Among nationalities that most often apply for registration are: Germany (1600 registrations), Italy (590 registrations), France (535 registrations), United Kingdom (484 registrations), Bulgaria (372 registrations).

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

As regards access to employment sector in Poland for Bulgarian and Romanian citizens, Poland decided to fully open its labour market. Therefore as from January 1, 2007, there are no restrictions for citizens from new Member States as regards access to employment. Moreover, Poland does not apply reciprocal measures as regards workers from relevant EU 15 member states (as from 17 January 2007).

CHAPTER VIII

Miscellaneous

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

Polish citizens and EU nationals engaged in economic activity at the territory of Poland are subjected to a Polish social security statutes. The Act of 13 October 1998 on social security system (Ustawa z dnia 13 października 1998 o systemie ubezpieczeń społecznych),³⁸ divides social security into following branches: retirement scheme, pension scheme, maternity and sickness scheme, accidents at work scheme. These branches are than divided into more detailed systems (see Report 2007). Whenever the social security defines “employees” in order to list their rights and obligations, these provisions apply on equal footing to both Polish and EU nationals - employees. Such employees are entitled to benefits according to rules stipulated by particular acts of national legal system. But it shall be mentioned, that the Act does not apply only to employees. Also other group of economically active individuals are covered by its provisions. 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.

However, there are certain groups of economic active individuals that are subjected to a special social security schemes. This applies inter alia to civil servants like judges or public prosecutors and farmers. Additional, special regime applies to teachers and miners.

The Act of 27 August 2004 on the health care benefits financed from the public sources 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.

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 23 June 2003 on social pension³⁹ (ustawa z dnia 23 czerwca o rencie socjalnej), Act of 28 November 2003 on family benefits (Ustawa z dnia 28 listopada 2003 o świadczeniach rodzinnych),⁴⁰ Act of 12 March 2004 on social assistance (ustawa z dnia 12 marca 2004 o pomocy społecznej).⁴¹ It shall be men-

38 *Journal of Laws* 2009, no. 205, item 1585.

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

40 *Journal of Laws* of 2006, no. 139, item 992.

41 *Journal of Laws* of 2004, no. 64, item 593.

tioned 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 and 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. It is regulated by the Act of 27 June 2003 on social pension. The characteristic elements of the social rent is similar to so called “Wajong benefit” that has been analysed in ECJ judgment – C-287/05 Hendrix. According to Art. 2 of the Act on social pension, the right to social pension shall be granted inter alia to EU/EEA or Swiss Confederation nationals and members of their families (as defined in the Act on entry). No prior employment is required. However, both Polish and EU/EEA/Swiss Confederation nationals shall reside in Poland to be eligible for the benefit.

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

Social pension is a kind of protection benefit that aim at compensation of inability to obtain social security benefits since the entire incapability of work occurred before starting first work.⁴² Social benefit shall be granted only to individuals entirely incapable to work. Situation at the labour market is irrelevant.⁴³

Analysis of the Polish social pension leads to conclusion that 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. Therefore as social pension shall not be granted to individuals that carry out economic activity, therefore following categories of beneficiaries may apply for the social pension: students and individuals having sufficient resources in order not to be burden for national social insurance benefit systems as well as members of their families. It shall mean that being eligible for social pension shall not automatically exclude an individual from the group entitled to stay. Therefore once the right to stay is granted (surely also right to permanent stay), provided that material conditions listed in the Act on social pension are fulfilled, an individual may apply for a social pension without concerns that he/she will automatically qualify as a person without sufficient resources to be eligible for stay at the territory of Poland and therefore deprived right of stay. As regards remarks made in Hendrix judgment concerning the right to receive Wajong benefit while moving to another Member State, this remarks shall also apply to Polish social pension. Therefore Thus, when deciding on the entitlement to social pension in case of residence in another country the economic and social links of beneficiary should be analysed. However, until now, there has been no case concerning situation

42 Supreme Court judgment of 8 April 2008, no. I UK 264/07.

43 Supreme Court judgment of 6 May 2008, no. I UK 331/07.

when beneficiary moves to another Member State and therefore does not fulfill condition to have a right to stay or permanent stay at the territory of Poland.

Concerning social pension – see also analysis of Hendrix judgment.

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. Deeper analysis of social assistance scheme in Poland is analysed in section concerning frontier workers.

As regards another benefit, i.e. pension benefit for incapacity to work as a war consequences, as has been analysed in Chapter on ECJ judgments. The relevant Law that has entered into force on 1 January 2010 has deleted the residence clause as a requirement to be entitled for benefit like Nerkowska benefit. Additionally, in the Law of 31 May 1996 on financial benefits for individuals deported to forced labour and imprisoned at labour camps by the Third Reich and USSR also residence clause has been deleted. Unfortunately, as has been emphasized, the Act of 16 November 2006 on financial benefits and rights for civil, blind war victims (Ustawa z 16 listopada 2006 o świadczeniu pieniężnym i uprawnieniach przysługujących cywilnym niewidomym ofiarom działań wojennych) states in Art 1.2 that individuals entitled to receive financial benefits are Polish citizens, that have a permanent residence at the territory of Republic of Poland. Therefore the residence clause in this case still applies. The draft of amending Act of 10 April 2010 does not change this residence requirement.

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

As has been emphasized in the Report, the Act on entry that implements provisions of Directive 2004/38 into Polish legal order does not treat frontier workers in a way different than other categories of workers. They have the same rights and duties. Also the same rules of entry and residence apply to them. However, in cases where there is a residence requirement, the situation of frontier workers may be affected in comparison with other workers. In detail see Chapter VI.

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*

There are no specific Polish policies of either general or individual nature that aim at enhancing or helping in integration at the territory of Poland.

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

The Act that regulates rules concerning rules on the access of third country nationals to Polish labour market is the Act on promotion of employment and institution of labour market. However, there is not a uniform regulation that covers third country nationals other than EU citizens and members of their families. Therefore rules concerning access to Polish labour market for foreigners are complicated and not clear.

The general rule is that foreigners, other than EU citizens and members of their families are required to obtain work permission in order to be employed (provided that they has legally entered and stayed at the territory of Poland). In the Act on promotion of employment, there is a wide list of foreigners that are not required to obtain such a work permission. This covers inter alia foreigners, who has 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 7 September 2007 on the Charter of Polish National (Ustawa z dnia 7 września 2007r. o Karcie Polaka).⁴⁴ 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.

In other cases the work permission is issued by the relevant voivoid (województwo). In case of employment of third country nationals, voivoid is obliged to check if the level of remuneration for the foreigner is not lower that remuneration for other individuals (i.e. Polish citizens and EU citizens) for work of same or similar kind and provided that relevant starost informs him that there is impossible, basing on unemployment and jobseekers registers, to find other candidates or starost informs that the previous recruitment procedure for the relevant employer has not been positively finished (art. 88c of the Act). Therefore, analysis of these provisions lead to conclusion that there is, in case of possible employment of third country nationals, the Union preference principle, as third country national may receive work permission if nobody has actually or potentially submitted his candidature for a post. The request for work permit shall be put by a potential employer.

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 obligation to receive work permit. Minister of Labour has issued the Regulation on 30 August

⁴⁴ *Journal of Laws* of 2007, no. 180, item. 1280.

2006.⁴⁵ The regulation contains a list of activities/jobs for which work permit is not required for those foreigners, who according to abovementioned regulations shall in principle obtain work permit. 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.

3.3. Return of nationals to new EU Member States

There are no specific Polish policies or practices of a general nature that are specifically address to those nationals who return to Poland after making use of free movement rights. Such issues as possibility to recognize their previous periods of employment in order to receive additional salaries or enhance promotion that are possible according to Act on promotion of employment or in other statutory acts that have been analysed in this Report apply also to such categories of individuals.

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

There are a few organizations that may be helpful in enforcing rights and duties stemming from EU provisions. However, it is purposeful to list here only those most important and most engaged in European matters, i.e.:

⁴⁵ *Journal of Laws* of 2006, no. 156, item 1116.

POLAND

- a) Rzecznik Praw Obywatelskich (Ombudsman) – www.rpo.gov.pl
- b) Fundacja Uniwersyteckich Poradni Prawnych (Legal Clinics Foundation) – www.fupp.org.pl
- c) Poradnia Prawna dla Cudzoziemców (Legal Bureaux for Aliens) – www.law.law.diplomacy.pl
- d) Helsińska Fundacja Praw Człowieka (Helsinki Foundation for Human Rights) – www.hfhrpolwaw.pl
- e) Instytut Spraw Publicznych (Institute for Public Affairs) – www.isp.org.pl
- f) Związek Biur Porad Obywatelskich (Union of Citizens Advice Bureaux) – www.zbpo.org.pl

Ad. A:

The *Polish Ombudsman (the Commissioner for citizens' rights)* is a constitutional body that shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts. Polish citizens may, according to Act on the Commissioner for citizens' rights, put a motion to the Commissioner and inform him about possible abuse or infringement of their rights stemming from EU law. The Commissioner shall analyse every information and decide to what further steps shall be taken.

Ad. B:

In contrast, *Legal Clinics Foundation* is a private body that is responsible for establishment of the legal clinics at the Faculties of Law and Administration at Polish Universities, where the students, under the supervision and substantial help of the faculty teachers and practitioners, provide free of charge legal advice for especially poor members of the community.

Ad. C:

Legal Bureaux for Aliens strongly supports activities of Legal Clinic Foundation. The main area of Bureaux activity is to provide legal support for aliens concerning such problems as: settlement at the territory of Poland, granting citizenship or refugee status, granting working permissions, issues connected with granting both temporary and permanent residence rights. In general, the aim of the Bureaux is to provide comprehensive legal support for both Polish, EU and non-EU citizens in problems connected with exercise of migration rights.

Ad. D:

Also *Helsinki Foundation for Human Rights*, is a well known Polish private foundation, that provide legal assistance also in European issues. The Foundation provides inter alia the cost-free Legal Assistance for Refugees and Foreigners, including possible litigation actions on behalf of applicants. The abovementioned programme is mainly focused on third country nationals, however also EU migrants may ask the Foundation for help in EU matters.

Ad. E:

The Institute for Public Affairs (also private organization) is also engaged in helping citizens with possible problems based on EU law. As regards the most important activity of the Institute in so called "EU matters", the Migration and Eastern Policy Programme shall be mentioned. The Programme is concerned with the problems of Poland's relations with neighbouring states as well as the eastern policy of the European Union. The main fields of the programme's activity are especially: the consequences of the implementation of the Schengen

acquis for the Central and Eastern European countries, return migrations and repatriations in Central Europe, free flow of labour and the globalization of labour markets.

Ad. F:

The Union of Citizens Advice Bureaux, a non-governmental organization, is also engaged in providing citizens legal help in European issues. Moreover, the Bureaux is executing the Project “Workers Mobility in UE” which aim is to showcase the evidence that European labour migration remains relatively low with the ultimate objective of supporting the rapid dismantling of transitional measures, which limit free movement rights. The project aspires to ensure that citizens from the enlarged Union are treated as first class citizens and can enjoy the rights that were conferred to them by accession.

Finally is worth mentioning that Naczelna Rada Adwokacka (the *Polish Bar Council* - www.nra.pl) organizes on regularly basis nationwide pro bono actions. The idea is to provide legal assistance for all interested Polish citizens for free. During such actions (which last mainly one weekend every 6 months), Law Firms that have declared their participation provide legal assistance, including assistance in “European” issues.

5. SEMINARS, REPORTS AND ARTICLES

CONFERENCES, SEMINARS:

Five years of EU membership (Pięć lat członkostwa Polski w Unii Europejskiej) – 26 May 2009, Warsaw

Bulgaria and Romania In EU. Political, legal and economical aspects of accession process (Bułgaria i Rumunia w Unii Europejskiej. Aspekty polityczne, prawne i ekonomiczne procesu akcesyjnego) – 13 March 2009, Warsaw

Foreigners in Poland: problems and challenges (Cudzoziemcy w Polsce: problemy i wyzwania) - 15 September 2009, Lublin

Five years of Polish membership in EU (Pięć lat polskiego członkostwa w Unii Europejskiej) – 30 May 2009, Gródek nad Dunajcem

PUBLICATIONS:

E. Siek, *International movement of labour force in integration process of Poland with EU Member States* (Międzynarodowe przepływy siły roboczej w procesie integracji Polski z krajami Unii Europejskiej) – Warsaw 2009

I. Justyńska, *The principle of protection of human rights in EC law* (Zasada poszanowania praw człowieka w europejskim prawie wspólnotowym) – Toruń 2009

T. Jurczyk, *Rights of individuals in ECJ jurisprudence* (Prawa jednostki w orzecznictwie Europejskiego Trybunału Sprawiedliwości) – Warszawa 2009

E. Wróbel (ed.), *The Charter of Fundamental Rights in European and Polish legal order* (Karta Praw Podstawowych w europejskim i krajowym porządku prawnym) – Warszawa 2009

S. Biernat & S. Dudzik (ed.), *Free movement of persons and providing services in EU. New circumstances and tendencies* (Przeływ osób i świadczenie usług w Unii Europejskiej. Nowe zjawiska i tendencje) – Warsaw 2009

- R. Wieruszewski, *EU citizenship* (Obywatelstwo Unii Europejskiej) – Warsaw 2008
- A. Frąckowiak-Adamska, *Proportionality principle as a guarantee for enforcement of internal market freedoms* (Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego) – Warsaw 2009
- Z. Brodecki, *Europe of Officials* (Europa Urzędników) – Warsaw 2009
- A. Majkowska-Szulc & M. Tomaszewska, *Discrimination in employment in case of lack of identifiable victim of discrimination* (Dyskryminacja w zatrudnieniu w braku możliwości do zidentyfikowania ofiary dyskryminacji), *European Judicial Review* 7/2009 (Europejski Przegląd Sądowy)
- A. Szklanna, *Protection of foreigner in ECHR* (Ochrona prawna cudzoziemca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka) – Warszawa 2010
- A. Szklanna, *Violation of the right to respect for family right guaranteed in ECHR* (Naruszenie prawa do poszanowania życia rodzinnego zagwarantowanego w Europejskiej Konwencji Praw Człowieka) – *European Judicial Review* 1/2010 (Europejski Przegląd Sądowy)
- A. Sapota, *Divorce and separation in the norms of EU law concerning conflicts of law* (Rozwód i separacja w normach kolizyjnych prawa europejskiego), *European Judicial Review* 1/2010 (Europejski Przegląd Sądowy)