



European network on free movement of workers

## **THEMATIC REPORT**

### **Follow-up of case law of the Court of Justice**

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## 1. INTRODUCTION

The national experts were requested to give an in-depth analysis and interpretation of the importance and potential impact of the Court's recent judgments. This will include a full account of follow up both by the legislator and the national courts. For the 2009-2010 edition the following 10 cases of the ECJ on free movement of workers were proposed.

***Family reunification:***

Jia, Eind, Metock,

***Frontier workers:***

Hartmann, Hendrix, Renneberg,

***Social benefits:***

Collins, Trojani, Vatsouras,

***Student or worker:***

Raccanelli.

## 2. FAMILY REUNIFICATION

### 2.1. Jia (C-1/05)

The Jia case concerned the interpretation of Article 43 of the Treaty and Directive 73/148/EEC. A Chinese mother to a Chinese national who lived in Sweden with his German wife (self-employed) applied for a residence permit, on the basis that she was related to a national of a Member State. The Swedish Migration Board rejected her application on the ground that there was insufficient proof of the situation of financial dependence. Ms Jia appealed against that decision at the Utlänningsnämnden (or Aliens Appeals Board). The Utlänningsnämnden referred several questions to the European Court of Justice, asking inter alia whether Community law, in the light of the judgment in Akrich (C-109/01), required Member States to make the grant of a residence permit to a third country family member of a Community national who had exercised his right of free movement, subject to the condition that that family member had previously been lawfully resident in another Member State.

The Court held that no such requirement followed from Community law in general or from the Akrich judgment, more specifically. The Court furthermore held that Directive 73/148 required that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national in order to meet their essential needs in the State of origin of those family members or the State from which they had come at the time when they applied to join that Community national.

The Court argued that Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support might be adduced by any appropriate means, while a mere undertaking from the Community national to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.

#### Concluding on Jia

The Jia judgment concerned two issues: does EU law require for family reunification with third country national family members previous lawful residence of these family members in another Member state and what does the notion of dependence of family members of an EU national mean?

Both issues are discussed in the *Bulgarian, Finnish, Greek, Polish, Slovak, Slovenian and UK reports*. The *Cypriot, Danish, German, Irish, Lithuanian, Dutch and Spanish reports* cover only the issue of previous lawful residency, while the *Austrian, Belgian, Czech, Estonian, French,*

*Hungarian, Italian, Latvian* and *Swedish* reports are limited to the issue of dependency.

The approach to the issue of previous lawful residency is rather different from Member State to Member State. In some Member States the *Jia* judgment is interpreted as explicitly excluding a requirement of previous lawful residence: *Bulgaria, Cyprus, Greece, Lithuania, Poland, Portugal, Slovenia* and *Spain*. The *Lithuanian* and *Spanish* reports do mention the issue of reverse discrimination in this respect. Third country national family members of a *Lithuanian* national are still required to have resided lawfully in another Member State before joining the family member in *Lithuania*. Although in *Spain* in principle the Spanish family members with a third country nationality are treated equally as EU third country national family members, the family member concept is more restrictive for *Spanish* citizens as for EU citizens; regarding ascendants who live under their charge, the regulations to be applied are those under general alien's legislation. At present the issue is under consideration at the *Spanish* Supreme Court.

In other Member States *Jia* is – despite its clear wording - interpreted as not precluding the application of the requirement of previous lawful residence: *Denmark, Finland, Ireland* and *UK*. Uncertainty still continued in *Germany* and the *Netherlands*. Only after the *Metock* judgment law and practice in these countries were changed by (explicitly) abolishing the requirement of previous lawful residence.

Concerning the issue of dependency a mere declaration of maintenance is – in conformity with *Jia* - not considered as sufficient prove of a situation of real dependence in *Austria, Portugal* and *Sweden*. Nevertheless, a simple declaration stating that the family member is dependent seems sufficient in *Hungary* and *Italy*.

In conformity with the ECJ *Jia* judgment, the Belgian interpretation is that the need for material support might be proven by any appropriate means. The same applies to *Greece*. Implementing circulars in *Greece* do not require any particular means of proof of the need for material support.

The *Latvian* regulations may be interpreted as requiring actual dependency. Also *French* legal practice requires actual prove of regular payments. No definition of dependency exists in *Bulgaria, Estonia* and *Slovakia* and the issue of dependency is not addressed in *Slovenia*. A rather strict interpretation of dependency is applied in the *Czech* legislation (unless illness or injury “systematically preparing for his/her employment”), which most probably contravenes the *Jia* judgment.

The scope of the dependency is still uncertain as well. According to the Finnish rapporteur administrative and legal practice in *Finland* seems to require full dependency. Also the UK rapporteur is of the opinion that financial dependency is interpreted more strictly in the UK than the ECJ

actually provided for in Jia.

In Poland the focus is not on the dependency in the country of origin or previous stay but on the availability of sufficient resources in Poland itself. According to the Polish legislation an EU citizens shall be in possession of enough 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. This may be proved by various means and submitted at the time of application for a right to join an EU citizen.

## **2.2. Eind (C-291/05)**

In February 2000, Mr. Eind moved from the Netherlands, of which he is a national, to the United Kingdom, where he worked as an employee and where, in December of that year, he was joined by his eleven years old daughter who did come direct from Surinam, of which State she is a national. In June 2001, the United Kingdom authorities informed Mr. Eind that he was entitled to reside in the United Kingdom. By letter of the same date, Miss Eind was informed that she was entitled to reside in the United Kingdom in her capacity as a member of a Community worker's family. October 2001, Mr. Eind and his daughter entered the Netherlands. November 2001, Miss Eind registered with the police authorities and asked them to issue a permit for a specified period to enable her to reside with her father in the Netherlands. The State Secretary for Justice rejected Miss Eind's application on the ground that she did not hold a temporary residence permit, adding that she could not be granted a residence permit on the basis of her status as a member of the family of a 'Community national'. On the latter point, it was stated in the decision that Mr. Eind could no longer be regarded as a 'Community national' since, after residing in another Member State and returning to the Netherlands, he had not carried on any effective and genuine activities in the Netherlands and could not be considered to be economically non-employed within the meaning of Community law.

In its preliminary questions the Judicial Division of the Council of State asked, essentially, whether, when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Community law to reside in the Member State of which the worker is a national, even where that worker does not carry on effective and genuine economic activities. The Court ruled that, in circumstances such as those in the case before the referring court, Miss Eind has the right to install herself with her father, Mr Eind, in the Netherlands, even if the latter is not economically active. This finding is not affected by the fact that, before residing in the United Kingdom

where her father was gainfully employed, Miss Eind did not have a right of residence, under national law, in the Netherlands.

### Concluding on Eind

As far as the Eind case is mentioned in the national reports: in *Austria, Finland, Greece, Latvia, Portugal* and *Spain* the decision did not ask for any amendments although the rapporteurs did not elaborate their conclusion. The *Romanian* rapporteur is not aware of any of such cases in *Romania*. The decision could be important for *Cyprus* due to the decision's liberal approach to family reunification.

The Eind judgment in particular concerned the issue whether or not residence rights for third-country family members in the Member State of which the Union citizen is a national require that the national be economically active or self sufficient upon return in his Member State. According to Eind a national is still entitled to his free movement rights even if on return he is not economically active or self sufficient anymore.

Due to Eind the administrative practice in *Denmark* and the *Netherlands* is explicitly modified. According to the new guidelines in both country nationals are on return still entitled to their free movement rights even if they are not economically active anymore. Nevertheless, in *Denmark* this seems limited to the right of family reunification and does not include specific social welfare rights which raises further issues of reverse discrimination contrary to EU law.

According to the national rapporteurs the legislation and practice in *Bulgaria, the Czech Republic, Hungary, Italy, Slovakia* and *Slovenia* seem in line with the Eind judgment, although it is not clear from the Czech and Slovenian reports if they cover the issue of family reunification with returning nationals as well. In *Hungary* and in *Slovakia* nationals and EU/EEA citizens are treated equally in this respect, although in *Slovakia* the notion of a family member of a Slovak citizen is different from and more narrowly defined than the notion of a family member of an EU/EEA citizen.

The situation in *Germany, Ireland, Poland, Sweden* and the *UK* is unclear. In *Germany* and *Poland* the implementing legislation refers to EU nationals only and should be applied by analogy to cover returning nationals. The legislation in *Ireland* and *Sweden* should cover the Eind scenario on its face, but cases of family reunification of a third-country national family member with a national returning to his Member State on a non economically-active basis are unknown in *Ireland* and *Sweden*. In the UK references to Eind are lacking in the legislation and the European Casework Instructions (ECI). The case law of the UK courts on the consequences of Eind is ambiguous. In Belgium the authorities could refuse a right to reside in the Member State to a family member of a worker who returns to his/her national Member State considering

that without effective and genuine economic activities, the worker is not able to financially support the family member. This policy seems in contradiction with the Eind judgement according to which nationals are on return still entitled to their free movement rights even if they are not economically active any more.

### **2.3. Metock (C-127/08)**

It is clear, the Jia and Eind judgments did not end all the confusion about the free movement of Union citizens and their family members, in particular not concerning the requirement of prior lawful residence in the EU of their third country national family members.

But the landmark decision of 25 July 2008 in the Metock case (C-127/08) will finally bring the restrictions on the free movement of third country national family members by applying national immigration rules to an end.

The Court answered two questions of the Irish High Court on the compatibility of national immigration rules restricting the free movement of third-country national family members of EU migrants if the family members did not have prior lawful residence in another Member State.

The Court held the Irish rule, introducing the extra condition of previous lawful residence in the EU, to be incompatible with the text and the aim of the Directive and with the objective of the internal market. The right of the third-country national family members to enter into and reside in the host Member State in order to accompany or join the Union citizen depends on two conditions only: the existence of the family relation, as defined in the Directive, and the presence of the Union citizen in the host Member State (par. 70).

The Court, in its answer to the second question of the Irish court, explicitly held it to be irrelevant whether the marriage was concluded before or after the Union citizen migrated to the host Member State, where the marriage was concluded and whether the third-country national entered the host Member State before or after the marriage.

The Court explicitly revoked its 2003 Akrich's ruling and followed again its previous case-law, *inter alia*, the judgments in MRAX and Commission v. Spain (par. 58) The right of residence of the family member of an EU migrant workers can only be terminated on two grounds: the public order exception of Article 27 and "in case of abuse of rights or fraud, such as marriages of convenience" in accordance with Article 35 of the Directive (par. 74 and 95). The Member State has to prove that one of these situations occurs. All four of these Irish cases involved marriages in which the husband had submitted from outside

the EU an application for asylum that was rejected, expulsion was announced and in one case actually carried out. The Irish court ruled that in none of these four cases, there was a sham marriage (par. 46). That is relevant because the discussions about this judgment are mainly focused on marriages of convenience.

### Concluding on *Metock*

As far as the *Metock* judgment is mentioned in the national reports the decision did not have any impact on *Belgian, Bulgaria, Estonia, Greece, Hungary, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain* and *Sweden* as the existing legislation and administrative practice are already in line with the decision, in particular while no previous lawful residence of the third country family member in another Member State is required.

The situation in the *Czech Republic* is not clear from the report. The same is true for *Latvia*. The *Lithuanian* legislation indirectly implies the requirement of a previous stay in another EU country, however the authorities are motivating that this provision only applies to *Lithuanian* citizens who did not yet exercise their freedom of movement.

In *France* the judicial practice is only partially in line with *Metock* while it still requires the legal entry of the third country family member into France. In *Italy* too the requirement of legal entry is an indirect consequence of the existing legislation transposing Directive 2004/38. Although by circular letter of 28 August 2009, the Minister of the Interior draws the attention of the local authorities on the *Metock* case, expressly reminding them to correctly apply it, no proposal to amend the legislation has been submitted yet.

In the *UK* Regulations 9 and 12 still give the impression that a third country national family member covered by Directive 2004/38 must have entered the EU area in accordance with the national law of a Member State before being able to enjoy family reunification with a migrant EEA national in the UK. Nevertheless, the relevant webpage of the UK Border Agency (UKBA) has been amended but not the statutory instrument itself.

The impact of the *Metock* judgment on the other Member States is huge.

In *Austria* the *Metock*-decision led to an amendment of the relevant provisions of the Settlement and Residence Act 2005. In recent decisions the Constitutional Court (16.12.2009, G244/09) and the Administrative Court (4.6.2009, 2008/18/0278) changed their previous case law and followed the *Metock* judgment. There is no need for legal stay in another Member State anymore and the date of starting the relationship is irrelevant.

In *Cyprus* the director of the Civil Registry and Migration Department issued a circular, which discussed the legal significance of *Metock*:

non-European spouses of EU citizens fall within the scope of implementation of the right of citizens of the Union and their family members to move freely and reside in the area of the Republic and therefore have a right to apply for a residence card, irrespective whether the marriage took place in Cyprus or abroad. Instructions were given to all officers of the Civil Registry and Migration Department for the immediate implementation of the ECJ decision.

*Denmark* too changed its legislation and administrative practice significantly. In addition to abolishing requirement of previous lawful residence, the personal scope of application of the EU rules concerning residence right for third-country spouses of Danish citizens was widened. Accordingly, the EU rules can now be invoked by a Danish citizen who has resided in another Member State as worker, self-employed person, service provider, as a retired worker or self-employed or service provider, or as a seconded person, student or person with sufficient means. Thus, although this issue was not expressly dealt with in the *Metock* judgment, the adjustment of administrative practice in this regard was decided as an indirect consequence of the judgment, probably in order to prevent further political and legal controversy over the Danish implementation of the EU rules pertaining to the exercise of free movement rights by citizens upon return from another Member State.

In *Finland* an amended Aliens Act entered into force on the 1st of July 2010 with a new wording of section 153: "Chapter [10 of the Aliens Act that contains provisions on free movement] shall be applied to an EU citizen who moves to Finland or resides in Finland, as well as to family members of such person, who accompany their EU citizen family member or join her later." According to the Legal Department of the Ministry for Foreign Affairs, the authorities responsible for issuance of visas have, too, brought their practice in line with the *Metock* ruling. Hence, the requirement of previous legal residence is no longer applied as a precondition for being treated as an EU citizen's family member in the context of visa procedure.

In *Germany* the Administrative Instructions of the federal government of 27 July 2009 refer under no. 3.0.3 to the *Metock*-judgment confirming that a right of entry and residence of family relatives is independent of a previous lawful stay in another EU Member State. All family relatives of Union citizens possess a right of entry and residence provided that they can prove their status as family relatives and fulfill the requirements laid down in Directive 2004/38. Therefore, a third-country national family relative of a Union citizen must not fulfill the general requirements of the *Aufenthaltsgesetz* (basic knowledge of German etc.).

The *Irish* Government reacted swiftly to the *Metock* judgment, adopting Regulations amending the offending part of the 2006 Regulations only four working days after the Court delivered its judgment. In respect of family members who are not Union citizens, the

requirement of prior lawful residence has now been removed.

As in *Germany* the *Netherlands* explicitly abandoned its plans to introduce long term visa requirements and integration obligations (language and knowledge tests) to third country national family members of a Community national. For the migration policies itself the *Metock* decision had no consequences. No amendment was needed as the requirement of previous lawful stay in another Member State was not yet introduced.

A possible **retrospective application** of *Metock* was discussed in the following national reports.

In the *Cypriot* report a retrospective application was denied although the Ministry of Interior recognized the need for correcting situations and reconsidering cases where previous legal residence was considered to be a necessary requirement. Individuals may well use the *Metock* case for the courts to reopen their cases, not by claiming retrospective application of *Metock* but for correcting the current and future status.

According to the *Irish* report all applicants who had applied since 28 April 2006 (the coming into force of Directive 2004/38) for a residence card and had been refused because they did not have prior lawful residence would have their applications reviewed.

The issue of **reverse discrimination** in this respect is explicitly discussed in the following reports.

As regards third-country nationals with a relationship to an *Austrian*, it is a prerequisite that the *Austrian* stayed abroad before and made use of his/her free movement rights. According to the Austrian Constitutional Court this is a justified differentiation.

According to the *Dutch* Aliens Circular the Court of Justice has accepted in *Morson*, that nationals who never have made use of the freedom of movement, are be subordinated to EU citizens on the issue of family reunification. According to the rapporteur, this wording is incorrect. The Court has never accepted this discrimination. Both in the *Morson* judgment as in *Metock*, the Court ruled only that EU law does not apply in this situation. That discrimination is not prohibited by EU law, does not mean that it is allowed. In the *Metock* ruling, the Court pointed out that a Member State must be able to justify such discrimination. So far, the Dutch Government has never provided a justification of this difference in treatment that meets the requirements of Article 14 ECHR and of Article 1 of Protocol XII to the ECHR.

The *Italian* national report mentions a decision of the Venetian administrative tribunal (10 February 2009, no. 329) which refers to *Metock* and according to which applying different rules for EU-citizens and nationals in this respect would amount to a reverse discrimination and would also be contrary to Article 8 ECHR.

Finally, due to *Metock* in some Member States the focus shifted to measures to prevent **abuse and fraud**.

As regards *Danish* citizens returning from another Member State, it is stipulated that the principal person applying for a registration certificate or residence card for family members must declare to have established genuine and effective residence in the host country. If there are reasons to assume that this is or was not the case, the Danish citizen is required to submit evidence of the residence established in the other Member State.

The *Hungarian* report mentions increased attention marriages of convenience. To assess a sham relationship is a joint responsibility of the Office for Immigration and Naturalization and the consular officers, but the distinct responsibilities has not been defined clearly.

The *Irish* government too has now focused on the issue of marriages of convenience.

In the *Netherlands* an extensive policy paper against abuse and fraud was presented in December 2009. The government distinguishes three forms of use. Firstly, a group of nationals and EU-citizens that makes regularly use of their free movement rights. Secondly, there is a group that cheats and concludes marriages of convenience. Thirdly, it distinguishes a group " which, albeit formally observing the conditions lay down by Community rules, does not comply with the purpose of those rules" while circumventing the national legislation on family reunification. The government would be able to act firmly against the abuse of the second and the "abuse of rights" of the third group.

Also the *Spanish* rapporteur mentions the Spanish efforts to combat cases of abuse of right because of marriages of convenience. The recent Article 54 (2 b) of the Organic Act 2/2009 introduces into Spanish Aliens law "marriages of convenience" or "common law couple" as very serious infringements.

Finally in this respect, the clear distinction in *Belgium* should be mentioned between the concept of "common settlement" and "permanent cohabitation". When common settlement ends, it is possible to withdraw the residence permit during the first two years of residence according to article 42ter, § 1, para 1, 4° of the Alien Law. The legislator noticed that this specific possibility to withdraw the residence permit was not an implementation of the 2004/38 Directive, as article 13 did not provide such possibility.

### 3. FRONTIER WORKERS

#### 3.1. Hartmann(C-212/05)

The Hartmann case concerns the entitlement of frontier workers to receive child-raising allowance (“*Erziehungsgeld*”) in the State of employment (Germany), rather than that of residence (Austria), as a social advantage under Article 7(2) of Regulation 1612/68. The Regulation 1408/71 regime did not apply because the applicant did not work and her husband, who was a civil servant, fell outside the scope of that Regulation. The Court held that the fact that the husband had settled in Austria for reasons unconnected with his employment did not justify refusing him the status of migrant worker when he had made full use of his right to free movement of workers by going to Germany to work there. The Court also held that the allowance was a social advantage for the frontier worker, although it was in fact claimed by the wife, and that it could not be denied to him on the basis that he did not reside in Germany. In the Hartmann case the Court declared that a full-time employment is a valid factor of integration into the society of Germany and thereby Mr. Hartmann’s children are entitled to be granted child-raising allowance.

However, in the Geven case (C-213/05) of the same day the ECJ accepted the reasoning of Germany that a minor employment does not constitute a sufficiently close link with Germany; the refusal was considered proportionate and thereby justified. Consequently, Ms Geven’s children could not receive the benefits.

#### Concluding on Hartmann

As far as the Hartmann case is analyzed in the national reports, the judgment has no impact on *Austria, Denmark, Finland* and is not likely to have any bearing on *Cyprus*. Nothing prevents the legal instruments in *Portugal* from being interpreted in line with the Hartmann decision.

The Hartmann judgment which was a German case, is since implemented in *Germany*.

The *Bulgarian, Czech, Greece, Hungarian, Irish, Lithuanian, Romanian* and *Swedish* rapporteurs argue with arguments that legislation and practice in their Member States are most probably in line with the decision while no residency clause is applied. Less clear is the situation in *Latvia* and *Slovenia*.

Openly contrary to the judgments is the situation in *France, Italy, Poland* and *Slovakia*, while in these Member States strict residency requirements are still in force.

The relevant regulations in the *UK* are still the subject of legal proceedings. As follow up to Geven concerns the regulations in the

Netherlands need still to be amended.

### 3.2. Hendrix (C-287/05)

This case is about a Dutch frontier worker who worked and lived in the Netherlands. While continuing to work in the Netherlands, he transferred his residence to Belgium. Before his removal he was entitled to a benefit for handicapped people according to the Disablement Assistance Act for Handicapped Young Persons of 24 April 1997 (Wajong), which is listed in Annex IIa of Regulation 1408/71 as a non-exportable special non-contributory benefit. Therefore, once Mr. Hendrix had left the country, the Dutch competent institution stopped paying that benefit applying the said provisions of Regulation 1408/71. However, as Mr. Hendrix continued to be active as a worker in the Netherlands, the ECJ was asked whether the withdrawal of the benefit is not contrary to Article 39 or Article 18 EC Treaty (new Article 45 resp. Article 21 TFEU).

The ECJ stated that Article 39 TEC (new Article 45 TFEU) and Article 7 of Regulation 1612/68 must be interpreted as not precluding national legislation, meaning that a special non-contributory benefit listed in Annex IIa to Regulation No 1408/71 may be granted only to persons who are resident in the national territory. However, a residence condition attached to receipt of the benefit under the Wajong can be put forward against a person in the situation of Mr. Hendrix only if it is objectively justified and proportionate to the objective pursued. The Court held that the condition of residence was objectively justified. In relation to proportionality, the Court noted that the Dutch legislation provided that the condition might be waived where it led to an unacceptable degree of unfairness. In this context, it stated that, in interpreting this provision in conformity with the requirements of Community law, the national court had to be satisfied that the requirement of residence did not lead to such unfairness, taking into account the fact that the applicant had exercised rights to free movement as a worker and that he had maintained economic and social links to the Netherlands.

#### Concluding on Hendrix

As far as the Hendrix judgment is mentioned in the national reports the decision hasn't had any impact on the Austrian law and practice and does not require any changes to *Danish* legislation.

The decision is not likely to have any impact on the *Bulgarian* and *Greek* situation while a residence clause does not exist. Most benefits in Estonia are exportable as well although one benefit for disabled persons is not exportable. The judgment has not had and is not likely to have any impact in *Finland* as the Finnish system is in line with it. Finnish disability pensions are exportable. Social benefits for disabled persons

are connected in *Germany* with ordinary residence, factual residence or occupation within *Germany*. Therefore, a person employed in *Germany* will be entitled to these social benefits, which covers the Hendrix' situation.

Situations comparable to Hendrix have not yet arisen in the *Czech, Italian* and *Spanish* context and given its geographical situation it is difficult to foresee that the Hendrix judgment will have an impact on *Malta*.

Although a comparable situation has not yet arisen in the *Czech Republic* the permanent residence clause in the relevant legislation most probably contravenes the Hendrix judgment. The same applies to the existing residence clauses in the *Cypriot, French, Hungarian, Irish, Latvian, Lithuanian, Polish, Portuguese, Romanian, Slovenian, Swedish* and *UK* legislation. The *Irish* and *Slovenian* rapporteurs explicitly mention that there does not seem to be provisions in *Ireland* and *Slovenia* akin to that in Hendrix allowing the residence condition to be waived on grounds of fairness. Nevertheless, the *Cypriot, Irish, Polish* and *Portuguese* rapporteurs all stress the fact that national rules cannot contradict EU free movement rules. Therefore, the residence condition can only apply subject to the principle of proportionality. The economic and social links of the beneficiary should be taken into account.

In the *Netherlands* the (referring) court relied in its decision of 7 February 2008 directly on the Hendrix judgments and set aside the residence clause in the Hendrix case while in the particular circumstances of this case the residence clause entailed "an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation". In July 2008 the same court used the 'disproportionality reasoning' from the Hendrix case to justify the entitlement to a Social Assistance Benefit to two British citizens, residing in the *Netherlands* during the period they would visit a rehabilitation clinic in *Scotland*.

In *Slovakia* too the Supreme Court relied directly on Hendrix, in a case in which the administrative authorities denied a Slovak student in the *Czech Republic* a benefit in material need, as he was staying abroad. The court stated in its decision that the proportionality of the protection of the legitimate aim enshrined in the Act on Aid in Material need and the intensity of the intervention into the applicant's rights guaranteed by Community law should be assessed by the authorities when deciding on the benefit in material need.

Regarding the Hendrix case, the *Belgian* report concluded that the situation of posted workers from neighbouring countries may lead to potential discrimination in the social security field. The interpretation of "posted workers" seems to be different from one EU Member State to the other. Some Member States, such as *Luxembourg*, accept posted

workers even without any condition of residence on its territory. Such different interpretations lead the “working country principle” to be replaced by the “employer domicile principle” (“principe du siège”). This would allow companies to “shop” for the EU Member State with the least expensive insurance. The problem results from article 14, 1a of the 1408/71 Regulation which does not require a previous minimum insurance period in the sending country for the posted worker. The real period of insurance required by the competent administration is clearly different from country to country. In Belgium, the ONSS (Office National de Sécurité Sociale) requires a minimum of 30 days of first insurance period before the posting. However, one can notice that the lower the required first insurance period before the post, the higher the risk of avoiding social security payment.

### **3.3. Renneberg (C-527/06)**

Mr. Renneberg was a Dutch citizen who went to live in Belgium while continuing to work in the Netherlands where he earned more than 90% of his total income. At that time, a resident of the Netherlands was eligible for tax relief in the Netherlands on the ownership of immovable property. If the property was situated in the Netherlands, there was a tax deduction based on the difference between the rental value of the dwelling and interest paid on the mortgage (called negative income). If the property was situated outside the Netherlands, relief was still available, although much more limited. Mr. Renneberg applied unsuccessfully for deduction of the negative income relating to his Belgian dwelling against his income arising in the Netherlands.

The Supreme Court of the Netherlands decided to refer the following question to the ECJ for a preliminary ruling:

“Must Article 39 EC (new Article 45 TFEU) be interpreted as precluding.....a situation in which a tax payer who in his Member State of residence has negative income from a dwelling owned and occupied by him, and obtains all of his work-related income in another Member State, is not permitted by that other Member State....to deduct the negative income from his taxable work-related income, even though the Member State of employment does allow its own residents to make such a deduction?”

First of all, the Court granted the protection of Article 39 TEC (new Article 45 TFEU) to workers who only became cross border worker by moving their residence. Mr. Renneberg a Dutch resident became not a usual cross border worker by starting to work in Belgium, but just the other way around: he moved his residence to Belgium but continued to work in The Netherlands. The problem then is that his tax treatment in

the Netherlands became less advantageous than that of resident workers.

The second question for the Court concerned the issue whether this unequal treatment derives from the bilateral tax agreement between the Netherlands and Belgium? The answer of the Court is negative for two reasons. Firstly, the distribution of the taxing powers in the bilateral tax treaty does not preclude the taking into account of negative income from immovable property in Belgium. "The taking into account of the relevant negative income, or the refusal to do so, thus depends in reality on whether or not those taxpayers are residents of the Netherlands". Secondly, the rules of the Court with respect to the taxation of cross border work as derived from Article 39 TEC (new Article 45 TFEU) have precedence over the allocation of taxing powers as agreed by the Member State. That is, when there is no objective difference between residents and non-residents, the latter group may not be denied the tax advantages available to residents. This is the case particularly where a non-resident taxpayer receives no significant income in his home state and derives the major part of his taxable income from an activity pursued in the work state. In such a situation discrimination arises from the fact that the personal circumstances of the taxpayer are taken into account neither in the home state nor in the work state.

Two conclusions emerge from the case law of the Court:

Firstly, Article 39 TEC (new Article 45 TFEU) is not only relevant where a worker become a cross border worker by changing jobs, but also by changing residence,

Secondly, the taking into account of a non-resident worker's personal circumstances includes all tax advantages, including the possibility to deduct losses.

### **Concluding on Renneberg**

The Renneberg case is not mentioned in the French and Luxembourg's reports.

The *Cypriot* rapporteur mentions the Renneberg case but has not identified any rule that is contrary to the findings or the broader principle of Renneberg. The decision should not have any impact on the Danish legislation, because this is already in line after implementation of the ECJ judgment in Schumacker. According to the *German* rapporteur the highly complex situation of calculating the taxable income and receiving a tax deduction based on negative income in another EU Member State is not fully clear.

Others, such as the *Greek, Irish, Lithuanian, Maltese, Romanian and Slovenian* rapporteurs limit themselves to the issue whether similar

possibilities as in *Renneberg* to deduct or not to deduct exist in their tax legislation. As in their Member States the benefit of any tax deduction in respect of a negative income does not exist, *Renneberg* should be of little relevance for their countries. These rapporteurs neglect the broader principle of *Renneberg* which includes that workers who earn all or almost all of their income in their work state should be treated by that work state as residents by taking into account all available tax advantages. The reports fall short in analyzing this broader principle of *Renneberg* in the national context.

The *UK* rapporteur on the contrary does realize these wider consequences. The first finding in the *Renneberg* case that an EU national who has always worked in his or her Member State of origin and only lives in another Member State is still a worker for the purposes of Article 45 TFEU (ex Article 39 TEC) is still important for the UK. There are strong indications that the kind of problem which arose in *Renneberg* could arise in the UK as well.

In *Latvia* too there is no right to negative income deduction with regard to the expenses relating to dwellings. There is only a right to negative income reduction for expenses relating to education and health services. But the detailed Latvian regulations concerning the negative income deduction does not envisage the situation of cross border workers. Firstly, a negative income deduction for health insurance only applies to medical insurance provided by a Latvian insurance company. Secondly, although the applicable regulations do not explicitly refer to the medical services received in Latvia only, it is very likely that the State Revenue Service takes into account only the medical services bought in Latvia. Both provisions neglect the situation of cross border workers who are more likely to receive medical services and medical insurance provided by local service providers in their home state.

In *Italy* too, the income tax legislation makes a differentiation between resident and non-resident taxpayers while taking into account tax advantages.

Strict residence clauses are applied in Poland as well. In conformity with the standard taxation textbooks all individuals, whose place of residence is in Poland, are subject to unlimited tax liability in Poland. Individuals who do not have their place of residence in Poland are subject to limited tax liability. According to the Polish tax legislation there is no possibility to cover income or losses generated outside the territory of Poland in cases of individuals subjected to limited tax liability in Poland. Only with regard to residents such losses are taken into account. This seems a clear violation of the *Renneberg* principles.

According to the *Austrian* rapporteur the *Renneberg* judgement doesn't call for any legal activity in Austria. The decision should not have an impact on Austrian legislation as the Austrian Income Tax Act

makes it possible to take into account a loss abroad, if the person is subject to taxation without limitation. But, according to the standard taxation textbooks only residents are subject to taxation without limitation. Therefore, resident and non-resident taxpayers are treated differently which may contravene *Renneberg*.

The *Belgian, Estonian, Hungarian, Polish* and *Portuguese* rapporteurs emphasize that the situation as regards double tax agreements must also be taken into account. That is true, but only one answer to the question. When a worker earns all or almost all of his income in the work state Article 45 TFEU (ex 39 TEC) may override the double tax agreements. The Portuguese rapporteur is aware of this consequence of *Renneberg*. He refers to the Portuguese-Spanish double tax Convention, but doubts whether the Convention allows the deduction. But according to the rapporteur Portugal must accept in any case that the negative income related to a dwelling in Spain is taken into account by its tax authorities when the taxpayer derives all or almost all of his taxable income from salaried activity carried out in Portugal. The Convention must be interpreted in conformity with the *Renneberg* judgment.

In *Belgium*, an inhabitant receiving income from abroad can be tax-exempt if he or she is submitted to an international convention preventing double tax application. However, this income is still subject to local and municipal taxes, as if the income were perceived in Belgium (article 466bis of the 1992 Income Tax code). Alleging that the application of article 466bis is a violation of article 39 of the EC Treaty (new Article 45 TFEU), a Belgian inhabitant working in the Netherlands lodged an action in front of the Tribunal of Antwerp who decided to ask for preliminary rulings to the Constitutional Court. The Belgian Constitutional Court reminded that the provisions of the Treaty preclude measures which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. However, the Court stated that, regardless of the fact that these local taxes could be an obstacle to free movement, it is enough to note that the litigated tax is applied without consideration of the inhabitant's nationality and aims to allow local inhabitants to financially contribute to support their local municipality. This goal is of public interest and the means does not appear to be disproportionate. In other words, the principle of proportionality was respected. Consequently, the action was pulled off.

No problem in applying *Renneberg* seems to occur in *Finland*. In Finland workers are entitled to claim tax deductions for payments of interest on a loan that is taken to finance the permanent owner-occupied home. Workers are entitled to make this deduction regardless of whether the home is located in Finland or abroad.

In the *Czech Republic* too mortgage interest relief may be claimed under certain conditions. These provisions do not specify, whether the

dwelling concerned has to be located in the Czech Republic. Thus it appears that it is possible to claim a mortgage relief also for properties located outside the territory of the Czech Republic. However, the income tax law stipulates the requirement, that non-resident taxpayers may claim mortgage relief (and certain other reliefs) only if their income from the Czech Republic is at least 90 per cent of his/her entire income. It is questionable whether the strict precondition of 90 per cent income from the Czech Republic is in conformity with the Renneberg requirement of receiving "all or almost all of its income" in a Member State, which he or she is not a resident of.

In *Slovakia* and *Sweden* the Renneberg judgment is already explicitly transposed and implemented in the tax legislation. The tax legislation in Spain is amended. The amendment intends to adapt the *Spanish* legislation on taxation of non-residents in order to improve free movement of workers, services and capital. The legal situation in the *Netherlands* concerning the compatibility with Renneberg of the new Income Tax Act 2001 is still unclear.

Finally, with reference to the Renneberg judgment the Bulgarian rapporteur mentions the closing of an infringement procedure as Bulgaria changed its legislation. On 19 March 2009 the European Commission announced the issuance of a reasoned opinion (2007/4881) formally requesting Bulgaria to change its tax provisions according to which certain types of Bulgarian source income are subject to a withholding tax on a gross base only when paid to non-residents whereas Bulgarian residents could deduct expenses related to the same income.

## 4. SOCIAL BENEFITS

### 4.1. Collins (C-138/02)

In Collins the ECJ issued judgment on 23 March 2004 that examines the extent to which national legislation may make entitlement to unemployment benefit - jobseeker's allowance in the UK - conditional on a residence requirement. The case involved Brian Francis Collins, who was born in the USA and possesses dual US and Irish nationality. In 1980 and 1981, he lived in the UK for around 10 months, during which time he performed part-time and casual work. He returned to the UK on 31 May 1998 to find work there in the social services sector. On 8 June 1998 he claimed jobseeker's allowance, which was refused on the ground that he was not habitually resident in the UK. Under UK law, in order to qualify for jobseeker's allowance, a claimant without family to support must be habitually resident in the UK or otherwise must be a worker for the purposes of Regulation 1612/68, or a person with a right to reside in the UK pursuant to Directive 68/360. Collins appealed to the UK Social Security Commissioner, who asked the ECJ the following questions:

- is a person in the circumstances of the claimant in the present case a worker for the purposes of Regulation 1612/68?
- if the answer is no, does a person in the circumstances of the claimant in the present case have a right to reside in the United Kingdom pursuant to Directive 68/360?
- if the answer to both of the above questions is no, do any provisions or principles of European Community law require the payment of a social security benefit with conditions of entitlement like those for income-based jobseeker's allowance to a person in the circumstances of the claimant in the present case?

The ECJ found first that Collins' position in 1998 must be compared with that of any national of a Member States looking for their first job in another Member State. However, there is a distinction to be drawn between Member State nationals who are looking for their first job in the host Member State and those who are working or have worked there. People looking for their first job benefit from equal treatment only in respect of access to employment, while those who have already entered the employment market may, under the 1968 Regulation, claim the same social and tax advantages as national workers. The ECJ found that a person in Collins' position is not a worker entitled to the same social and tax advantages as national workers. However, it also observed that, in certain provisions of the 1968 Regulation, the

term 'worker' has a broader meaning and therefore gave the Social Security Commissioner the task of determining in which sense the term 'worker' as referred to by the UK legislation is to be understood.

The ECJ also stated that the Treaty establishing the European Community grants nationals of a Member State seeking employment in another Member State a right of residence which may be limited in time. However, this right is, in accordance with the 1968 Directive, accorded only to nationals of a Member States who are already in employment in another Member States. Therefore, Collins does not have a right to reside in the UK solely on the basis of that Directive.

Finally, the ECJ stated that nationals of a Member State seeking employment in another Member State fall within the scope of the Treaty provisions on freedom of movement for workers and therefore enjoy a right to equal treatment. This right also encompasses benefits of a financial nature, such as the UK's jobseeker's allowance. The ECJ therefore stated that a citizen who is seeking employment in another Member State cannot be discriminated against on grounds of nationality when claiming such an allowance. Given that the UK legislation on the jobseeker's allowance contains a difference in treatment according to whether a person is habitually resident in the UK and since that requirement can be met more easily by UK nationals, the legislation places at disadvantage nationals of other Member States. The ECJ therefore stated that this residence requirement can only be justified if it is based on objective considerations that are independent of the nationality of the persons concerned and if it is proportionate to the legitimate aim of the national provisions. It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.

The ECJ therefore ruled that the answer to the first two questions was no and that Community law does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

### **Concluding on Collins**

The Collins judgment is not mentioned in the *Finnish, French, Lithuanian, and Luxembourg's* and *Polish* reports. It didn't have any impact in *Austria, Estonia, Greece, Latvia* and *Slovenia*. Financial benefits equivalent to the one which was in question in the Collins case do not exist in *Italy* and *Romania*. The situation concerning jobseekers has not been regulated in *Spain*, let alone their right to unemployment

benefits.

According to the *Czech* rapporteur Czech legislation and practice continues to be in conformity with *Collins* judgment.

*Hungary* grants benefits for workers even if they have no real and sufficiently close links to Hungary.

In the *Netherlands* the court considers a 'genuine link' between the applicant and the employment market decisive for social assistance requests. The 'sufficient connection' to the labour market plays probably a role in *Sweden* as well.

In *Denmark* 'first-time jobseekers' and in *Germany* 'persons who are staying in Germany exclusively for the purpose of seeking labour' are excluded from social cash benefits or jobseeker's allowances. As certain *Danish* benefits should be considered as facilitating access to employment the rapporteurs doubts whether the strict exclusion in the Danish legislation is in conformity with EU law. The *Portuguese* rapporteur too doubts whether a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State can be excluded from the scope of Article 45 of the TFEU.

Residence and a residence permit are required for social assistance in *Belgium, Bulgaria, Cyprus, Malta* and *Slovakia*. Belgian law regarding unemployment benefits applicable for job-seekers requires a link with the domestic work market through the residence requirement. The candidate for unemployment benefits has to be a resident of Belgium.

In *Cyprus* the Social Welfare Service considered till recently the right of residence for EU citizens in general dependent on being in the possession of sufficient means. According to the Cypriot Equality Body this ruling contravened EU law.

*Ireland* and the UK too still apply a habitual residence condition. In both Member States detailed guidelines are published. It seems that the decision on habitual residency is made on the basis of the length and continuity of residence, the person's future intentions, their employment prospects, their reasons for coming to the country and where the person's 'centre of interest' lies. A person coming to seek employment (rather than to take up an actual job offer) is unlikely to be habitually resident. In the UK there is still a steady stream of cases going to the courts on the subject.

#### **4.2. Trojani (C-456/02)**

The claimant, a French national, lived in Belgium at a Salvation Army hostel for which, in return for board and lodging and some pocket money, he did various jobs for about 30 hours a week as part of a personal socio-occupational reintegration program. He applied for the Belgian *minimex*, a minimum subsistence allowance for persons with

inadequate resources, but was refused on the ground that he did not satisfy the conditions of eligibility that he was either of Belgian nationality or a worker in the meaning of Regulation 1612/68 on freedom of movement for workers. In proceedings by the claimant, a preliminary ruling was sought on whether he could claim a right of residence as a worker, under Article 39 TEC (new Article 45 TFEU) on freedom of movement for workers, or other provisions of Community law.

The ECJ said that it was clear from the facts that two necessary elements of any paid employment relationship, subordination and the payment of remuneration, were made out. If, in a case of a person such as the claimant, it was also found that two further essential elements, namely that the paid activity was real and genuine, were also established, the person could claim a right of residence as a worker under Article 39 para (3)(c) TEC (new Article 45 para (3)(c) TFEU), of which provided that that freedom entailed the right to stay in a Member State for the purpose of employment. Even if Article 39 (new Article 45 TFEU) did not avail him, he might, as a citizen of the European Union, enjoy a right of residence by direct application of art 18(1) TEC (new Article 21(1) TFEU), subject to the limitations and conditions there referred to (which however had to be applied in conformity with Community law and in particular the principle of proportionality), which could include a condition that the person had sufficient resources to avoid becoming a burden on the host state's social security system. However, in the present case, as the court had been informed, the claimant had latterly been granted a residence permit by the authorities in Brussels. A Union citizen who was not economically active could rely on the equal treatment principle in Article 12 TEC (new Article 18 TFEU) if he was lawfully resident in the host state. National legislation such as that in issue, which withheld a social assistance benefit to a Union citizen such as the claimant who was residing lawfully in the host state, constituted discrimination on grounds of nationality prohibited by Article 12 TEC (new Article 18 TFEU), and such a person could rely on Article 12 (new Article 18 TFEU) in order to be granted a benefit such as the *minimex*.

### **Concluding on Trojani**

The Trojani judgment is not mentioned in the *Cypriot, German, Lithuanian, Luxembourg's, Maltese* and *Polish* reports. It didn't have any impact in *Austria* and *Slovakia*. Trojani is mentioned in the Greek and Latvian reports but not elaborated.

According to the *Czech* and *Slovenian* rapporteurs the legislation in their countries appears to be in conformity with Trojani. As far as in the Czech Republic the entitlement to a minimum subsistence allowance cannot be based directly on EU law, the benefit is granted according to national law under the precondition of residency for more than

three months.

As in *Collins* (see above) Ireland and the UK still apply a habitual residence condition concerning benefits corresponding to the minimex benefit in *Trojani*, with all the problems thereof. An EU citizen, who does not enjoy a right of residence in *Belgium* and *Portugal* under Articles 45, 49 or 56 of the TFEU and therefore is not economically active, but who is in possession of a valid residence permit, has a right to a social subsistence allowance by virtue of the principle of non discrimination on grounds of nationality. A strict residence clause is applied in Romania as well.

At the time of the transposition of Directive 2004/38 *Trojani* is explicitly taken into account in *Finland* and in *Sweden* while amending the Aliens Act. In *Finland* and *Hungary* it is acknowledged that the authorities are to use discretion when deciding whether to refuse an individual's entry on the ground that (s)he does not meet the requirement of not burdening unreasonably the social assistance system. It shall be decided case by case. The State is required to endure a certain degree of social burden. In both countries refusals on this ground are exceptional or non existing. In *Portugal* too a removal decision may not automatically be based on recourse to social assistance.

The *Danish* rapporteur is not fully convinced that the Act on Active Social Policy is administered on the basis of a correct understanding of the EU rules on residence right, in particular the criteria for acquiring the status of worker. In *Bulgaria*, *Estonia* and *Italy* too the *Trojani* judgment could have an impact in determining the notion of worker.

Despite the *Trojani* decision, the *Spanish* authorities have been limiting social benefits.

Explicit references to *Trojani* by courts and other judicial bodies are reported in *France*, the *Netherlands* and the *UK*. The *French* case law and corresponding administrative practice are interesting as it is acknowledged that in the light of Community law a lawful residence condition for a social benefit differs significantly depending on whether the parties have already been receiving benefits or not. By granting applicants in de past social benefits on the condition of lawful residence the authorities have recognized their right of residence at present as well. This reasoning was based on the *Trojani* decision.

### 4.3. **Vatsouras (C-22/08)**

In this judgment of 4 June 2009 the Court confirmed that the concept of worker is independent of the limited amount of remuneration and the short duration of the professional activity. It also ruled that a job-seeker can receive a benefit of a financial nature intended to facilitate access to employment. Such a benefit is not seen as social

assistance, which Member States may refuse to job-seeker according to Article 24(2) Directive 2004/38. To be entitled to such a benefit the job-seeker can be required to have established genuine links with the labour market of the Member State, for example by instituting that the person has actually sought work in that Member State for a reasonable period.

### Concluding on Vatsouras

The decision is not mentioned in the *Cypriot, Finnish, French, Lithuanian, Luxembourg's, Maltese* and *Polish* reports. The *Austrian, Greece, Latvian, Romanian, Slovakian, Spanish* and *Swedish* reports did not go into the details of Vatsouras. Financial benefits equivalent to the one which was in question in the Collins and Vatsouras cases do not exist in *Italy, Poland* and *Slovenia*.

The Vatsouras judgment concerns two issues: the criteria for the status of worker and the character of benefits which are intended to facilitate access to the labour market.

Concerning the first issue the Bulgarian report reiterates that there is no transposition in *Bulgarian* law of Article 14 (4) (b) of Directive 2004/38 providing that "Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged". The *Czech* report underlines that the *Czech* courts have to apply the EU understanding of the notion of worker. The decision would have an impact on *Estonia* too in determining the notion of worker.

Irrespective of the Vatsouras judgment allowances for jobseekers are in *Bulgaria* still considered as 'social assistance' in the meaning of Article 24(2) Directive 2004/38. The same applies most probably for *Ireland* and the *UK*. EU national jobseekers who do not have habitual residence (*Ireland*) or the right to reside (*UK*) are still excluded from access to social benefits, even if these benefits are designed to assist individuals to get into or back into work. In the *Netherlands* too the benefit based on the Work and Social Assistance Act is seen as "social assistance", despite its work incentive. Only an economic active EU citizen who has fulfilled effective and genuine activities and has become involuntary unemployed has a right to such a benefit during the six months period he holds his status as a worker. Also the *Portuguese* solidarity allowances are seen as social assistance. As entitlement to such allowances require 'the active availability to work' the *Portuguese* rapporteur is of the opinion that EU national jobseekers are entitled to these allowance during the first three months of residence or as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. Doubts are expressed by the *Danish* rapporteur as

well. Certain benefits under the Danish Act on Active Social Policy should be considered as facilitating access to employment. Strict application of the provision according to which 'first-time jobseekers' are excluded from these benefits is most probably not in conformity with EU law.

In *Belgium* there is no financial benefit intended to facilitate access to employment either. There is only a social assistance benefit in the terms of article 24(2) Directive 2004/38. Consequently, a financial benefit claimed by any job-seeker in Belgium could be denied.

In *Germany* the *Vatsouras* judgment has not solved the diversity among German social courts on the issue whether unemployment benefits must be granted to Union citizens even though they fall under the exclusion clause whereby foreigners who are staying in Germany exclusively for the purpose of seeking labour are excluded from unemployment benefits as well as social assistance.

No problems in this regard are foreseen by the *Czech* rapporteur. EU citizens and their family members are in general treated equally with Czech nationals and the provision stipulating concrete preconditions for receiving unemployment benefits does not contain any restrictions in this regard. *Hungarian* law too makes no distinction as regards the receipt of unemployment benefits on the basis of the legal status of the migrant.

## 5. STUDENT OR WORKER

### 5.1. Raccanelli (C-94/07)

The case concerned Mr. Raccanelli who was a student at the Max Plank Institute for Radio Astronomy, part of the Max-Planck-Gesellschaft zur Förderung der Wissenschaften in Germany. Mr. Raccanelli was funded by a doctoral grant given by the Institute. Under this grant Mr. Raccanelli was not placed under an obligation to work for the Institute, and could if he so desired devote his entire time to his doctoral thesis. Researchers formally employed by the Institute were required to work during normal working hours for the Institute, and could only work on their theses outside of these normal working hours. Grant funded researchers, like Mr. Raccanelli, were exempt from income tax and were not affiliated to the social security system. Employed researchers were liable to pay income tax and social security contributions. Mr. Raccanelli was Italian, and complained to the Arbeitsgericht (Labour Court) Bonn (comparing himself to German employees of the Institute) that he was being discriminated on the basis of his nationality in a working relationship, contrary to Article 7 of Council Regulation 1612/68 on freedom of movement for workers within the Community. The Arbeitsgericht Bonn referred various questions to the ECJ, including whether Mr. Raccanelli was a worker. The ECJ said, *inter alia* "a researcher preparing a doctoral thesis on the basis of a grant contract...must be regarded as a worker within the meaning of Article 39 TEC (new Article 45 TFEU) only if his activities are performed for a certain period of time under the direction of an institute...if, in return for those activities, he receives remuneration".

#### Concluding on Raccanelli

The Raccanelli case is not mentioned in the *Finnish, French and Luxembourg's* reports. The case is mentioned but not elaborated in the *Belgium* report. The decision doesn't cause problems in *Austria*. No follow-up was noted in *Denmark, Bulgaria, the Czech Republic, Estonia, Finland, Ireland, Italy, Latvia, Lithuania, Malta, Poland and Romania*. The relevant rules in *Cyprus* contain various discriminatory elements with regard to researchers from other Member States. A complaint is pending before the Cypriot Equality body. The principle of equal treatment in this respect is explicitly mentioned by the *Bulgarian, Estonian, Portuguese and Slovakian* rapporteurs. In the *Netherlands* the Supreme Court decided that Ph.D. students working on a grant should be considered as working on a labour contract according to the Civil Code. The *Slovenian* rapporteur is of the opinion too that in case of a dispute it shall be assumed that an employment relationship exists, if the core elements of employment are dominant. The situation in

Sweden (why should a scholarship under specific circumstances not being considered as remuneration?), *Spain* and *Hungary* is unclear. Nonetheless, the law faculty of the ELTE University in *Budapest* applies discriminatory criteria while students who obtained their diploma in another Member State are excluded from the possibility to apply and to become funded full time Ph.D. researchers. The question raised in *Raccanelli* is certainly relevant to the *UK* but the extent to which postgraduate students may wish to challenge their classification is less clear. In *Germany*, the Labour Court of Bonn by judgment of 19 November 2008 has rejected the claim of Mr. Raccannelli, since he has not been regarded by the Court as qualifying as a worker in the sense of EU legislation due to his particular contractual agreement with the Max-Planck-Society. Mr. Raccanelli has filed an appeal with the Labour Appeal Court. The appeal is still pending.

## 6. CONCLUSIONS

The “concluding” paragraphs of the Chapters 2, 3, 4 and 5 contain the substantive and detailed conclusions on the importance and potential impact in the Member States of each of the 10 ECJ judgments. Paragraph 6.1. recalls these concluding paragraphs in short. More procedural and general conclusions are the subject of the paragraphs 6.2. and 6.3.

### 6.1. Potential impact of the judgments

#### **Jia:**

In some Member States the Jia judgment was interpreted as explicitly excluding a requirement of previous lawful residence: *Bulgaria, Cyprus, Greece, Lithuania, Poland, Portugal, Slovenia* and *Spain*. On the contrary, in other Member States Jia was – despite its clear wording - interpreted as not precluding the application of the requirement of previous lawful residence: *Denmark, Finland, Ireland* and *UK*. Uncertainty still continued for a while in *Germany* and the *Netherlands*. Only after the *Metock* judgment law and practice in these countries were changed by (explicitly) abolishing the requirement of previous lawful residence.

Concerning the issue of dependency a mere declaration of maintenance is – in conformity with Jia - not considered as sufficient prove of a situation of real dependence in *Austria, Portugal* and *Sweden*. Nevertheless, a simple declaration stating that the family member is dependent seems sufficient in *Hungary* and *Italy*. In conformity with the Jia judgment, the Belgian interpretation is that the need for material support might be proven by any appropriate means. The same applies to *Greece*. Implementing circulars in *Greece* do not require any particular means of proof of the need for material support. The *Latvian* regulations may be interpreted as requiring actual dependency. Also *French* legal practice requires actual prove of regular payments. No definition of dependency exists in *Bulgaria, Estonia* and *Slovakia* and the issue of dependency is not addressed in *Slovenia*. A rather strict interpretation of dependency is applied in the *Czech* legislation, which most probably contravenes the Jia judgment.

The scope of the dependency is still uncertain as well. According to the *Finnish* rapporteur administrative and legal practice in *Finland* seems to require full dependency. Also the *UK* rapporteur is of the opinion that financial dependency is interpreted more strictly in the *UK* than the ECJ actually provided for in Jia.

In *Poland* the focus is not on the dependency in the country of origin or previous stay but on the availability of sufficient resources in *Poland* itself.

**Eind:**

According to the national reports: in *Austria, Finland, Greece, Latvia, Portugal* and *Spain* the decision did not ask for any amendments. The *Romanian* rapporteur is not aware of any of such cases in *Romania*. The decision could be important for *Cyprus* due to its liberal approach to family reunification.

Due to *Eind* the administrative practice in *Denmark* and the *Netherlands* is explicitly modified. Nevertheless, in *Denmark* this seems limited to the right of family reunification and does not include specific social welfare rights which raises further issues of reverse discrimination contrary to EU law.

According to the national rapporteurs the legislation and practice in *Bulgaria, the Czech Republic, Hungary, Italy, Slovakia* and *Slovenia* seem in line with the *Eind* judgment, although it is not clear from the *Czech* and *Slovenian* reports if they cover the issue of family reunification with returning nationals as well. In *Hungary* and in *Slovakia* nationals and EU/EEA citizens are treated equally in this respect, although in *Slovakia* the notion of a family member of a *Slovak* citizen is different from and more narrowly defined than the notion of a family member of an EU/EEA citizen.

The situation in *Germany, Ireland, Poland, Sweden* and the *UK* is unclear. In *Belgium* the authorities could refuse a right to reside in the Member State to a family member of a worker who returns to his/her national Member State considering that without effective and genuine economic activities, the worker is not able to financially support the family member. This policy seems to contradict the *Eind* judgement.

**Metock:**

As far as the *Metock* judgment is mentioned in the national reports the decision did not have any impact on *Belgium, Bulgaria, Estonia, Greece, Hungary, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain* and *Sweden* as the existing legislation and administrative practice are already in line with the decision.

The situation in the *Czech Republic* is not clear from the report. The same is true for *Latvia*. The *Lithuanian* legislation indirectly implies the requirement of a previous stay in another EU country, however the authorities are motivating that this provision only applies to Lithuanian citizens who did not yet exercise their freedom of movement.

In *France* the judicial practice is only partially in line with *Metock* while it still requires the legal entry of the third country family member into France. In *Italy* too the requirement of legal entry is an indirect consequence of the existing legislation transposing Directive 2004/38. In the UK Regulations 9 and 12 still give the impression that a third country national family member covered by Directive 2004/38 must have entered the EU area in accordance with the national law of a Member State before being able to enjoy family reunification with a

migrant EEA national in the *UK*. Nevertheless, the relevant webpage of the UK Border Agency (UKBA) has been amended but not the statutory instrument itself.

The impact of the *Metock* judgment in *Austria, Cyprus, Denmark, Finland, Germany* and *Ireland* was huge. These Member States changed their legislation and/or administrative practices considerably. Since a right of entry and residence of third country family relatives is independent of a previous lawful stay in another EU Member State

A possible retrospective application of *Metock* was discussed in the *Cypriot* and the *Irish* reports. In *Cyprus* a retrospective application is denied. In *Ireland* negative decisions will be reviewed from 28 April 2006 on.

The issue of reverse discrimination in this respect is explicitly discussed in the *Austrian, Dutch* and *Italian* reports.

Finally, due to *Metock* in some Member States the focus shifted to measures to prevent abuse and fraud, particularly in *Denmark, Hungary, Ireland, the Netherlands* and *Spain*. In *Belgium* the legislator added an additional possibility to withdraw the residence permit during the first two years of residence in case the common settlement ends.

#### **Hartmann:**

As far as the *Hartmann* case is analyzed in the national reports, the judgment has no impact on *Austria, Denmark, Finland* and is not likely to have any bearing on *Cyprus*. Nothing prevents the legal instruments in *Portugal* from being interpreted in line with the *Hartmann* decision.

The *Hartmann* judgment which was a German case is since implemented in *Germany*.

The *Bulgarian, Czech, Greece, Hungarian, Irish, Lithuanian, Romanian* and *Swedish* rapporteurs argue with arguments that legislation and practice in their Member States are most probably in line with the decision while no residency clause is applied. Less clear is the situation in *Latvia* and *Slovenia*.

Openly contrary to the judgments is the situation in *France, Italy, Poland* and *Slovakia*, while in these Member States strict residency requirements are still in force.

The relevant regulations in the *UK* are still the subject of legal proceedings. As follow up to the related judgment on *Geven* concerns the regulations in the *Netherlands* concerning the criteria for effective and genuine employment still need to be amended.

#### **Hendrix:**

As far as the *Hendrix* judgment is mentioned in the national reports the decision hasn't had any impact on the *Austrian* law and practice and does not require any changes to *Danish* legislation. The decision is not

likely to have any impact on the *Bulgarian* and *Greek* situation while a residence clause does not exist. Most benefits in *Estonia* are exportable as well although one benefit for disabled persons is not exportable. The judgment has not had and is not likely to have any impact in *Finland* as the Finnish system is in line with it. Finnish disability pensions are exportable. Social benefits for disabled persons are connected in *Germany* with ordinary residence, factual residence or occupation within Germany. Therefore, a person employed in Germany will be entitled to these social benefits, which covers the Hendrix' situation.

Situations comparable to Hendrix have not yet arisen in the *Czech*, *Italian* and *Spanish* context and given its geographical situation it is difficult to foresee that the Hendrix judgment will have an impact on *Malta*.

Although a comparable situation has not yet arisen in the *Czech Republic* the permanent residence clause in the relevant legislation most probably contravenes the Hendrix judgment. The same applies to the existing residence clauses in the *Cypriot*, *French*, *Hungarian*, *Irish*, *Latvian*, *Lithuanian*, *Polish*, *Portuguese*, *Romanian*, *Slovenian*, *Swedish* and *UK* legislation.

In the *Netherlands* the (referring) court relied in its decision of 7 February 2008 directly on the Hendrix judgments and set aside the residence clause in the Hendrix case. In *Slovakia* too the Supreme Court relied directly on Hendrix, in a case in which the administrative authorities denied a Slovak student in the *Czech Republic* a benefit in material need, as he was staying abroad.

The *Belgian* rapporteur refers to the potential discrimination in the field of social security for posted workers, due to the different interpretation of 'posted worker' from Member State to Member State.

**Renneberg:**

The Renneberg case is not mentioned in the *French* and *Luxembourg's* reports.

The *Cypriot* rapporteur mentions the Renneberg case but has not identified any rule that is contrary to the findings or the broader principle of Renneberg. The decision should not have any impact on the *Danish* legislation, because this is already in line after implementation of the ECJ judgment in *Schumacker*. According to the *German* rapporteur the highly complex situation of calculating the taxable income and receiving a tax deduction based on negative income in another EU Member State is not fully clear.

Others, such as the *Greek*, *Irish*, *Lithuanian*, *Maltese*, *Romanian* and *Slovenian* rapporteurs limit themselves to the issue whether similar possibilities as in Renneberg to deduct or not to deduct exist in their tax legislation. As in their Member States the benefit of any tax deduction in respect of a negative income does not exist, Renneberg should be

of little relevance for their countries. These rapporteurs neglect the broader principle of *Renneberg* which includes that workers who earn all or almost all of their income in their work state should be treated by that work state as residents by taking into account all available tax advantages. The reports fall short in analyzing this broader principle of *Renneberg* in the national context.

The *UK* rapporteur on the contrary does realize these wider consequences. There are strong indications that the kind of problem which arose in *Renneberg* could arise in the *UK* as well.

In *Latvia* too there is no right to negative income deduction with regard to the expenses relating to dwellings. There is only a right to negative income reduction for expenses relating to education and health services. But the detailed *Latvian* regulations concerning the negative income deduction does not envisage the situation of cross border workers.

In *Italy* too, the income tax legislation makes a differentiation between resident and non-resident taxpayers while taking into account tax advantages.

Strict residence clauses are applied in *Poland* as well. Only with regard to residents losses generated outside the territory of *Poland* are taken into account. This seems a clear violation of the *Renneberg* principles.

In *Austria* too resident and non-resident taxpayers are treated differently which may contravene *Renneberg*.

The *Belgian*, *Estonian*, *Hungarian*, *Polish* and *Portuguese* rapporteurs emphasize that the situation as regards double tax agreements must also be taken into account. But when a worker earns all or almost all of his income in the work state Article 45 TFEU (ex 39 TEC) may override the double tax agreements. The *Portuguese* rapporteur is aware of this consequence of *Renneberg*. The *Belgian* rapporteur mentions a decision of the *Belgian* Constitutional Court to the contrary in cases of local taxes.

No problem in applying *Renneberg* seems to occur in *Finland*. Workers are entitled to make deductions for payments of interest regardless of whether the home is located in *Finland* or abroad.

In the *Czech* Republic too mortgage interest relief may be claimed under certain conditions. These provisions do not specify, whether the dwelling concerned has to be located in the *Czech* Republic. However, the income tax law stipulates the requirement, that non-resident taxpayers may claim mortgage relief (and certain other reliefs) only if their income from the *Czech* Republic is at least 90 per cent of his/her entire income. It is questionable whether the strict precondition of 90 per cent income from the *Czech* Republic is in conformity with the *Renneberg* requirement of receiving "all or almost all of its income" in a Member State, which he or she is not a resident of.

In *Slovakia* and *Sweden* the *Renneberg* judgment is already explicitly transposed and implemented in the tax legislation. The tax legislation in *Spain* is amended. The legal situation in the *Netherlands* concerning the compatibility with *Renneberg* of the new Income Tax Act 2001 is still unclear.

Finally, with reference to the *Renneberg* judgment the *Bulgarian* rapporteur mentions the closing of an infringement procedure as *Bulgaria* changed its legislation.

**Collins:**

The *Collins* judgment is not mentioned in the *Finnish*, *French*, *Lithuanian*, and *Luxembourg's* and *Polish* reports. It didn't have any impact in *Austria*, *Estonia*, *Greece*, *Latvia* and *Slovenia*. Financial benefits equivalent to the one which was in question in the *Collins* case do not exist in *Italy* and *Romania*. The situation concerning jobseekers has not been regulated in *Spain*, let alone their right to unemployment benefits.

According to the *Czech* rapporteur *Czech* legislation and practice continues to be in conformity with *Collins* judgment.

*Hungary* grants benefits for workers even if they have no real and sufficiently close links to *Hungary*.

In the *Netherlands* the court considers a 'genuine link' between the applicant and the employment market decisive for social assistance requests. The 'sufficient connection' to the labour market plays probably a role in *Sweden* as well.

In *Denmark* 'first-time jobseekers' and in *Germany* 'persons who are staying in Germany exclusively for the purpose of seeking labour' are excluded from social cash benefits and jobseeker's allowances. As certain *Danish* benefits should be considered as facilitating access to employment the rapporteur doubts whether the strict exclusion in the *Danish* legislation is in conformity with EU law. The *Portuguese* rapporteur too doubts whether a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State can be excluded from the scope of Article 45 of the TFEU.

Residence and a residence permit are required for social assistance in *Belgium*, *Bulgaria*, *Cyprus*, *Malta* and *Slovakia*. *Ireland* and the *UK* too still apply a habitual residence condition. A person coming to seek employment (rather than to take up an actual job offer) is unlikely to be habitually resident.

**Trojani:**

The *Trojani* judgment is not mentioned in the *Cypriot*, *German*, *Lithuanian*, *Luxembourg's*, *Maltese* and *Polish* reports. It didn't have any impact in *Austria* and *Slovakia*. *Trojani* is mentioned in the *Greek* and *Latvian* reports but not elaborated.

According to the *Czech* and *Slovenian* rapporteurs the legislation in

their countries appears to be in conformity with *Trojani*.

As in *Collins* (see above) *Ireland* and the *UK* still apply a habitual residence condition concerning corresponding benefits. An EU citizen, who does not enjoy a right of residence in *Belgium* and *Portugal* under Articles 45, 49 or 56 of the TFEU, but who is in possession of a valid residence permit, has a right to a social subsistence allowance by virtue of the principle of non discrimination on grounds of nationality. A strict residence clause is applied in *Romania* as well.

At the time of the transposition of Directive 2004/38 *Trojani* is explicitly taken into account in *Finland* and in *Sweden* while amending the Aliens Act. In *Finland* and *Hungary* it is acknowledged that the authorities are to use discretion when deciding whether to refuse an individual's entry on the ground that (s)he does not meet the requirement of not burdening unreasonably the social assistance system. In *Portugal* too a removal decision may not automatically be based on recourse to social assistance.

The Danish rapporteur is not fully convinced that the Act on Active Social Policy is administered on the basis of a correct understanding of the EU rules on residence right, in particular the criteria for acquiring the status of worker. In *Bulgaria*, *Estonia* and *Italy* too the *Trojani* judgment could have an impact in determining the notion of worker.

Despite the *Trojani* decision, the Spanish authorities have been limiting social benefits.

Explicit references to *Trojani* by courts and other judicial bodies are reported in *France*, the *Netherlands* and the *UK*.

**Vatsouras:**

The decision is not mentioned in the *Cypriot*, *Finnish*, *French*, *Lithuanian*, *Luxembourg's*, *Maltese* and *Polish* reports. The *Austrian*, *Greece*, *Latvian*, *Romanian*, *Slovakian*, *Spanish* and *Swedish* reports did not go into the details of *Vatsouras*. Financial benefits equivalent to the one which was in question in the *Collins* and *Vatsouras* cases do not exist in *Italy*, *Poland* and *Slovenia*.

The *Vatsouras* judgment concerns two issues: the criteria for the status of worker and the character of benefits which are intended to facilitate access to the labour market.

Concerning the first issue the *Bulgarian* report reiterates that there is no transposition in *Bulgarian* law of Article 14 (4) (b) of Directive 2004/38. The *Czech* report underlines that the *Czech* courts have to apply the EU understanding of the notion of worker. The decision would have an impact on *Estonia* too in determining the notion of worker.

Irrespective of the *Vatsouras* judgment allowances for jobseekers are in *Bulgaria* still considered as 'social assistance' in the meaning of Article

24(2) Directive 2004/38. The same applies most probably for *Ireland* and the *UK*. EU national jobseekers who do not have habitual residence (*Ireland*) or the right to reside (*UK*) are still excluded from access to social benefits, even if these benefits are designed to assist individuals to get into or back into work. In the *Netherlands* too the benefit based on the Work and Social Assistance Act is seen as "social assistance", despite its work incentive. Also the *Portuguese* solidarity allowances are seen as social assistance. As entitlement to such allowances require 'the active availability to work' the *Portuguese* rapporteur is of the opinion that EU national jobseekers are entitled to these allowances. Doubts are expressed by the *Danish* rapporteur as well.

In *Belgium* there is no financial benefit intended to facilitate access to employment either. There is only a social assistance benefit in the terms of article 24(2) Directive 2004/38. Consequently, a financial benefit claimed by any job-seeker in *Belgium* could be denied.

In *Germany* the *Vatsouras* judgment has not solved the diversity among German social courts on the issue whether unemployment benefits must be granted to Union citizens.

No problems in this regard are foreseen by the *Czech* rapporteur. *Hungarian* law too makes no distinction as regards the receipt of unemployment benefits on the basis of the legal status of the migrant.

### **Raccanelli:**

The *Raccanelli* case is not mentioned in the *Finnish*, *French* and *Luxembourg's* reports. The case is mentioned in the *Belgian* report but not elaborated. The decision doesn't cause problems in *Austria*. No follow-up was noted in *Denmark*, *Bulgaria*, the *Czech Republic*, *Estonia*, *Finland*, *Ireland*, *Italy*, *Latvia*, *Lithuania*, *Malta*, *Poland* and *Romania*. The relevant rules in *Cyprus* contain various discriminatory elements with regard to researchers from other Member States. A complaint is pending before the Cypriot Equality body. The principle of equal treatment in this respect is explicitly mentioned by the *Bulgarian*, *Estonian*, *Portuguese* and *Slovakian* rapporteurs. In the *Netherlands* the Supreme Court decided that Ph.D. students working on a grant should be considered as working on a labour contract according to the Civil Code. The *Slovenian* rapporteur is of the opinion too that in case of a dispute it shall be assumed that an employment relationship exists, if the core elements of employment are dominant. The situation in *Sweden*, *Spain* and *Hungary* is unclear. The question raised in *Raccanelli* is certainly relevant to the *UK* but the extent to which postgraduate students may wish to challenge their classification is less clear. In *Germany*, the Labour Court of Bonn by judgment of 19 November 2008 has rejected the claim of Mr. *Raccanelli*, since he has not been regarded by the Court as qualifying as a worker in the

sense of EU legislation. Mr. Raccanelli has filed an appeal. The appeal is still pending.

## 6.2. Reported references by national courts and other judicial bodies

**Jia:** references were only reported in the national reports of Austria, Finland, France, Ireland, Spain, Sweden (Member State of referring court) and the UK.

**Eind:** the Netherlands (MS of referring court) and the UK.

**Metock:** Austria, the Czech Republic, France, Ireland (MS of referring court), Italy and the UK.

**Hartmann:** Germany (MS of referring court).

**Hendrix:** the Netherlands (MS of referring court).

**Renneberg:** Belgium and the Netherlands (MS of referring court).

**Collins:** the Netherlands and the UK (MS of referring court).

**Trojani:** France, the Netherlands and the UK.

**Vatsouras:** Germany (MS of referring court).

**Raccanelli:** Germany (MS of referring court) and the Netherlands.

### **Concluding:**

With the exception of the *Jia* and *Metock* judgments, according to the national reports the selected ECJ decisions do not play an important role in the national case law of the Member States. Their influence is mainly limited to the country in which the referring court is situated. This is the more remarkable as the national reports reveal that administrative practices in many Member States are still not in line with these judgments, or that conformity is at least disputable. The national reports provide a strong indication that awareness of EJC case law among national judges (let alone their preparedness to request preliminary rulings) should be strengthened.

## 6.3. Reported legislative and policy impacts of the judgments

### **Jia:**

In the *Netherlands* the decision to extend the integration measures and long term visa requirements to third-country family members of EU

nationals was postponed until the judgment of the ECJ in the *Jia* case. A final decision was only taken in the Netherlands after *Metock*.

**Eind:**

In *Denmark* and the Netherlands new policy guidelines were introduced as a result of the *Eind* judgment. A returning national will be entitled to bring his or her family back even if he or she is not employed or carrying out other economic activity at the time of return from abroad.

In *Germany* the Administrative Instructions refer under no. 1.3 to the *Eind*-case: Germans as well as their family relatives may rely upon EU free movement rights if they return to Germany after having exercised an economic activity in another EU Member State.

In *Slovakia* the *Eind* judgment is mentioned in the explanatory report to the 2009 draft law amending the Foreigners Act (the draft law was adopted on 1 December 2009). However, the explanatory report only mentions the judgment in the list of judgments dealing with the issues covered by the draft law. It is not clear from the explanatory report, what is the impact of the judgment on the draft law, neither it is from the wording of the law itself.

**Metock:**

In *Austria* the *Metock*-decision led to an amendment of the relevant provisions of the Settlement and Residence Act 2005

In *Cyprus* the director of the Civil Registry and Migration Department issued a circular which discussed the legal significance of *Metock*: non-European spouses of EU citizens fall within the scope of implementation of the right of citizens of the Union and their family members to move freely and reside in the area of the Republic and therefore have a right to apply for a residence card, irrespective whether the marriage took place in Cyprus or abroad.

The *Metock* judgment resulted in significant change of legislation and administrative practice in *Denmark* by abolishing for third-country family members the requirement of previous lawful residence.

In *Finland* too the requirement of previous lawful residence was abandoned by an amendment to the Aliens Act which entered into force on 1 July 2010.

In *Germany* the Administrative Instructions of the federal government of 27 July 2009 refer under no. 3.0.3 to the *Metock*-judgment confirming that a right of entry and residence of family relatives is independent of a previous lawful stay in another EU Member State.

The *Irish* Government reacted swiftly to the *Metock* judgment, adopting Regulations amending the offending part of the 2006 Regulations only four working days after the Court delivered its judgment. In respect of family members who are not Union citizens, the requirement of prior lawful residence has now been removed.

In *Italy*, the Minister of the Interior draw by circular letter of 28 August 2009 the attention of the local authorities on the *Metock* case, expressly reminding them to correctly apply it.

In the *Netherlands*, the *Metock* judgment constituted a fatal blow to the desire to introduce long term visa requirements and integration obligations to third country national family members of a Community national.

In an internal message of the *Swedish* Migration Board it was stated that the *Metock* case should not have influence on the Board's practice, since the Aliens Act should be applied already in line with the *Metock* judgment.

### **Hartmann:**

Following the *Hartmann*-judgment, in *Germany* the relevant social laws have been repeatedly amended finally by law of 2 March 2009. According to sec. 1 of the *Bundeskindergeldgesetz* in the version of 28 January 2009 there is no distinction between Union citizens and German nationals with regard to the access to *Kindergeld* under the general conditions of sec. 1 providing for an entitlement to children benefits to everybody who is employed under German law in a regular employment relationship, subject to obligatory insurance or without a regular residence in Germany is subject to German tax obligations.

### **Hendrix:**

No explicit legislative and policy impacts are reported.

### **Renneberg:**

With reference to the *Renneberg* judgment the *Bulgarian* reporter mentioned an infringement procedure which was closed on 5 May 2010 as Bulgaria changed its legislation.

In the *Netherlands*, answering parliamentary questions the State Secretary of Finance informed Parliament on 9 December 2008 that the consequences of the *Renneberg* judgment for the Income Tax Act 2001 are still subject of further investigation.

In *Slovakia* the *Renneberg* judgment was explicitly mentioned in the compatibility clause to the draft law amending Act No 595/2003 on Income Tax (the draft law was adopted on 17 February 2009 and published in the Collection of Laws under No 60/2009). This Act repealed from the Act on income tax the permanent residence condition in Article 33 of the Act which governs so called tax bonus – the possibility to lower the tax base when having dependent children.

In *Sweden* the *Renneberg* judgment has been considered in Swedish tax law and an amendment of the Income tax Act was coming into force on January 1, 2008. The intention was to adapt the Swedish legislation to EC law and to facilitate the movement on the labour market. The increased right to tax reduction for interest rate paid in

another Member State should be granted to people having residence in the EU and income solely (or almost solely) from work in Sweden, if the interest rate has not been subject to tax reduction in the home Member State.

**Collins:**

In Sweden, in the preparatory works to the legislation it is stated that a jobseeker very probably could have a right to equal treatment regarding social benefits in situations when (s)he has a “sufficient connection” to the Swedish labour market.

**Trojani:**

The case of Trojani was referred to in the *Finnish Government Bill 205/2006* for the Act amending the Aliens Act, the purpose of which was to transpose the provisions of the Directive 2004/38/EC to national legislation.

In France Trojani is confirmed by the provisions of a Circular of the Directorate of Social Security of June 3, 2009. It is also confirmed in a circular of National Social Welfare Fund (Caisse Nationale d'Allocations Familiales, CNAF) of October 2, 2009.

Trojani has been dealt with in *Swedish* preparatory works on law (in connection with Collins), see above.

**Vatsouras:**

In the *Netherlands* the Vatsouras decision led to questions in Parliament. According to the government the Dutch benefit based on the Work and Social Assistance Act (Wet Werk en Bijstand, WWB) should be seen as a social assistance benefit and not as a benefit to facilitate access to employment like the *German* benefit as disputed in Vatsouras.

**Raccanelli:**

No explicit legislative and policy impacts are reported.

**Concluding:**

With the exception of the Metock judgment in some Member States, the selected ECJ decisions did only have occasionally some legislative and policy impacts. According to the national reports the legislative and administrative follow up of ECJ judgments seems rather limited in the Member States with no noticeable differences in old and new Member States. It should be recommendable if the relevant migration departments/ministries in the Member States issue yearly a report to the national parliaments on the relevance of the Court's recent cases on free movement and migration in general for the national legislation and/or administrative practice.

## ANNEXES: NATIONAL REPORTS BY JUDGMENT

### 1. National reports on Jia

The Jia judgment is not mentioned in the *Belgian, Luxembourg's, Maltese* and *Romanian* reports.

In conformity with article 6(b) of Directive 73/148 and the ECJ Jia judgment, the *Belgian* interpretation is that the need for material support might be proven by any appropriate means. Article 40bis, §4, 2 of the Alien Act of 1980 states that, in order to evaluate the resources of the EU citizen, one must take into consideration the personal situation of the EU citizen, which includes the nature and periodicity of the income and the number of supported family members.<sup>1</sup>

In *Austria* the Administrative Court ruled on 4 June 2009 (2009/18/0048) in accordance with the Jia judgment that a “declaration of maintenance” is not a sufficient proof of the need for material support.

According to the *Bulgarian* rapporteur the Bulgarian legislation is in conformity with the Jia judgment while it does not contain an explicit requirement of previous lawful residence. With regard to the notion of a 'dependent' family member the legislation only requires that this is a person “provided for” by an EU/Bulgarian citizen or his/her spouse without further elaboration. The Jia judgment has not yet been referred to by the Bulgarian courts.

According to the *Cypriot* rapporteur the Jia-judgment is directly important for Cyprus while the ECJ allowed Ms Jia to switch from one status (visitor) under national immigration rules to residency under the terms of European Community law. Also Cyprus is not entitled to implement a blanket requirement for previous lawful residence in another Member State as a condition precedent to granting a residence permit to a non-Member State dependent relative seeking to remain on the basis of their dependency on an EEA national exercising free movement rights in Cyprus. This can have an important effect on the immigration law and practice in Cyprus.

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<sup>1</sup> “Le citoyen de l'Union visé à l'article 40, §4, alinéa 1<sup>er</sup>, 2<sup>o</sup>, doit également apporter la preuve qu'il dispose de ressources suffisantes afin que les membres de sa famille visés au §2 ne deviennent pas une charge pour le système d'aide sociale du Royaume au cours de leur séjour, et d'une assurance maladie couvrant l'ensemble des risques pour les membres de sa famille dans le Royaume. Dans le cadre de l'évaluation des ressources, il est tenu compte de la situation personnelle du citoyen de l'Union, qui englobe notamment la nature et la régularité de ses revenus et le nombre de membres de la famille qui sont à sa charge”.

In the light of *Jia* the Czech legislation still appears problematic as it limits the reasons for dependency in a strict way. Section 15a(3) of the Czech Foreigners Residence Act stipulates that a dependent person is considered to be a foreigner: who is systematically preparing for his/her occupation, or cannot systematically prepare for his/her occupation or cannot perform a gainful activity due to illness or injury, or is unable to perform systematic gainful activity due to a long-term unfavourable state of health. It remains questionable, whether such narrowed definition is consistent with the *Jia* judgment conclusions.

In *Denmark* the *Jia* judgment had limited influence on Danish practice concerning residence right for third-country family members, given that the requirement of previous lawful residence had been introduced against the background of the *Akrich* judgment and the *Jia* judgment had not resulted in a change of the administrative practice in this respect. Only after the *Metock* judgment the administrative practice was significantly changed.

In *Estonia* the *Jia* judgment would have an impact in order to help to determine what "dependent relatives" does mean. The *Jia* judgment can be helpful in this sense, as the Estonian legislation also refers to the "dependent relatives" without any further explanations of "dependency".

The *Finnish* Ministry of Interior was of the opinion that the *Jia* judgment did not preclude application of the requirement of previous lawful residence in cases involving third country national family members, as laid down in section 153 of the Aliens Act. Therefore, no pressure was felt after this judgment to amend the Aliens Act in this regard. This same conclusion was drawn from the *Akrich* judgment. The requirement of previous lawful residence was abolished from the Aliens Act only after the *Metock* judgment in which the ECJ ruled unequivocally that this requirement is contrary to the rules on free of movement.

The *Jia* judgment raises also the question of the correct meaning of the requirement of *dependency* as a precondition for direct relatives in the ascending line to be regarded as family members for the purposes of application of legislation on free movement. The Government Bill 205/2006 that concerned the transposition of the Citizenship Directive explains that in the context of free movement the term 'dependency' presumes that the family member is financially dependent on the sponsor. When assessing this, account shall be taken of the family member's personal circumstances and needs. According to the Bill, the dependency has to be established by relevant documentary evidence

Judicial practice elaborating on the notion of 'dependency' in cases involving EU citizens is rather scarce. Case 08/0176/3 of 14.2.2008 by the Administrative Court of Helsinki, however, elaborated on this issue to some extent. The appellant who was a widow wanted to move to live with his children who resided in Finland as workers. The appellant argued that he was financially dependent on his children because his pension (40 e/month) was not sufficient to cover his living expenses in his home country. Furthermore, he claimed that due to severe health problems he needed his children's help in his everyday life. There was no-one in his home country to help him. The police had not registered the appellant's right of residence because he was not regarded to be dependent on his children within the meaning of section 154(1)(3) of the Act, and could therefore not be regarded as his children's family member. Furthermore, the appellant was not regarded to have sufficient funds to secure his subsistence and therefore he was not regarded to have an independent right of residence.

The Administrative Court sustained the decision taken by the police. The Court referred to cases 316/85 Lebon, C-200/02 Chen, and C-1/05 Jia, and concluded that the appellant was not dependent on his children within the meaning of section 154(1)(3) of the Aliens Act and the EU law on free movement, and could thus not be regarded as his children's family member. Furthermore, the Court confirmed that the applicant's pension (40 e/ month) was not sufficient to secure his subsistence in Finland and therefore his right of residence could not be registered. The Court did not attach any significance to the fact that the appellant's children had declared that they would take care of the appellant's subsistence in Finland. According to the rapporteur, it is difficult to see on which grounds the Court reached the conclusion that the appellant was not dependent on his children. He considers it also questionable whether the way the Court applied the notion of 'dependency' was fully in line with community standards. The local police and the administrative court seemed to require *full* dependency and regarded that this degree of dependency was not met in the present case.

In a judgment of 2 February 2010, Zammouri, the French Council of State, emergency judge, admits not demand suspension of refusal opposed to by a Moroccan national on the grounds that he did not, at the time of the request, prove to be dependent on a national of a Member State of the Union (his son of Spanish nationality residing in France). Indeed, the applicant did not establish that his son makes regular payments to meet his needs. In addition, his son is not able to support an additional person in his home in which already four dependent children are living. [EC, ref., 2 Feb. 2010, no 334549, Zammouri]

In *Germany* the federal government only referred to the *Metock* judgment confirming that a right of entry and residence of family relatives is independent of a previous lawful stay in another EU Member State. It ignored the *Jia* judgment in this respect.

In *Greece* the right of residence for more than three months, according to Article 7 par. 2 of P.D. 106/2007, is extended to family members who are not nationals of a Member State, accompanying or joining a Union citizen, provided that such Union citizen satisfies the conditions provided by law for such a residence. Therefore, no status of previous residence in another member state is required and the *Jia* and judgments do not have any influence in Greece. Circulars of application do not require any particular means of proof of the need for material support of the family member. There has been no reference in these Circulars to the *Jia* decision.

It seems that the approach of *Hungarian* law to the question of dependence is a rather different from the approach applied by Sweden and thereby probably the case *Jia*. Swedish law focuses on the fact of real dependence of the family member on the Community national as a pre-condition to judge an application. However, in Hungary, dependence is rather treated as a guarantee towards the state that somebody – the Community national or the family member – will personally provide for the financial means necessary for covering the costs of stay. The whole concept of the supporting declaration sees as a primary target to appoint the person who is legally liable for the possible costs occurred in connection with the stay. In this sense it might be said that the real dependence of the family member on the Community national is not relevant. Consequently, the elements of dependence are not of practical relevance either. The legislation follows the rationale of prior migration provisions in Hungary: dependence is a legal tie between the sponsor and dependant regardless the social reality, so law enforcement or social affairs authorities neglect the personal scrutiny.

In *Ireland* the scope of the *Jia* ruling was adverted to by the High Court (*Hanna J*) in the 2007 S.K. case. This involved a third-country national who had resided illegally in the UK and then moved with his Estonian partner to Ireland where he claimed asylum, and where the couple later married. It was discovered that he had made an unsuccessful application for asylum in Belgium some years before. He subsequently withdrew the application for asylum and applied for residency on the basis of marriage to an EU national, which was refused given the absence of prior lawful residence of the third-country national in the UK. The High Court held that the prior lawful residence requirement gave effect to the Residence Directive and the *Akrich* case, holding that the circumstances differed from those in *Jia*, which should be left to one side.

In taking the decision to refer the *Metock* case to the Court of Justice, the High Court judge (Finlay-Geoghegan J) declined to follow the approach taken in the *S.K.* approach. The ruling of the Court of Justice makes it clear that the approach taken by the judge in *S.K.* is no longer tenable.

In *Italy* neither the act transposing Directive 2004/38, nor the subsequent instructions say anything about when a member of the family of a EU national can be considered as dependent on him/her. In its website the Ministry of Foreign Affairs clarifies which documents are necessary for family reunification. The citizen of the Union shall fill a declaration simply stating that the member of his/her family, whose reunification s/he is applying for is dependent on him/her. Parentage can be proved by a document issued by the State of origin of the citizen of the Union. No case law on the subject is reported yet.

There is no administrative or judicial practice on application of the provisions of *Latvian* law in situations like the *Jia* case. Regulation No. 586 may be interpreted in a way that it requires actual dependency on an EU or EEA citizen when he/she moves to reside in Latvia.

With regard to issues of *Jia* judgment, there should be no similar problems in *Lithuania* as those analyzed in this case, except that it may affect the family members of the Lithuanian national, because in case of a family member of Lithuanian national the Aliens Law requires residence in another Member State before joining the family member in Lithuania (Art. 101(2) of the Law).

In the *Netherlands* the government interpreted the *Akrich* judgment as allowing for the introduction of long term visa requirements and integration obligations, if the third country national family member of an EU migrant has not been admitted under the national immigration rules of another Member State. Nevertheless, the government decided to postpone the extension of the integration measures and long term visa requirements to third-country family members of EU nationals until the judgment of the ECJ in the *Jia* case. In its judgment in *Jia* the Court avoided a clear position on this issue and a final decision was only taken in the Netherlands after *Metock*.

The *Polish* Act on entry that implements Directive 2004/38 fully complies with the *Jia* ruling. Article 11 para 1 of the Act on entry lists conditions when a third country national (member of family of EU citizen) may be refused entry. There is no provision that demands previous legal stay at the territory of another Member State. Moreover as regards the definition of "dependency", Article 18 in connection with Article 16 of the Act on entry states that EU citizens shall be in possession of enough 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. This may be proved by various means and submitted at the time of application for a right to join an EU citizen.

In *Portugal* there is nothing in Law 37/2007 that conflicts with the *Jia* decision of the ECJ. Moreover, the Portuguese administration has never interpreted that law as subjecting the grant of a resident permit to a third country national who is a family member of a EU national exercising his or her free movement rights in Portugal to the condition of a previous legal residence in another Member State.

It should also be stressed that Law 37/2006 is perfectly consistent with the part of the *Jia* judgment were the ECJ interpreted the notion of dependence of family members of a EU national as meaning the need of material support of that EU national or his/her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join that EU national. Proof of the need for material support may be made by any appropriate means; a mere undertaking from the EU national or his or her spouse to support the family members concerned need not to be regarded as establishing the existence of the family members' situation of real dependence.

In *Slovak* legislation, the right of residence of family members (both, citizens of EEA countries and citizens of third countries) was not conditioned by prior lawful residence of those family members in another Member State. Therefore, the *Jia* and *Metock* judgments have no relevance in Slovakia. There has been no reference in law or in Slovak case law of the *Jia* judgment. There is no definition of dependency in the Slovak Foreigners Act with regard to family members of EEA citizens.

From the viewpoint of the *Jia* and *Metock* judgment, the *Slovenian* legislation as regards conditions under which third-country family members can enter and reside in Slovenia may be considered as in conformity with EU law. Furthermore, the Slovenian Aliens Act does not address the issue of dependence (need of material support) of a family member upon his/her EU national spouse.

The *Spanish* RD 240/2007 does not require a national of a non-member State who is the spouse of a Union citizen resident in Spain, to have previously been lawfully resident in another Member State before arriving in Spain. Therefore, no mention in the judicial practice in this respect to the *Jia* and the *Metock* judgments exists. Nevertheless, the *Jia* case was subject to a public debate in Spain. Although, RD 240/2007 established a new provision under the general alien's regulations in order to apply RD 240/2007 to Spanish family members with a third country nationality as

well, the family member concept is more restrictive for Spanish citizens than for EU or EEA citizens; regarding ascendants who live under their charge, the regulations to be applied are those under general alien's legislation (Ley de Extranjería).

In 2008 the Jia case was used on Appeal lodged by Spanish associations (Andalucía Acoge, Asociación pro derechos humanos de Andalucía, etc.) before the Supreme Court against RD 240/2007. The case is still pending. According to the rapporteur, the Spanish family reunification requirements under general alien's law are obviously more restrictive than under RD 240/2007.

Besides, a judgment 00378/2008 of the Court for Contentious Administrative Proceedings of Lleida (Catalonia), dated November 27, 2008, has determined that "different treatment to ascendants (third country nationals) of a Spaniard from treatment delivered to ascendants of a EU or EEA citizen is not justified (...) It is against article 14 of Spanish Constitution on fundamental right to equal treatment and the non discrimination principle".

In Jia the Swedish Migration Board rejected the application on the ground that there was insufficient proof of the situation of financial dependence. The ECJ found that the word "dependent" in Article 1.1 d of Directive 73/148/EEC means that members of the family of a Community national established in another Member State need the material support in order to meet their essential needs in the State of origin or the State from which they have come at the time when the application is made. The ECJ also stated that proof of the need for material support may be adduced by any appropriate means. However, a mere undertaking from the Community national or his or her spouse to support the family members concerned need, is not to be regarded as establishing the existence of real dependence. From the fact of the case follows that the Migration Board's interpretation of the word "dependent" in national legislation (the Aliens Act Ch. 3a § 2) is within the boundaries of the Court's judgment.

The Jia decision did not solicit any change to the immigration rules in the *United Kingdom* in 2009. The 2006 Regulations were not amended as regards the definition of dependency as they are sufficiently widely worded to encompass the decision. The European Casework Instructions<sup>2</sup> were adjusted to include the Jia rules on dependency. They state at chapter 2, para 2.3 that dependent family members (other family members in the ascending or descending lines) must show that they are dependent:

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<sup>2</sup> <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/>.

- There is no need to determine the reasons for recourse to the financial support or to consider whether the family members is able to support him/herself by taking up paid employment;
- The definition of dependent only includes financial dependency (material support); it does not include emotional dependency;
- Financial dependency should be interpreted as meaning that the family member needs the financial support of the EEA national or his or her spouse/civil partner in order to meet the family members' essential needs in the country of origin – not in order to have a certain level of income."

According to the rapporteur it might be considered that this is a rather stricter interpretation of Jia than the ECJ actually provided for, in particular regarding the essential nature of the support in the country of origin.

In 2008 two court decisions on Jia are of some interest, one in the field of immigration, the other social security. The first case, HB (EEA right to reside Metock Algeria [2008] UTAIT 00069 is primarily concerned with the correct application of the Metock judgment in the UK. However, in passing it also considers Jia. Here it was the lower court against the decision of which the appeal took place which had relied heavily on Jia as authority for the proposition that lawful residence was a requirement for a family member seeking to remain with an EEA migrant worker. The appeal court reverses this misunderstanding on the basis of the later Metock decision.

In the social security case, a Portuguese national joined her son in the UK and on turning 60 applied for a state pension. Once again the issue was whether she had a right to reside which would entitle her not to be 'a person from abroad'. Once again the court found that she did not have a right to reside but went on to consider whether or not she was dependent on her son according to the Jia definition. Referring to Commissioner Jacobs analysis in another decision (CIS/2100/2007), the judge noted that Directive 2004/38 is intended to consolidate the preceding legislation and to simplify and strengthen the right of free movement. She stated that in Jia the court focused on the factual situation "the only question was whether the family member was in fact supported in such a way as to be properly regarded as a dependent." On the facts of the case before her, the judge noted that it had never been suggested in the case that the claimant was dependent on her son before she came to join him in the UK. For this reason, the lack of material support in the country of origin, the judge decided against the appellant.

## 2. National reports on Eind

The Eind judgment is not mentioned in the *Belgian, Estonian, French, Lithuanian, Luxembourg's and Maltese* reports. It is not mentioned in the *Finnish* report either which implicates according to the rapporteur that the judgment has not had any impact on the Finnish system nor should it has had such an impact.

According to the *Austrian* report no problems are reported until now.

The follow-up of this decision in *Belgium* in the national case law and in domestic law is scarce. However, Belgian authorities could refuse a right to reside in the Member State to a family member of a worker who returns to his/her national Member State considering that without effective and genuine economic activities, the worker is not able to financially support the family member.

The Law on Foreigners in *Bulgaria* stipulates that permission for continuous residence in the country (for up to one year) is given to family members of Bulgarian citizens. The legal provision poses no further conditions to this right and therefore seems in line with Eind. The Eind judgment has not been referred to Bulgarian courts in 2009/10.

Cyprus applies in general a restrictive approach to family reunification which may be found to have a deterrent effect to the freedom of movement. For that reason the Cypriot rapporteur considers Eind important for Cyprus due to its liberal approach to family reunification.

Family members of EU citizens are under *Czech* law granted the right to entry and to obtain temporary residency permit on the grounds of the mere fact, that they enjoy the status of a family member of an EU citizen. Therefore, according to the rapporteur it appears that Czech legislation is in conformity with the conclusions of the Court in the Eind case. It is not clear from the report whether the same applies for third country family members of returning Czech nationals even if that national is not economically active anymore

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

employed or carrying out other economic activity at the time of return from abroad.<sup>3</sup>

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

In *Germany* the Administrative Instructions refer to the Eind-case with regard to sec. 1 of the Freedom of Movement Act, stating that Union citizens may directly derive a right of residence from the Union citizenship. No.1.3 states that Germans as well as their family relatives may rely upon EU free movement rights if they return to Germany after having exercised an economic activity in another EU Member State. It has to be mentioned, however, that the Freedom of Movement Act is not applicable in this case.

According to the Greek rapporteur the Metock decision does not have any impact on *Greece*, although the rapporteur only considers the issue of previous residence and not the issue whether a returning Greek national may still benefit from EU law even if he is not economically active anymore.

In *Hungary* Act I of 2007 on entry and residence rights of persons being entitled to free movement (FreeA) regulates comprehensively the right of residence in terms of Dir. 2004/38/EC. The FreeA clearly regulates (Article 1 (1) b) that the Republic of Hungary guarantees the right to free movement and the right of residence to family members of EEA nationals - also Swiss nationals - and pursuant to Article 1 (1) c) this right is also provided for the family members of Hungarian nationals. Consequently, if the person proves his/her family ties (spouse, children, ancestor) with a Hungarian national and wishes to settle in Hungary, the same rules apply to his/her situation then those applicable to a migrant EEA national's family member. It means that Hungarian law itself diminished reverse discrimination by placing EEA nationals and Hungarian nationals on the same footing. It also encompasses that it is not necessary to leave Hungary and to return in order to activate EC law and to become entitled to invoke the benefits contained in Dir. 2004/38/EC. The same legal effect can be generated by simply

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<sup>3</sup> Press release of 15 January 2008 from the Ministry of Refugee, Immigration and Integration Affairs. and memorandum of 10 April 2008 from the Ministry of Refugee, Immigration and Integration Affairs.

referring to the implementing Act and submitting the necessary documents.

According to the rapporteur the *Eind* case has not been considered in any *Irish* court case yet. Nor is it referred to in any official documentation or on the website of the Irish Naturalization and Immigration Service (INIS). The position of free-moving Irish nationals is briefly addressed by INIS, which states that “if, as a Irish national, you have exercised your EU Treaty rights in another Member State with your family member and have now returned to Ireland, you may apply” for EU Treaty-based residence rights for the family member based on the EU Treaties. Evidence of thus exercising EU Treaty rights *with the family member* must be submitted with all other relevant documentation. On its face, this covers the *Eind* scenario.

The rapporteur is not aware of any case where a third-country national family member of an *Irish* free mover, whether or not returning to Ireland on a non economically-active basis, has been refused a right of residence in Ireland. However, it should be noted that, in the absence of free movement, Irish nationals have had great difficulty in being joined by third-country national family members.

There is no administrative or judicial practice on application of the provisions of *Latvian* law in situations like the *Eind* case.

Non-EU members of the family of *Italian* nationals are within the scope of Legislative Decree no. 30 of 2007, implementing Directive 2004/38/EC (Article 23). Therefore, if Ms *Eind* had been the daughter of an Italian national coming back to Italy after staying in another Member State for working reasons, the right to stay would not have been refused to her, since she would have claimed the benefit of the Legislative Decree which entrusts a family member with the right to stay. Moreover, Article 19 of the Legislative Decree 1998 no. 286 (consolidated law on immigration) states that the non-EU daughter of an Italian national living under the same roof may not be expelled (unless for reasons of public order) and shall be issued with a residence permit. No case law on the subject is reported.

Till recently the Dutch Aliens Circular contained the following wording: “Community national is also the Dutch national who had been established in another Member State to carry on economic activities and who has returned to the *Netherlands* to continue here his economic activities” This wording was in clear contradiction with the above judgment of the Court. On 29 January 2009 paragraph B10/5.3.2.1 of the Aliens Circular was amended in conformity with the *Eind* judgment: on return in the *Netherlands* a Dutch national is still entitled to his free movement's right, even if he is not economically active anymore.

It seems that under *Polish* law the Act of 14 July 2006 (on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members) would be applicable by analogy to a situation as considered in *Eind*. This Act refers to EU nationals moving to Poland and the rights of their relatives. However, since the rules on free movement of EU nationals should be interpreted broadly, it seems it would be possible to apply the Act of 14 July 2006 to establish rights as well of a Polish national who took advantage of free movement rules and enjoys the status of a “migrant worker” under the TFEU.

The Portuguese rapporteur is not aware of administrative practices in *Portugal* contrary to *Eind*. Nothing in Law 37/2006 or in the rules to implement it prevents or constitutes an obstacle to the implementation of *Eind*.

The Romanian rapporteur is not aware of any case in *Romania* regarding returning Romanian citizens and third country family members.

In *Slovakia* the *Eind* judgment is mentioned in the explanatory report to the 2009 draft law amending the Foreigners Act (the draft law was adopted on 1 December 2009). However, the explanatory report only mentions the judgment in the list of judgments dealing with the issues covered by the draft law. It is not clear from the explanatory report, what is the impact of the judgment on the draft law, neither it is from the wording of the law itself. However, third country family members have right to reside in Slovakia, even if the Slovak worker does not carry on any effective and genuine economic activities. Nevertheless, the notion of a family member of Slovak citizen is different from and more narrowly defined than the notion of a family member of an EU/EEA citizen.

From the viewpoint of the *Eind* judgment, the *Slovenian* legislation as regards conditions under which third-country family members can enter and reside in Slovenia may be considered as in conformity with EU law.

In *Spain* the *Eind* case is not mentioned at all in the Spanish judicial practice.

In *Swedish* migration law no rules exist that prevent an effective application of Article 10(1)(a) of Regulation 1612/68 in line with the Courts interpretation of that article in the *Eind* case. However, a factual situation on which the Dutch authorities decided the case has not

been tried before a Swedish migration court (or by the Migration Board).

The Eind decision has not resulted in any change in UK law or secondary legislation on free movement of workers. No reference is made to it in the European Casework Instructions (ECI).

The Eind case has been considered twice by UK courts over the past two years. In the same AIT decision which considered *Metock*, the judges considered also the Eind judgment.<sup>4</sup> It had come out just as the national case was under consideration so the court adjourned to allow the parties to make submissions in respect of it. The national court considered that the key relevance of Eind is “This ruling essentially establishes a negative: that in order for a third country family member to have a right to reside in the Member State of which the Union citizen is a national it is not necessary that he or she had a right to reside there previously. Further the case is not concerned with a third country national who’s presence in both the host Member State and the Member State to which the Union citizen went in order to work is unlawful. Miss Eind was granted a right to reside in the UK and, prior to entering the Netherlands with her Dutch father had no history of unlawful presence in the Netherlands or anywhere else in the Community. But in light of what the Court ruled in *Metock*, [the advocate for the appellant] does not need to rely on Eind.” The rapporteur considers this a particularly narrow analysis of the Eind decision particularly in light of the ECJ’s finding in Eind that the right to family reunification under the Directive was not negated by the fact that the EU national who had exercised his free movement right in another Member State, on his return home no longer exercised an economic activity or established economic self sufficiency such that he would be exercising a Treaty right on which to attach a family reunification right in any other Member State. As access to social benefits seems to be one of the key issues which arises in so many of the UK cases on EU workers, overlooking this aspect of the judgment is according to the rapporteur unfortunate. The failure to take full account of this aspect of the Eind decision may have contributed to another UK court making a reference to the ECJ which includes a question on a rather similar point.<sup>5</sup>

The second reference to Eind is in the judgment *MJ and Others*.<sup>6</sup> While this case is probably no longer good law following the ECJ’s decisions in *Ibrahim* and *Teixeira* as regards the meaning of Article 12 of Regulation 1612/68, it is worth considering how the UK judge dealt with Eind. He considered that “It would be extraordinary if it were the case that the appellants had a right of residence in the United Kingdom, without needing to be self sufficient, because [the EU

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<sup>4</sup> *HB (EEA right to reside – Metock) Algeria* [2008] UKAIT 00069.

<sup>5</sup> *Shirley McCarthy and Secretary of State for the Home Department* [2008] EWCA Civ 641.

<sup>6</sup> *MJ and Others (Art 12 Reg 1612/68 – self sufficiency?)* [2008] UKAIT 00034.

national estranged spouse of the third country national appellant and father of her EU national child] should not be deterred from exercising his free movement as a worker given that, on the finding of the immigration judge, he had remained in the United Kingdom without carrying on any economic activity and without any right to do so under European law." The national judge went on to state "This view is borne out by the recent decision of the ECJ in *Eind* (free movement of persons) [2007] EUECJ C-291/05...In the particular circumstances of that case [*Eind*] where the appellant as a citizen of the Netherlands had a right to return to his own Member State from the United Kingdom without being economically active, it was held his daughter had a similar right by analogy under Article 10(1)(a) of Regulation 1612/68. In this particular case Mr. K had lost the right to remain in the United Kingdom upon ceasing to work. The decision in *Eind* therefore is of no assistance to the appellants." Leaving aside the issue of internal inconsistencies regarding whether Mr. K had been a worker in the UK, the judge's easy dismissal of the ECJ's finding in *Eind* is somewhat surprising. This is particularly so as it is exactly the point about continuing EU family rights when the principal is no longer economically active or self sufficient which the judge is rejecting but which is established in *Eind*.

### 3. National reports on *Metock*

The *Metock* judgment is not mentioned in the *Luxembourg's* report.

In *Austria* the *Metock*-decision led to an amendment of the relevant provisions of the Settlement and Residence Act 2005. In 2007 the Constitutional Court stated that Directive 2004/38 applies to third-country nationals only if he/she possesses a residence title and is within the country before he/she starts a relationship with a Union citizen. In 2008 the ECJ decided in its *Metock*-decision differently. There is no need for legal stay and the date of starting the relationship is irrelevant. The Constitutional Court followed that opinion in its recent decision (16.12.2009, G244/09) as regards family members of Union citizens or Swiss citizens as well as the Administrative Court (e.g. 4.6.2009, 2008/18/0278). But as regards third-country nationals with a relationship to an Austrian, it is a prerequisite that the Austrian stayed abroad before and made use of his/her free movement rights. According to the Constitutional Court this is a justified differentiation. The Administrative Court had to deal with two short stays abroad: The Austrian wife of a third-country national went for a two weeks language course, the husband stayed in Austria; the Administrative Court denied the application of *Metock*-principles because they neither went abroad as a couple nor did they come back as a couple

but only the wife was abroad (24.9.2007/18/0347). The other decision was about an Austrian wife who went to Greece for 5 weeks and later for six months; during that periods her husband stayed in Austria. The Administrative Court (25.9.2009, 2009/18/0276) rejected the argument that this is a situation according to the ECJ's judgment Singh (C-370/90) or Carpenter (C-60/00).

Concerning Mettock, no extra conditions of previous lawful residence in the EU, exist in *Belgian Alien law*. There are only two conditions in EC law for the third-country national family members to enter into and reside in the host Member State to accompany or join a Union citizen: the existence of family ties, as defined in the Directive, and the presence of the Union citizen in the host Member State. This position has been recalled by the ECJ and is applied by Belgian authorities.

For example, as far as partners are concerned, article 40bis, §2, 2° of the Alien law provides that are considered family members of an EU citizen, partners with whom the Union citizen has a durable and stable relationship for one year without requiring that this relationship begin in another Member State.<sup>7</sup> Moreover, article 40bis, §2, 2° provides that partners can be as young as 18 years old if they can prove that they were living together for at least one year before the partner arrived in Belgium, without requiring that the relationship started in another Member State.<sup>8</sup>

Parliamentary documents confirm the legislator's intention to make a clear distinction between the concept of "common settlement" and "permanent cohabitation". When common settlement ends, it is possible to withdraw the residence permit during the first two years of residence according to article 42ter, §1, para 1, 4° of the Alien Law.<sup>9</sup> The legislator noticed that this specific possibility to withdraw the residence permit was not an implementation of the 2004/38 Directive, as article 13 did not provide such possibility.<sup>10</sup>

In *Bulgaria* the regulation of the entry and residence rights of the family members of EU citizens in Bulgaria is found in the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD). Family members of Bulgarian citizens are excluded from the scope of that law. There is no explicit requirement in LERD of previous lawful residence in Bulgaria of in

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<sup>7</sup> "2° le partenaire auquel le citoyen de l'Union est lié par un partenariat enregistré conformément à une loi, et qui l'accompagne ou le rejoint, pour autant qu'il s'agisse d'une relation durable et stable d'au moins un an dûment établie, qu'ils soient tous deux âgés de plus de 21 ans et célibataires et n'aient pas de relation durable avec une autre personne".

<sup>8</sup> "L'âge minimum des deux partenaires fixé au 2° est ramené à 18 ans, lorsqu'ils peuvent apporter la preuve d'une cohabitation d'au moins un an avant l'arrivée du citoyen de l'Union rejoint dans le Royaume".

<sup>9</sup> "§ 1er. [...] le ministre ou son délégué peut mettre fin à leur droit de séjour durant les deux premières années de leur séjour en tant que membre de la famille du citoyen de l'Union, dans les cas suivants: [...] 4° leur mariage avec le citoyen de l'Union qu'ils ont accompagné ou rejoint est dissous ou annulé, il est mis fin au partenariat enregistré visé à l'article 40bis, § 2, alinéa 1er, 1° ou 2°, ou il n'y a plus d'installation commune".

<sup>10</sup> See Doc. Parl., 2008-2009, No 2845/001, p.116

another Member State. The list of documents presented with the application for a residence permit includes “a passport”. The case of *Metock* has not been referred by Bulgarian courts in 2009/10.

According to the rapporteur the *Metock* judgment had profound influence in legal and administrative practices in *Cyprus*. On the 14.01.2009 the director of the Civil Registry and Migration Department issued a circular, which referred to a inter-departmental meeting between interested governmental parties and a representative of the Legal Service of the Republic, which discussed the legal significance of *Metock*: non-European spouses of EU citizens fall within the scope of implementation of the right of citizens of the Union and their family members to move freely and reside in the area of the Republic and therefore have a right to apply for a residence card, irrespective whether the marriage took place in *Cyprus* or abroad. Instructions were given to all officers of the Civil Registry and Migration Department for the immediate implementation of the ECJ decision.

The Ministry of Interior noted that according to the decision C-206 of ECJ, dated 12.2.2008, the Administration is not obliged to re-examine applications filed prior to the decision of the ECJ concerning the matter. The question “Retrospective application of *Metock*” may not be in issue but there is a strong case for correcting situations and reconsidering cases where previous legal residence was considered to be a necessary requirement. Individuals may well use the *Metock* case for the courts to reopen their cases, not by claiming retrospective application of *Metock* but for correcting the current and future status.

According to the *Czech* report *Metock* was only referred to once in the *Czech Republic*. In the judgment 3 As 16/2009 – 95 the applicant (father of a child with a *Czech* citizenship) supported its argumentation with the *Metock* judgment. The Supreme Administrative Court did not accept argumentation of the applicant and held that *Metock* is not applicable in the circumstances of the case. The case concerned the enforcement of an administrative expulsion of a foreigner and the assessment of its enforcement in the light of the right to family or private life of the applicant

Whereas the *Jia* judgment had limited influence on *Danish* practice concerning residence right for third-country family members, given that the requirement of previous lawful residence had been introduced against the background of the *Akrich* judgment, the *Metock* judgment resulted in significant change of administrative practice. In addition to abolishing this requirement, the personal scope of application of the EU rules concerning residence right for third-country spouses of *Danish* citizens was widened. Accordingly, the EU rules can now be invoked by a *Danish* citizen who has resided in another Member State as worker, self-employed person, service provider, as a retired worker or self-

employed or service provider, or as a seconded person, student or person with sufficient means. Thus, although this issue was not expressly dealt with in the *Metock* judgment, the adjustment of administrative practice in this regard was decided as an indirect consequence of the judgment, probably in order to prevent further political and legal controversy over the Danish implementation of the EU rules pertaining to the exercise of free movement rights by citizens upon return from another Member State.

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

The *Metock* judgment is not directly applied in *Estonia*. At the same time there are no obstacles for non-Member States' citizens to join the migrant worker without any requirement to stay or reside legally in another Member State. As the Citizen of European Union Act in this context is the direct translation of the directive, this means that the interpretation should be in line with *Metock* decision. This means that Estonia has to apply the principle according to which, third country nationals can directly join the migrant worker of the EU without any requirement to be legal resident in another Member State of the European Union. On the website of Citizenship and Migration Board (CMB) there is no official link to the *Metock* decision or at least explanation of the decision and its consequences.

According to section 153(3) of the Aliens Act, provisions on free movement applied to EU citizen's family members till recently only if they accompanied or joined them by moving to *Finland* from another Member State where they have resided together with their EU citizen family member lawfully and in a non-temporary manner. Under section 153(4) of the Aliens Act this same requirement was applicable also in cases involving family members of Finnish citizens who have used their right to free movement. There was a clear discrepancy between these provisions of the Aliens Act and the *Metock* judgment.

The Finnish Government gave on 29 May 2009 to the Parliament a Bill for amending the Aliens Act (HE 77/2009 vp) with the purpose of abolishing the requirement of previous lawful residence from the Aliens

Act and thereby bringing Finnish legislation in line with EU law. The proposed new wording of section 153 of the Aliens Act reflects the wording of the Citizenship Directive. Hence, under the new formulation:

Chapter [10 of the Aliens Act that contains provisions on free movement] shall be applied to an EU citizen who moves to Finland or resides in Finland, as well as to family members of such person, who accompany their EU citizen family member or join her later.

The proposal was adopted by the Parliament in the proposed form and the amended Act entered into force on the 1<sup>st</sup> of July 2010.

According to information received from the Legal Department of the Ministry for Foreign Affairs, the authorities responsible for issuance of visas have, too, brought their practice in line with the *Metock* ruling. Hence, the requirement of previous legal residence is no longer applied as a precondition for being treated as an EU citizen's family member in the context of visa procedure.

In *France*, the Administrative Court of Appeal of Paris referred in a decision of 21 January 2009 to the *Metock* case (CAA Paris, 07PA04221). The case involved a Nigerian citizen who entered France, before his marriage to a British citizen celebrated May 7, 2005, without having a visa. The Prefect of the Paris Police refused to issue him a residence permit considering he had not entered France legally. The Paris Administrative Court annulled the decision of the Prefect. The latter has appealed the ruling. The Administrative Court of Appeal of Paris decided firstly that an alien, who is not himself a national community is not exempt from the requirement to have a visa and can only obtain a residence permit as spouse of EU citizen if he entered France legally, but irrespective the date he entered or married.

A comparable case was decided on February 18, 2010. Mrs. May, a Japanese citizen, requested a residence as the spouse of a community national. Given the expiry of her visa at the time of application, the prefect of police refused to issue the requested title. Ms. May has appealed against that decision. The Paris Administrative Court rejected her request. She has since appealed the decision before the Administrative Court of Paris. This has granted her request based on *Metock* judgment (CAA Paris, February 18, 2010, 09PA04280). The Administrative Court of Appeal of Paris ruled again that that an alien, who is not himself a community national is not exempt from the requirement to have a visa and can only obtain a residence permit as spouse of EU citizen if he entered France legally, irrespective the date she entered or married.

In both cases, the Administrative Court of Appeal of Paris based its decision on the case *Metock* judgment. But this reference is only partial. In fact, the Administrative Court of Appeal still requires that the entry in France is regular. However, the Court stressed in its ruling that the right of residence should be recognized irrespective of the place

and date of the marriage. Nevertheless, due to the requirement of a legal entry a full application of community law according to *Metock* is not achieved yet.

In *Germany* the Administrative Instructions of the federal government of 27 July 2009 refer under no. 3.0.3 to the *Metock*-judgment confirming that a right of entry and residence of family relatives is independent of a previous lawful stay in another EU Member State. Therefore, the previous distinction with regard to family reunion of Union citizens between a first move into the Union territory and freedom of movement within the Union is abandoned. All family relatives of Union citizens possess a right of entry and residence provided that they can prove their status as family relatives and fulfill the requirements laid down in the Union Citizens Directive. Therefore, a third-country national family relative of a Union citizen must not fulfill the general requirements of the *Aufenthaltsgesetz* (basic knowledge of German etc.).

According to the Greek rapporteur the *Metock* decision does not have any impact on Greece while previous residence in another Member State is not required.

In *Hungary* the Office for Immigration and Naturalization (OIN) confirmed that a residence card is issued without the requirement of previous lawful residence. However, to get a visa for family reunification is often quite difficult. To assess a marriage of convenience (Art.35 of Directive 2004/38/EC) is a joint task of the OIN and the consular office but the shared responsibility has not been defined clearly in practice. Issuance of visa for third country national family member is a discretionary decision of the OIN upon proposal of the consular officer. For instance, the Ombudsman received a complaint from a Hungarian national whose Egyptian partner living in Egypt could not obtain visa although there is a valid marriage. According to the complaint the visa refusal was explained by "supposed false marriage" but without personal scrutiny and reasoning.

The *Irish* Government reacted swiftly to the *Metock* judgment, adopting Regulations amending the offending part of the 2006 Regulations only four working days after the Court delivered its judgment. In respect of family members who are not Union citizens, the requirement of prior lawful residence has now been removed and it is now stated that the Regulations apply to "qualifying family members of Union citizens, who are not themselves Union citizens" who seek either: (i) to enter the State in the company of the Union citizen family member/s; or (ii) "to join those Union citizens, in respect of whom they are family members, who are lawfully in the State". The same

approach is now taken to “permitted” family members, including those who are not Union citizens.

The Department of Justice, Equality and Law Reform stated that all applicants who had applied since 28 April 2006 for a residence card and had been refused because they did not have prior lawful residence would have their applications reviewed. It was envisaged at the time that this process would take three or four months to complete, though it is understood that it may have taken longer.

Although the Irish Government therefore sought to address the *Metock* ruling in an impressively short timeframe, it also started to campaign for an amendment to amend the Directive. It was joined in this campaign by Denmark and the issue has been debated in the JHA Council and is the subject of a Council Resolution. This issue of abuse and fraud has been addressed in the 2009 Commission Communication, and is a key element in the Stockholm program. The Irish Government has now focused on the issue of marriages of convenience.

Previous legal residence in *Italy* is not required as such to family members, but flows from the legislation transposing Directive 2004/38/EC, in that their residence can be registered for the purposes of free movement only after the issuance of the residence card, and the entry visa, when entry is conditional upon it, shall be attached to the application (see Circular letter no. 19 of 2007, Art. 9.5 and 10.3 of Legislative Decree no. 30 of 2007).

By circular letter of 28 August 2009, the Minister of the Interior draw the attention of the local authorities on the *Metock* case, expressly reminding them to correctly apply it. No proposal to amend the legislation has been submitted.

Courts have referred to the *Metock* judgment in a number of cases:

– Tribunale di Reggio Emilia, decree 27-12-2008

The judge makes reference to the *Metock* judgment in order to decide the case of the non-EU spouse of an Italian national. In fact, Article 23 of Legislative Decree no. 30 of 2007 states that non Italian family members of Italian nationals are within the scope of the rules on the status of Union citizens if these rules are more favorable to them. According to the judge, whether a rule is more or less favorable to the family members shall be assessed on a case by case basis. If the general legislation on immigration was to be applied, cohabitation of the spouses would be a condition necessary for the issuance of a residence permit to an illegal foreigner married to an Italian citizen. On the contrary, under EU law cohabitation is not required. Since in the present case the spouses did not live together, the application of the general legislation on immigration would lead to the expulsion of the foreigner. Therefore, the judge decides the case on the basis of EU law as interpreted by the Court of Justice in the *Metock* ruling.

– Tribunale amministrativo regionale per il Veneto, 10-2-2009 no. 329.  
The Venetian Administrative Tribunal referred to the *Metock* case to avoid a reverse discrimination. The case was a judicial review of the Questura's denial of the conversion of the residence permit for family reasons into a residence permit for working reasons. The applicant is a Russian national who entered Italy under a tourism visa in 1999 and got married to an Italian national. Under Italian law, an illegal foreigner married and living under the same roof with an Italian national cannot be expelled and is granted a residence permit for family reasons. In the present case, the couple separated. The Questura asserted that the holder of a residence permit for family reasons should keep on living under the same roof with her spouse to maintain her permit. The tribunal decided that in the present case the Questura was obliged to convert the residence permit for family reasons into a residence permit for working reasons. In fact, living under the same roof is necessary only for the issuance of the permit. Once granted, it is no longer conditional upon it. The judge decided the case according to Italian law, but it referred to the *Metock* case and to Directive 2004/38/EC as additional arguments to support its decision. He pointed out that according to the European Court of Justice the spouse of the Union citizen "irrespective ... of how the national of a non-member country entered the host Member State" enjoys the right to stay. Therefore, applying different rules to the case before it (spouse of an Italian national) would amount to a reverse discrimination and would also be contrary to Article 8 ECHR.

There is no administrative or judicial practice on application of the provisions of *Latvian* law in situations like the *Metock* case.

Concerning the applicability of *Metock* judgment, *Lithuania* seems to follow the ECJ rule established in this judgment. There is certain indistinctness as concerns third country nationals who are family members of Lithuanian citizens. The Aliens' Law (Article 101(2)) requires that third country national family member of Lithuanian citizens who applies for EU residence permit has exercised the right to freedom of movement in the EU or has arrived from another EU Member State's territory. This indirectly implies the requirement of a previous stay in another EU country, however the authorities are motivating that this provision only applies to Lithuanian citizens who did not yet exercise their freedom of movement.

The *Metock* judgment appears to be applied by the Maltese authorities. In the case of a married couple, irrespective of when and where the marriage took place, a non-European Union spouse of a citizen of the European Union can reside with that citizen in *Malta* without having previously been resident in another Member State.

In the *Netherlands* the Government stated on different occasions that the *Metock* decision had no consequences for the Dutch migration policies, let alone that they needed to be amended (Handelingen Tweede Kamer 18 September 2008, p. 188 and Tweede Kamer 23 490, nr. 517, p. 6 en 523, p. 17.) Nevertheless, the *Metock* judgment constituted a fatal blow to the desire in the Netherlands to introduce language or knowledge test as a condition for a visa for third-country national spouses of EU migrants in the national law of certain Member States. Such tests are clearly incompatible with Directive 2004/38 after the Court has specified that the rights of entry and residence of those family members depend on the fulfillment of those two conditions only. The above mentioned plans in the Netherlands to introduce long term visa requirements and integration obligations to third country national family members of a Community national can no longer be realized (see Hand. Tweede Kamer 4 december 2008, p. 2949, Aanh. Tweede Kamer 2008/2009, no. 3549 and 3596, and Tweede Kamer 23 490, nr. 569, p. 16).

The *Metock* ruling contains other relevant points for the legal practice in the Netherlands as well. For example, the Court decided that Union citizens are entitled in accordance with Directive 2004/38 to at least the same rights as under the old rules on free movement which were withdrawn. Some Member States, including the Netherlands, claimed before the Court that this explanation if accepted by the Court would lead to "unjustified discrimination" of its own citizens who have not used the right to freedom of movement within the EU. According to EU law they are not entitled to reunification with members of their families from third countries. The Court reiterated its previous case-law (for the first time in the *Morson* ruling) according to which "any difference in treatment" between EU citizens who have made use of their free movement rights and those who have not, falls outside the scope of community law. However, the Court underlined that the Member States must comply on this point with art. 8 ECHR (par. 59). According to the Dutch Aliens Circular the Court of Justice has accepted in *Morson*, that nationals who never have made use of the freedom of movement, are be subordinated to EU citizens on the issue of family reunification (B10/5.3.1). This wording is incorrect. The Court has never accepted this discrimination. Both in the *Morson* judgment as in *Metock*, the Court ruled only that EU law does not apply in this situation. That discrimination is not prohibited by EU law, does not mean that it is allowed. In the *Metock* ruling, the Court pointed out that a Member State must be able to justify such discrimination. So far, the Dutch Government has never provided a justification of this difference in treatment that meets the requirements of Article 14 ECHR and of Article 1 of Protocol XII to the ECHR.

After *Metock* it will not be easy to maintain existing restrictions or to introduce new ones, although the introduction of more strict policies to prevent abuse, such as marriages of convenience, may be

expected. On 18 December 2009, the State Secretary of Justice presented her policies against abuse and fraud (Tweede Kamer 2009-2010, 32 175, nr. 6). The State Secretary distinguishes three forms of use. Firstly, a group of nationals and EU-citizens that makes regularly use of their free movement rights. Secondly, there is a group that cheats and concludes marriages of convenience. Thirdly, she distinguishes a group " which, albeit formally observing the conditions lay down by Community rules, does not comply with the purpose of those rules" while circumventing the national legislation on family reunification. The Secretary of State would be able to act firmly against the abuse of the second and the "abuse of rights" of the third group.

The measures taken already in January 2009 will be continued: for a "durable relationship" it is required that the parties are living together for at least six months or that in the relationship a child is born. By 1 August 2009 the "pilot" in The Hague concerning the further investigations of suspected sham relationships with EU nationals will be "rolled out" nationally. Consular marriages are addressed and examined in greater detail. In addition, the State Secretary strongly supports registration and notification in a European context. Finally, the existing cooperation in this area with Belgium, Germany and Denmark will be extended to the United Kingdom and Portugal.

As regards family members of a Union citizen, no provision of the Act on entry makes the application of the Act conditional on requirement to be previously and lawfully resident in *Poland*. Therefore, the Polish Act implements Art. 3 para 1 and Art. 2 point 2 of the Directive 2004/38 correctly. According to Art. 9 para 1 and 2 of the Act, Union citizen may enter the territory of Poland on the grounds of a valid travel document or other valid documents confirming their identity and citizenship. Family member who is not a Union citizen may enter the territory of the Republic of Poland on the grounds of a valid travel document and visa (except for cases where visa is not required). Art. 10 para 1 of the Act on entry states that a family member who is not a Union citizen shall be issued an entry visa for stay or to join a national of the Member State. The Polish Act does not require that a family member shall previously lawfully reside in another Member State before entering Republic of Poland.

Similarly to *Jia*, the application of the *Metock* judgment in *Portugal* is not problematic. Law 37/2006 does not oblige a national of a non-member State who is the spouse of a EU citizen residing in Portugal, but who does not possess Portuguese nationality, to have previously been lawfully resident in another Member State before arriving in Portugal, in order to benefit from the provisions set forth in that law. Moreover, the rights foreseen in Law 37/2006 are granted to a national of a third country who is the spouse of a EU citizen residing in Portugal and who accompanies or joins that EU citizen, irrespective of when and where

their marriage took place and of how the national of a non-member country entered the country.

The *Romanian* regulation - Government Emergency Ordinance no.102/2005 – doesn't require prior lawful residence in another Member State for third country national's family members. According to the rapporteur no cases or complaints of this type occur in Romania.

In *Slovak* legislation, the right of residence of family members (both, citizens of EEA countries and citizens of third countries) is not conditioned by prior lawful residence of those family members in another Member State. Therefore, the *Metock* judgment has no relevance in Slovakia either.

From the viewpoint of the *Jia* and *Metock* judgments, the *Slovenian* legislation as regards conditions under which third-country family members can enter and reside in Slovenia may be considered as in conformity with EU law.

The *Spanish* legislation does not require a national of a non-member State who is the spouse of a Union citizen resident in Spain, to have previously been lawfully resident in another Member State before arriving in Spain. Therefore, no mention on judicial practice to this *Metock* question exists.

This is also the case regarding the second question treated in *Metock*: that is, whether the spouse of a Union citizen who has exercised his/her right of freedom of movement by becoming established in a Member State whose nationality he or she does not possess, benefits from the provisions of Directive 2004/38 irrespective of when and where the marriage took place and the circumstances in which s/he entered the host Member State. In this context, it is important to mention Spanish efforts to combat cases of abuse of right because of marriages of convenience. The recent Article 54 (2 b) of the Organic Act 2/2009 introduces into Spanish Aliens law "marriages of convenience" or "common law couple" as very serious infringements.

The *Swedish* Migration Board's practice concerning immigration of family members is in line with the *Metock* case. Further, in an internal message at September 17, 2008, in the Migration Board it was stated that the *Metock* case should not have influence on the Board's practice, since the Aliens Act should be applied already in line with the *Metock* judgment.

Since the *Metock* judgment was handed down on 25 July 2008 neither has there been in the *United Kingdom* an amendment to the 2006 Regulations, which at regulation 9 make prior residence by the family in

another Member State a requirement for family reunification in the UK with third country national family members, and regulation 12(1)(b)(i) which requires evidence that lawful residence in another Member State is presented before an EEA family permit (i.e. visa) will be issued. Nor have the ECI instructions been updated to reflect the current position in law.

The *Metock* judgment has received some attention from the UK judicial authorities in 2009. The 2007 Regulations have been amended a number of times, most recently on 30 April 2009 to include new powers on detention and expulsion of EEA nationals. However, the opportunity has not been taken to amend either regulations 9 or 12 which gives the impression that a third country national family member covered by article 2 Directive 2004/38 must have entered the EU area in accordance with the national law of a Member State before being able to enjoy family reunification with a migrant EEA national in the UK. The relevant webpage of the UK Border Agency (UKBA) has been amended but not the statutory instrument itself.<sup>11</sup>

#### 4. National reports on Hartmann

The Hartmann judgment is not mentioned *Estonian*, *Luxembourg's* and *Maltese* reports and not elaborated in the *Belgian* report.

In *Austria* the Hartmann decision has no impact on the Austrian legislation.

The only source of special legal regulations on the issue of frontier workers in *Bulgaria* is found in intra-institutional instructions. So far they seem not to contradict the findings in the Hartmann case. Neither transfer of residence, nor lack of permanent residence in the country, seems to be obstacles to equal treatment in Bulgaria. However for the time being administrative and judicial practice is lacking to confirm these theoretical suggestions. The case of Hartmann has not been referred by Bulgarian courts in 2009/10.

While Hartmann involves the category of 'frontier workers' this as such is - according to the *Cypriot* rapporteur - unlikely to have any bearing on Cyprus.

According to the *Czech* rapporteur the problem whether a cross-border worker and/or his/her spouse fall within the scope of the Regulation 1612/68 appears in the Czech legal context as unlikely. One of the reasons is the non-existence of a social benefit comparable to the German "Erziehungsgeld" in the Czech social system. Furthermore

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<sup>11</sup> <http://www.ukba.homeoffice.gov.uk/eucitizens/applyingundereuropeanlaw/>.

under Czech law governing social benefits, EU citizens are entitled to social benefits pursuant to Regulations 1612/68 and 1408/71. Thus the issue of frontier workers is regulated in the Czech Republic by direct application of Regulations 1408/71 and 1612/68. Therefore as regards to the classification of a person as a migrant worker it can be assumed, that under the legislation applicable in the Czech Republic, a national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can also claim the status of migrant worker for the purposes of Regulation No. 1612/68. Taking into account this conclusion, also family members of a migrating worker would be entitled to social benefits under the Regulations stated above. From this it follows, that also the question of granting a social benefit to the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, would be in the Czech legal context most probably resolved in conformity with the Hartmann judgement.

In *Denmark* no follow-up actions of the Hartmann judgment were identified while the domestic system is already regarded to be in line with it.

According to the *Finnish* Social Insurance Institution, the Hartmann judgment has not had and is not likely to have any impact on the domestic system in Finland too because it is already regarded to be in line with it.

In *France*, the residence requirement imposed by Article L 512-1 of the Code of Social Security for the granting of family benefits can be considered as contrary to the Hartmann judgment. Indeed, a French citizen residing in Spain and working in France cannot benefit from social benefits, as a frontier worker, since the allocation of benefits depends on the residence in France.

Following the Hartmann-judgment, in *Germany* the relevant social laws have been repeatedly amended finally by law of 2 March 2009. According to sec. 1 of the Bundeskindergeldgesetz in the version of 28 January 2009 there is no distinction between Union citizens and German nationals with regard to the access to Kindergeld under the general conditions of sec. 1 providing for an entitlement to children benefits to everybody who is employed under German law in a regular employment relationship, subject to obligatory insurance or without a regular residence in Germany is subject to German tax obligations. Therefore, a person in the situation of Hartmann would be entitled to Kindergeld under German law.

Most social allowances do not depend on residence, but on employment in Greece. Therefore, frontier workers are entitled to social allowances depending on employment.

According to Hungarian labour law every person who is in legal employment qualifies as a worker. Every EEA national who exercises economic activity on the basis of a legal employment relationship falls within the ambit of Reg. 1408/71/EEC. In addition, Article 2(d) of the Family Act explicitly lays down that the residence condition is waived for frontier workers. In sum, if a union citizen works in Hungary in a legal employment relationship (irrespective of the duration of the work), s/he will fall within the ambit of Reg. 1408/71/EEC and if s/he resides in another Member State will be exempted from evidencing his/her Hungarian residence. The person will be entitled to claim family benefits as a Community worker for himself and for his family. In this regard, Hungarian law is more favourable than the ECJ in *Hartmann and Geven* (C-213/05) because it grants benefits for the workers even if they have no real and sufficiently close links to Hungary.

There has been no explicit recognition in *Irish* practice that a frontier worker who does not fall within the regime of Regulation 1408/71 is able to claim the benefits of Article 7(2) of Regulation 1612/68 in the circumstances that obtained in the *Hartmann* case. There is a general recognition in relation to Supplementary Welfare Allowance, which is affected by Article 7(2) of Regulation 1612/68 that workers within the meaning of Article 45 TFEU (ex Article 39 TEC) do not have to establish habitual residence. This approach should extend to cover the *Hartmann* scenario. However, in discussions with an official in the Department of Social and Family Affairs, it appears that the issues in *Hartmann* have not arisen in the Irish context, but that if they did, those cases would be applied in deciding whether to dispense with any residence condition.

*Italian* law does provide for two social advantages for women similar to the German child-raising allowance and subordinate to the condition of residence in Italy. No case law on the subject is reported.

The situation in *Latvia* seems rather complicated. Article 4 of the Law on State Social Allowances provides that the right to the social allowances is enjoyed by persons residing in Latvia permanently. Union Citizens and their family member who have not obtained the status of permanent residents are entitled to the child-raising allowance only if this follows from Regulation 1408/71. As explained by the State Social Insurance Agency, if the child-raising allowance is claimed by a frontier worker employed in Latvia but living with his/her family in another EU Member State, Latvia will provide child-raising allowance to the frontier worker as an individual right. If, however, his/her spouse living in

another EU Member State is also employed there, then the state responsible for the provision of child-care allowance is the Member State where the child lives. In addition, both Member States are under the obligation to compare the amount of child-care allowances, and in case the amount of allowances differs they must compensate the difference. It follows that the Social Insurance Agency takes into account Regulation 1408/71 only. It is clear that under Latvian law the unemployed wife of a frontier worker residing outside of Latvia would be denied the right to Latvian child-care allowance, because the right to child-care allowance in Latvia is an individual right. However taking into account the *Hartmann* decision, especially paragraphs 25-26, where in substance the ECJ gave the interpretation of the scope of an individual right to social advantages for a frontier worker by extending it to the spouse as an indirect beneficiary, the understanding of an individual right to child-care allowance under Latvian law in the light of Article 7(2) of the Regulation 1612/68 also has to be extended.

In *Lithuania* family benefits may be paid to a person on the basis of the work place and not residence. The responsible country is the country of the workplace even if one of the parents is unemployed. If the allowance is higher in the country of residence, then the later pays the difference.

The *Hartmann* judgment of 18 July 2007 has to be read in conjunction with the *Geven* judgment (C-213/05) of the same day. Both judgments concern the German child-raising allowance ("Erziehungsgeld") to a cross-border worker. For the Dutch situation, *Geven* is of particular interest. Wendy *Geven* lives in the *Netherlands* but works after her pregnancy leave during the first year of her son's life between 3 and 14 hour a week in Germany. Before the Court could decide on the entitlement to a children's allowance it should be decided whether *Geven* is a worker in the meaning of Regulation 1612/68. The referring court (Bundessozialgericht) had already "established that during the period in question Ms *Geven* was in a genuine employment relationship allowing her to claim the status of migrant worker for the purposes of Regulation No 1612/68." Obviously the Court agreed. The Advocate-General added in his opinion that "the Bundessozialgericht (had) established that Ms *Geven* was indeed in a genuine employment relationship at the material time and that this followed in particular from the long-term nature of her employment".

Dutch policy and jurisprudence follow a rather different and much more restrictive approach. Since the nineties the Aliens Circular applies for genuine and effective employment the criteria of 40% of the fulltime equivalent (see Aliens Circular 2000, B10/3.2.1.). This criteria is leading for the jurisprudence as well, although District Court Amsterdam 6 April 2007, AWB 06/1681 [LJN: BA4413], *Jurisprudentie Vreemdelingenrecht 2007*, 277, rejected the argument of the

Immigration and Naturalization Service (IND) that employment is only effective and genuine when it is at least 40% of the full time equivalent. With reference to *Ninni-Orasche* (C-413/01) the court was of the opinion that the IND must base its examination on objective criteria and assess as a whole all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue. Nevertheless, District Court Haarlem 10 August 2007, AWB 07/4861, 07/4859 is still of the opinion that 6 hours where 38 is the full time equivalent does not constitute effective and genuine employment (see also Chapter I of this report). This approach clearly contravenes the *Geven* judgment. *Geven* implies also that the wording of the Aliens Circular 2000 should be amended.

In *Poland* the comparable benefit (child-raising allowances) is provided by the Act on family benefits, but the benefit is only provided for those migrants (EU nationals included) who reside in Poland during the period of receiving the benefit, unless provided otherwise by rules on co-ordination. Thus, it can be stated that with regard to child-raising benefits the Act requires the residence within the territory of Poland. The prerequisite of residence in Poland needs to be fulfilled.

This *Hartmann* judgment is of clear relevance for *Portugal*, since there is already a significant number of Portuguese who work in Portugal and transferred their residence to Spain and also of EU citizens who reside in Spain and work in Portugal. It follows from that judgment that the Portuguese State is obliged to grant the comparable child-raising allowances, which are foreseen by Decree-Law 176/2003, even to EU nationals or spouses who do not reside in Portugal, but one of whom works in full-time in Portugal and has established a real link with the Portuguese society, namely through a substantial contribution to the national labour market. Nothing in the text of Decree-Law 176/2003, and of Ruling 458/2006 implementing it, prevents these legal instruments from being interpreted in that sense.

Although the relevant legislation in *Romania* concerning child-care allowance, additional family allowances and single-parent support contains a provision on legal residency in Romania, it can be conclude through interpretation of the texts that the residence condition applies only in the case of third country nationals and not regarding EU citizens.

There has been no reference in law or in *Slovak* judgments of the *Hartmann* decision. However, almost all social benefits in Slovak legislation are conditioned with permanent residence in the country, or at least temporary residence. Therefore, individuals in similar position as in the *Hartmann* case would not be entitled, according to Slovak legislation, to the social benefits contrary to the wording of Article 7 (2) of the Regulation 1612/68 in the light of abovementioned decision.

As far as the ruling in *Hartmann* is concerned in the fields of social and tax advantages *Slovenian* legislation does not devote special attention to workers' family members, meaning that they have to satisfy generally stipulated conditions for entitlement to a particular right.

Unemployment benefit in *Spain* is governed by bilateral agreements concluded between EU frontier countries and the Spanish government. A recent judgment (67/2010) of the Galicia Autonomous Community High Court, dated January 15, 2010, has recognized the EU frontier workers' right to obtain the benefits resulting from the Social Security agreements concluded between the Member States, which work out more favorable than the EU legislation. The Spanish Court held that a different application of these Social Security agreements would constitute a restriction on the free movement of workers.

In *Sweden* a child-care allowance has been introduced recently. According to the guidelines the benefit should be embraced both by Regulation 1612/68 and 1408/71. In principle this should mean that a Swedish child-care allowance will be co-ordinated with the corresponding benefit in other Member States.

There has been no reference in law or in *UK* judgments of the *Hartmann* decision. However, there is a series of test cases before the Upper Tribunal (the new name for the Social Security Commissioners) regarding the export of the mobility component of disability living allowance – mainly a result of the issues around the entry into force of regulation 883/2004.

## 5. National reports on *Hendrix*

The *Hendrix* judgment is not mentioned in the *Luxembourg's* report.

In *Austria* the *Hendrix* judgment doesn't call for activity. According to information by social law experts and labour law experts as well as to data base research and newspaper observation, this decision hasn't any impact on the domestic law and practice.

Regarding the *Hendrix* case, the *Belgian* report concluded that the situation of posted workers from neighbouring countries may lead to potential discrimination in the social security field. The interpretation of "posted workers" seems to be different from one EU Member State to the other. Some Member States, such as Luxembourg, accept posted workers even without any condition of residence on its territory. Such different interpretations lead the "working country principle" to be

replaced by the “employer domicile principle” (“principe du siège”). This would allow companies to “shop” for the EU Member State with the least expensive insurance. The problem results from article 14, 1a of the 1408/71 Regulation which does not require a previous minimum insurance period in the sending country for the posted worker. The real period of insurance required by the competent administration is clearly different from country to country. In Belgium, the ONSS (Office National de Sécurité Sociale) requires a minimum of 30 days of first insurance period before the posting. However, one can notice that the lower the required first insurance period before the post, the higher the risk of avoiding social security payment.

The Law on the Integration of Disabled People and the Regulation for its Implementation, which regulate the provision of special non-contributory benefits to disabled people, do not stipulate an explicit requirement for residence in *Bulgaria*. The case of *Hendrix* has not been referred by Bulgarian courts in 2009/10.

The issue of the social benefits is to some extent a sensitive and controversial one in *Cyprus*. The *Hendrix* decision may have some bearing on Cypriot courts; moreover, the fact that the ECJ stated that the provisions of Regulation 1408/71 must be interpreted in light of the objective of Article 42 EC, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers, is significant for a potential case in *Cyprus* on the subject of freedom of movement. Moreover, the ruling that the residence condition can be applied only if it is objectively justified and proportionate to the objective pursued is again a significant authority for future court cases in *Cyprus*.

The *Hendrix* judgment is not yet referred to by *Czech* courts. Currently, there is no special law granting benefit payable to young persons suffering from total or partial long-term incapacity for work before joining the labour market. Therefore appearance of a case similar to *Hendrix* is in the *Czech* context unlikely.

Benefits to disabled persons are regulated by the Act No. 100/1988 Coll. on Social Security, which is implemented by the Regulation No. 182/1991 Coll. Further social benefits, which are applicable to young disabled persons under 26 years of age, are granted on the basis of the State Social Support Act No. 117/1995 Coll., as one of the categories of child benefits. Invalidity benefits are granted generally under the Act No. 155/1995 Coll., on Pension Insurance. However, only the benefits granted under Act No. 117/1995 Coll. were submitted by the *Czech Republic* for listing in the Annex IIa to Regulation 1408/71 and thus fall within the category of “special non-contributory benefits”, the payment of which could validly be made to depend on a condition of residence.

As to the possible export of these benefits, there are no special provisions in the applicable legislation. The general eligibility provisions of the State Social Support Act declare that a person who meets the usual entitlement conditions and is either a Czech national or a foreigner with permanent residence on the Czech territory is eligible.

According to the *Danish* Ministry of Employment, the judgment in *Hendrix* did not require any changes to Danish legislation.

In *Estonia* the scheme of non contributory benefits is very limited. Therefore there are only few benefits that are not exportable and that are connected with the state of the residence. According to the Annex II of the Regulation 1408/17 such benefits are benefits for disabled persons. Taking into account that there is only one benefit for disabled persons that is not exportable, it seems to be no difficulties concerning the equal treatment between the citizens of the EU Member States in questions of the non-contributory benefits.

In the *Finnish* system, the benefit comparable to that at issue in *Hendrix* is disability pension, the purpose of which is to secure minimum subsistence for persons who are unable to work. This benefit is covered by the Regulation 1408/71. Disability pension is exportable. The judgment in *Hendrix* has not had and is not likely to have any impact in Finland as the Finnish system is in line with it.

In *France* the benefits provided by law for workers with disabilities do not qualify for workers who do not live there. Therefore, these provisions preclude that a community worker living abroad and seeking professional activity in France can be recognized as a disabled worker.

According to the *German* Federal Ministry of the Interior, the access of Union citizens to social benefits for disabled persons is connected with ordinary residence, factual residence or occupation within Germany. Therefore, a person employed in Germany will be entitled to social benefits according to sec. 2 para. 2 and 3 Social Code IX.

Exporting social benefits has not been an issue occupied *Greek* law or Greek courts. The *Hendrix* judgment was not referred to by Greek courts in 2009/2010. Granting of unemployment benefits is dependent on having at least fulfilled a minimum period of insurance and not only on residence in Greece. Therefore, the *Hendrix* judgment does not have particular influence.

The Greek Organization for Workers' Housing provides the subsidizing of the rent of low income workers and pensioners. It is, however, unclear if the entitlement to this allowance remains when the beneficiary person resides in a country other than Greece.

*Hungarian* social law contains three types of special non-contributory benefits in terms of Reg. 1408/71/EEC: non-contributory old-age allowance, invalidity annuity and a benefit for motor-disabled persons. These benefits are found in three pieces of legislation, the personal scope of which are, however, commonly regulated in the main Act, the SocialA (Act III of 1993 on Social Administration and Social Benefits). Pursuant to the Act persons being entitled to exercise the right to free movement (EEA nationals, Swiss nationals and their family members) can claim these benefits if they possess a Hungarian residence that is evidenced by an address card issued by the local authority. The address card is usually issued for an indefinite period in case of Hungarian nationals and for one year in case of EEA nationals. Both Hungarian and EEA nationals are obliged to notify the authorities of their change in residence and they are legally liable for the damage caused by the omission of the notification. Reading these provisions together it must be stressed that Hungarian law sets the objective criteria of Hungarian residence for these special non-contributory benefits that must be evidenced by a valid address card. The lack of lawful residence results in the withdrawal of the benefit. Hence the objective requirement of residence is set by the SocialA, the authorities are not allowed to exercise discretion in cases of persons who leave Hungary. The Act does not contain any general clause for persons in possible hardship who maintain their economic and social links to Hungary.

There are a number of benefits which are categorized as social assistance or welfare payments and applicants for such benefits are under *Irish* legislation required to be habitually resident in Ireland. These benefits are: Jobseeker's Allowance; Non-Contributory State Pension; Blind Pension; Widow(er)'s Non-Contributory Pension; One Parent Family Payment; Guardian's Payment; Carer's Allowance; Disability Allowance; Supplementary Welfare Allowance (other than once-off exceptional and urgent needs payments); Child Benefit; and Domiciliary Care Allowance.

To the extent that the claimant is living outside Ireland in another EEA Member State and is working *in* Ireland, and the benefit claimed constitutes a social advantage, the habitual residence condition will not in principle apply (since the national rule cannot contradict EU free movement rules). However, where the social security regime (Regulation 1408/71 and, now, Regulation 883/2004) permits the paying Member State to limit payment of the benefit to persons resident there, the habitual residence condition will apply, subject to the principle of proportionality.

This is the position, for example, in relation to Non-Contributory State Pension. Although the payment may be made to persons outside Ireland for a five-year period, the person concerned must have first qualified for the payment as a habitual resident. There does not seem

to be a provision akin to that in Hendrix allowing the residence condition to be waived on grounds of fairness. The Irish national report does not identify any case-law or other public documentation referring specifically to the Hendrix principle

The *Italian* legal order does not envisage a benefit such as the one under review in the Hendrix case.

*Latvian* national law does not provide the right to benefits for the disabled persons in order to cover a reduction in income. However according to Annex IIa of Regulation 1408/71 Latvia has declared one benefit for disabled persons to be not exportable. It is the benefit for compensation of transportation for disabled persons. Looking to this provision from the perspective of Article 39 TEC (new Article 45 TFEU) and Article 7(2) of Regulation 1612/68 there could be situations especially with regard to frontier workers and members of their family where application of residence clause with regard to the right to the transportation benefit for disabled persons could lead to 'unacceptable degree of unfairness'. The State Social Insurance Agency has not received yet respective claims from frontier workers so far.

On the issues mentioned in Hendrix, the Lithuanian legislation may be problematic too, because benefits for handicapped persons are related to permanent residence in Lithuania (Article 1(4) of the Law on State Benefits of 29 November 1994, new version of the law of 19 May 2005).

*Malta* has only listed the 'Supplementary Allowance' and the 'Age Pension' in Annex IIa of Regulation 1408/71. It is however difficult to foresee that the Hendrix judgement will have an impact on Malta: given its geographical situation, it is very difficult to have a frontier worker who commutes on a daily basis to and from his residence to go to work.

Following the Hendrix judgment of the ECJ, the Central Appeals Tribunal in the *Netherlands* which asked for the preliminary ruling, came up with a decision on 7 February 2008. The Tribunal could not apply the 'unacceptable degree of unfairness'-clause as suggested by the ECJ in this case because this provision was only introduced in the *Wajong* in 2001, while the issue at stake was situated in 1999. However, the circumstances in this particular case do not fulfil the condition of paras 54-56 of the ECJ judgment that the legislation must not entail an infringement of rights, which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. The Tribunal referred to the fact that Mr Hendrix stayed employed in the *Netherlands* after he moved to Belgium and the close relation

between his working activities and receiving the Wajong benefit. So therefore the appeal was granted. In July 2008 the Central Appeals Tribunal used the 'disproportionality reasoning' from the *Hendrix* case to justify the entitlement to a Social Assistance Benefit to two British citizens, residing in The Netherlands during the period they would visit a rehabilitation clinic in Scotland. Withdrawal of the benefit because of the residence clause of the Social Assistance Act during this period was seen as an unjustified obstacle to the free movement of services.

In *Poland* a benefit of the kind as in *Hendrix* is provided by the Act on social pension. A Social pension (*renta socjalna*) is a non – contributory benefit for persons who became incapable to work before reaching maturity or graduating studies. No prior employment is required. The characteristic of the Polish "*renta socjalna*" is in principle the same as the 'Wajong' benefit in The Netherlands. For Polish and EU/EEA nationals there is a requirement of residence in Poland to be eligible for the benefit. According to the point 38 of the *Hendrix* judgment the residence requirement to reside in Poland seems to be compatible with Community law. Nevertheless, it seems that the reasoning of the ECJ is relevant to Polish law as well (especially points 57 and 58 of the judgment). Thus, when deciding on the entitlement to a social pension in case of residence in another country the economic and social links of beneficiary should be analyzed.

The *Portuguese* benefit to disabled young people is equivalent to the Dutch and, therefore, must be considered as a special non-contributory benefit within the meaning of Article 4(2)(a) of Regulation 1408/71 and a social advantage within the meaning of Article 7(2) of Regulation 1612/68. This payment may be validly reserved to persons who reside in Portugal because it is closely linked to the Portuguese socio-economic situation, since it is based on the national minimum wage and standard of living. It does not exclude that in cases where the worker who moved to Spain has maintained all of his economic and social links to Portugal, he/she must keep receiving the benefit at issue. It is for the national administration, under the control of the national court, to take such circumstance into account.

The *Romanian* Law no. 448/2006 about protecting and promoting the rights of persons with handicap grants allowances available to Romanian citizens living in Romania, and for citizens of other states and of persons without citizenship, if they are legally resident in Romania. The residency therefore is necessary to benefit from the provisions of the law. No similar practice occurred such as the *Hendrix* case yet.

The *Hendrix* judgment was mentioned in one decision of the Slovak Supreme Court. It was used by the Supreme Court in the case of a Slovak student studying in Czech Republic. The administrative

authorities denied him the benefit in material need, as he was, as a student of a university in the Czech Republic, staying abroad. According to Article 25 (9) of the Act No 599/2003 Coll. on Aid in Material Need and on amendments of some acts, as amended: „Benefits and allowances are not paid abroad and do not belong for the time in which the citizen in material need, or any of the individuals to be assessed together with a citizen in material need, stay abroad.” The Supreme Court revoked the decision of the administrative authorities in that case and returned the case back to them. The court stated in its decision that the proportionality of the protection of the legitimate aim enshrined in the abovementioned Article of the Act on Aid in Material need and the intensity of the intervention into the applicant's rights guaranteed by Community law should be assessed by the authorities when deciding on the benefit in material need.

According to the *Slovenian* rapporteur the domestic legislation does not include the ‘unacceptable degree of unfairness’ clause, as an exception to the rule of actual residence in a member state, obliged to provide such a non-contributory benefit. Nevertheless, despite this fact the rapporteur is of the opinion that the applicability of the Regulation 1612/68 in Slovenia is not eliminated.

The Hendrix decisions in not mentioned in the *Spanish* judicial or administrative practice.

The corresponding benefit *in Swedish* law is the disablement allowance (handikappersättning), and this benefit is listed in the Social security Act (1999:799) as a benefit based on residence. Hence, a preliminary conclusion is that in accordance with Swedish law the disablement allowance should not be paid if, for instance, a frontier worker living and working in Sweden moves to Denmark for residence but continues working in Sweden.

In the *UK* a “right to reside test”, which was introduced by the Social Security (Habitual Residence) Amendment Regulations 2004 became effective on May 1<sup>st</sup> 2004. Since then, a claimant for the means-tested benefits, as well as being present and habitually resident as required by the 1994 test, also has to have a ‘right to reside’ in the UK under UK or EU law. The right to reside test continues to give rise to legal challenges in the UK concerning who may rely on Article 7 of Regulation 1612/68; whether the residence test can be objectively justified and is proportionate to the objective pursued, and whether it goes further than what is required to achieve a legitimate objective pursued by national legislation as mentioned in the Hendrix case.

The Hendrix judgment was not referred to by *UK* courts in 2009/10. The main non-governmental organization which provides

advice to individuals about access to social benefits has referred to the judgment in questioning whether three UK benefits are liable to export. The detailed guidance issued by the Department for Work and Pensions states that a person claiming from abroad must still meet the usual entitlement conditions with the exception that they no longer have to be normally resident or present in the UK. In addition a person must have spent at least 26 of the previous 52 weeks in the UK at the date on which entitlement to the benefit can be established, unless they are: a posted or frontier worker; a family member of a worker in the UK, including posted or frontier workers, claiming Disability Living Allowance (care component) or Attendance Allowance, or under the special rules for terminally ill people.

## **6 National reports on Renneberg**

The Renneberg judgment is not mentioned in the *French* and *Luxembourg's* reports.

In *Austria* the Renneberg decision doesn't call for any activity in. According to Sect. 2 § 8 Income Tax Act (Einkommensteuergesetz) it is possible to take into account a loss abroad, if the person is subject to taxation in Austria without limitations. Tax law experts confirm that the decision has no impact on Austrian legislation.

In *Belgium*, an inhabitant receiving income from abroad can be tax-exempt if he or she is submitted to an international convention preventing double tax application. However, this income is subject to local and municipal taxes, if allowed by the International Convention, as if the income were perceived in Belgium (article 466bis of the 1992 Income Tax code). In this context, a Belgian inhabitant working in the Netherlands has to pay local and municipal income taxes even though he or she is exempted of taxes in Belgium by a bilateral convention preventing double tax application between Belgium and the Netherlands dated 5 June 2001. Alleging that the application of article 466bis is a violation of article 39 of the EC Treaty, a Belgian working in the Netherlands lodged an action in front of the Tribunal of Antwerp who decided to ask for preliminary rulings to the Constitutional Court. Answering the question on 5 February 2009, the Constitutional Court acknowledged that the legislator could not decide unilaterally in transnational matters (Constitutional Court, 5 February 2009, No 16/2009).

Basing its judgment on the *Government of the French Community and Walloon Government v Flemish Government* case (C-212/06), the Belgian Constitutional Court reminded that the provisions of the Treaty on freedom of movement for persons preclude measures

which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State, and that articles 39 EC and 43 EC are against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by EU nationals of the fundamental freedoms guaranteed by the Treaty. The Court refers to cases *Gilly* (C-336/96), *de Groot* (C-385/00) and *Renneberg* (C-527/06) (point B.12).

However, the Court stated that, regardless of the fact that these local taxes could be an obstacle to free movement, it is enough to note that the litigated tax is applied without consideration of the inhabitant's nationality and aims to allow local inhabitants to financially contribute to support their local municipality. This goal is of public interest and the means does not appear to be disproportionate. In other words, the principle of proportionality was respected. Consequently, the action was pulled off.

With reference to the *Renneberg* judgment the *Bulgarian* rapporteur mentioned an infringement procedure which was closed on 5 May 2010 as Bulgaria changed its legislation. On 19 March 2009 the European Commission announced the issuance of a reasoned opinion (2007/4881) formally requesting Bulgaria to change its tax provisions according to which certain types of Bulgarian source income are subject to a withholding tax on a gross base when paid to non residents whereas Bulgarian residents may deduct expenses related to the same income. According to the Bulgarian rules at the time (mainly the Law on Taxation of the Incomes of Physical Persons) certain types of Bulgarian source income of individuals and legal persons resident in other EU Member States and EEA/EFTA states are subject to withholding tax on a gross basis. However, the tax on similar income earned by Bulgarian residents is assessed on a net basis and Bulgarian residents may deduct expenses for the purpose of determining the basis of assessment of taxation of their income.

The case has not been mentioned by Bulgarian courts in 2009/2010.

The *Cypriot* rapporteur has not identified any rule that is contrary to the findings or the broader principle of the *Renneberg* case.

No concrete follow-up of *Renneberg* judgment in the activities of Czech authorities or courts could be identified. Under Czech income tax law, residential taxpayers and taxpayers, who stay in the Czech Republic more than 183 days a year, are subject to tax on their entire income, all other taxpayers (non-resident taxpayers) are subject to tax only on income received in the Czech Republic. Pursuant the provisions of Act. No. 586/1992 Coll., on Income Tax, mortgage interest relief may be claimed under certain conditions, however, these provisions do not

specify, whether the dwelling concerned has to be located in the Czech Republic. Thus it appears that it is possible to claim a mortgage relief also for properties located outside the territory of the Czech Republic. However, the income tax law stipulates the requirement, that non-resident taxpayers may claim mortgage relief (and certain other reliefs) only if their income from the Czech Republic is at least 90 per cent of his/her entire income. This provision appears to be problematic, as such requirement is applicable only to non-resident taxpayers, but no such precondition is entailed for the resident taxpayers. Thus in a case of a person with e.g. 85 per cent income from Czech Republic, the right to claim mortgage relief under Czech income tax law would depend from the residency of that person or the fact, whether or not such person has stayed for at least 183 days of the particular tax period (year) in the Czech Republic. Renneberg case concerned a person, inter alia, receiving "all or almost all of its income" in a Member State, which he/she was not resident of. It remains questionable, whether a non-resident with e.g. 85 per cent income from the Czech Republic would still fall under this category. If the answer would be positive, it appears, that the provisions stipulating the precondition of 90 per cent income from the Czech Republic would be in contrary to the ruling of the ECJ ruling in Renneberg case and thus with the Community law.

According to information obtained from the *Danish* Ministry of Taxation, the Renneberg judgment did not require any changes to Danish tax legislation, as the rules on frontier workers introduced in Danish legislation upon the ECJ judgment in Schumacher (C-279/03), such as the Act on Pay-as-you-earn Taxation ('Kildeskatteloven') Section 5B, allows tax relief in situations similar to the situation in Renneberg

According to the *Estonian* rapporteur the Renneberg decision has as a consequence that the bilateral tax agreements should be revised in order to avoid any unequal treatment or less favourable position of a migrant worker.

In *Finland* workers are entitled to claim tax deductions for payments of interest on a loan that is taken to finance the permanent owner-occupied home. Workers are entitled to make this deduction regardless of whether the home is located in Finland or abroad.

Although it is not quite clear to what extent the Dutch tax situation can be compared to the *German* situation, the rapporteur assumes that by the recent legislation on the transposition of EU tax provisions (Gesetz zur Umsetzung steuerlicher EU-Vorgaben sowie zur Änderung steuerlicher Vorschriften v. 8.4.2010 (BGBl. 2010, p. 386) the general issue of taking account of deductible expenses spent abroad for foreign organizations or security systems has explicitly been dealt with. However, it is not clear whether the highly complex situation of

calculating the taxable income and receiving a tax deduction based on negative income in another EU Member State is covered by the law.

According to the *Greek* rapporteur the *Renneberg* decision had no particular influence on Greece. Greek tax legislation does not provide that if the calculation of net income (including the income deriving from occupying his own dwelling), results in a negative amount, this negative amount is deducted from taxable gross income. Therefore, concerning this issue, there is no discrimination between nationals and other EU citizens.

As the *Estonian* rapporteur the *Hungarian* rapporteur refers to the applicable bilateral tax agreements as well. If a bilateral agreement so prescribes, a tax title emerging in another Member State has to be taken into account in the Member State liable for tax assessment.

The specific circumstances obtaining in the *Renneberg* case do not obtain in *Ireland*, since taxable income does not include the advantage which the taxpayer derives from occupying his own dwelling (and as a result will not enjoy the benefit of any tax deduction in respect of a negative amount).

In *Italy* the income tax act does not take into account the rental loss on immovable property in order to determine the basis of assessment of the income tax of a non-resident taxpayer, while interests paid on the mortgage are deducted from the gross income tax. On the contrary, resident taxpayers are entitled to both advantages.

In *Latvia* there is no right to negative income deduction with regard to the expenses relating to the dwelling in Latvia. There is only a right to negative income reduction for expenses relating to education and health service. The detailed Latvian regulations concerning the negative income deduction obviously does not envisage the situation of frontier workers. Firstly, expenses for medical services include expenses for health insurance, but regard only to such health insurance which is provided by insurance companies operating in accordance with Latvian Law. Therefore, a negative income deduction does not apply to such medical insurance which is provided by an insurance company outside Latvia. Secondly, although the applicable regulations do not explicitly refer to the medical services received in Latvia only, it is more likely that State Revenue Service would apply these regulations regarding only the medical services bought in Latvia. Both provisions neglect the situation of a frontier worker and his/her family members, who having residence in another member state and are more likely to receive medical services and medical insurance provided by local service providers. Although in 2008, the regulations

were amended concerning the provision considering expenses for education services received in other EU and EEA member states as subject to the negative income deduction, the Latvian tax legislation with regard to the negative income deduction is still contrary to Article 39 of EC Treaty (new Article 45 TFEU) and Article 7(2) of Regulation 1612/68.

The *Lithuanian* rapporteur sees little relevance of the *Renneberg* judgment for the Lithuanian situation because no similar possibilities to deduct or not to deduct income exist according to the Lithuanian legislation. The same applies to *Malta*, *Romania* and *Slovenia*.

The referring Supreme Court of the *Netherlands* took a final decision on 26 June 2009 (nr. 39258bis, VN 2009/33.14) in accordance with the decision of ECJ. This meant that *Renneberg* with regard to the tax treatment of his Belgian dwelling had to be treated in the same way as residents of the Netherlands. While the Belgium dwelling was his main residence he was entitled to the deduction for home mortgage interest according to the legislation at that time. In spite of the fact that the procedure related to years prior to the entry into force of the present Income Tax Act 2001 and the new income tax treaty with Belgium, it is not impossible that this judgment is still of importance. In the tax professional literature, reference is made to a number of possible discriminatory provisions in the current law as well.

Answering parliamentary questions the State Secretary of Finance informed Parliament on 9 December 2008 that the consequences of this ECJ judgment are still subject of further investigation (Tweede Kamer, vergaderjaar 2008–2009, Aanhangel 1897). The subject is still under investigation, see most recently Tweede Kamer, vergaderjaar 2009–2010, 26 834, no. 28, p. 7 (Report Commission Frontier Workers).

According to the *Polish* Act on personal income tax, there is a different position of individuals depending on their residence status. According to Article 3 of the Act, all individuals, whose place of residence is in Poland, are subject 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 subject 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 of the Act, there is no possibility to cover also income or losses generated outside territory of Poland in cases of individuals subjected to limited tax liability in Poland.

Concerning the implementation at national level of the *Renneberg* judgment, the *Portuguese* rapporteur remarks firstly, that the Portuguese tax law foresees that the interest on a debt taken on to finance a personal dwelling is deduced from gross work-related income and, consequently, from the taxable income of a resident taxpayer, even if the interest exceeds the advantage the taxpayer derives from living in his own dwelling. Secondly, there is a Convention between the Portuguese Republic and the Kingdom of Spain for the avoidance of double taxation and for the prevention of fiscal evasion in the field of taxes on income. It is not clear if such convention allows the deduction, for the purposes of determining the basis of assessment of the income in one of the States, the negative income relating to a house owned by the taxpayer and used as a dwelling in the other State, even if the nonresident taxpayer receives all or almost all of his taxable income in the State where he works. According to the rapporteur, due to Article 39 of the EC Treaty (new Article 45 TFEU) as interpreted by the Court of Justice in *Renneberg*, Portugal must accept in any case that the negative income related to a dwelling in Spain is taken into account by its tax authorities for the purposes of determining the basis of assessment of taxable income, whereas the taxpayer derives all or almost all of his taxable income from salaried activity carried out in Portugal. Therefore, the above mentioned convention must be interpreted in conformity with the *Renneberg* judgment.

In *Slovakia* the *Renneberg* judgment was explicitly mentioned in the compatibility clause to the draft law amending Act No 595/2003 on Income Tax (the draft law was adopted on 17 February 2009 and published in the Collection of Laws under No 60/2009). This Act repealed from the Act on income tax the permanent residence condition in Article 33 of the Act which governs so called tax bonus – the possibility to lower the tax base when having dependent children. Only individuals having permanent residence in Slovakia could apply the tax bonus before the amendment. As from 1 March 2009, tax bonuses on children are not connected with the permanent residence. The residence criterion was changed into an income criterion: 90 % of the income of the person concerned has to be from Slovakia.

Recently the *Spanish* tax legislation is amended. The amended Act intends to adapt the Spanish legislation on taxation of non-residents in order to improve free movement of workers, services and capital. Regarding frontier services a new rule is introduced on taxation in the reception State while till recently the Spanish rule was taxation in the State of origin. Concerning real estate taxes, the new Act includes rules on taxation in the Member State in which the real estate is located. On the other hand, the new Act introduces special rules for income obtained without a permanent establishment by taxpayers residents in another Member State.

In Sweden the *Renneberg* judgment has been considered in Swedish tax law and an amendment of the Income tax Act was coming into force on January 1, 2008. The intention was to adapt the Swedish legislation to EC law and to facilitate the movement on the labour market. The increased right to tax reduction for interest rate paid in another Member State should be granted to people having residence in the EU and income solely (or almost solely) from work in Sweden, if the interest rate has not been subject to tax reduction in the home Member State.

While the UK courts have not referred yet to the *Renneberg* decision, there has been quite a lot of academic interest in the judgment. Although the facts of *Renneberg* relate to the offsetting of rental income losses against income gained in another Member State from other sources, the wider principle applying the right of free movement of workers to tax matters is quite controversial. As regards loss made on UK holiday rental property, the asset most obviously relevant to EU nationals exercising free movement rights as workers, the rules are found in the Income Tax Act 2007 section 127(4) which applies to UK based holiday rental property. These losses can be offset against UK income. Regarding losses on rental property outside the UK, by concession any loss can be carried forward and set against future profits from the same property. This does not appear to be exactly what the ECJ had in mind in *Renneberg*. For EU nationals who are not resident in the UK but rent out property there, HM Revenue and Customs has a non-Resident Landlords (NRL) Scheme for taxing UK rental income. It requires UK letting agents to deduct basic rate tax from any rent they collect for the nonresident owner. If there is no letting agent and the rent exceeds £100 per week, the tenants must deduct the tax. Deductible expenses can be taken off. The nonresident owner must complete UK tax returns in respect of the tax deducted. Nonresident owners can apply to HM Revenue and Customs to receive rent without tax deducted subject to quite strict rules. This scheme may be questioned as regards its compatibility with *Renneberg* if applied to EU national workers exercising Treaty rights.

## **7. National reports on Collins**

The decision is not mentioned in the *Finnish, French, Lithuanian, Luxembourg's* and *Polish* reports.

In *Austria* the *Collins* judgment regarding the possibility to look for a job in another Member State and to receive financial support didn't cause any debate.

According to the rapporteur the follow-up of Collins in *Belgium* regarding job-seekers is consistent with the ECJ judgment. The link required with the domestic work market through the residence requirement exists also in the Belgian law regarding unemployment benefits applicable for job-seekers. The candidate for unemployment benefits has to be a resident of Belgium (see [www.belgium.be/fr/emploi/chomage/chomage\\_complet/conditions/](http://www.belgium.be/fr/emploi/chomage/chomage_complet/conditions/))

The corresponding term in *Bulgarian* law for 'habitual residence' is 'permanent address'. An issue regarding the requirement in law to submit applications for allowances at one's permanent address arose in 2009 when the Directorate of Social Assistance denied a right to allowances to a foreign national who had a permit for "continuous" residence in Bulgaria (renewable every one year). The reasoning of the administrative organ was that the foreign national did not have a "permanent" address in Bulgaria. That narrow interpretation of the law however was dismissed by the first instance court, as well as by the Supreme Administrative Court (SAC). In its Judgment No.2621 of 25 February 2010 the SAC stated that the "permanent" address specification in law concerned the territorial competence of the administrative organ rather than the recognition of the right of the individual.

The case of Collins has not been referred by Bulgarian courts in 2009-2010.

There is a decision of the *Cypriot* Equality Body (the Anti-Discrimination Authority) that addresses the receipt of public assistance for health reasons, which is illuminating as to the situation of the Union citizens requiring public assistance, including jobseekers' allowance. A complaint was registered by an 18-year-old Greek citizen suffering from severe leukemia against the Social Welfare Service, which had decided to discontinue the claimant's social assistance benefit for treatment received until May 2007. The Union citizen had been resident in Cyprus with his parents since 2002 and had been granted a 'visitor' indefinite leave to remain and was in receipt of public assistance since 2005 for humanitarian reasons, despite initial rejection due to his 'visitor' status. In October 2006, the complainant and his mother's residence status were changed to that of a family member of a Union citizen based on the law on free movement of workers. The Social Welfare Service decided to discontinue the public assistance on the grounds that he was not allowed assistance as his residence status was that of a dependent of his mother, who is a Union citizen with a residence permit for reasons of employment activity. The reasoning of the Social Welfare Service was based on the logic that the granting of residence is premised on the proof that the complainant's mother is in possession of "sufficient means for the maintenance of her family." According to the Equality Body the Director of the Social Welfare Service erroneously

suggested that a precondition for granting the free movement rights under article 9(1)(b) of Law 7(I)/2007 is that they are not considered to be “unreasonable burden on the social assistance system of Cyprus”. Moreover, the Director went on, again erroneously, to comment that the right of residence is dependent on being in possession of sufficient means.”

Central to the finding of the Cypriot Equality Body is the principle of equal treatment under sec. 22 of Law 7(I)/2007, considering the discrimination by the Social Welfare Service as unreasonable. The Equality Body clarified that all administrative formalities for the exercise of free movement and residence of Union citizens and their families for a period more than three months are set out exhaustively in the law and the Directive. It is clear that their primary residence stay is not dependent on the existence of sufficient means, as is the case with students or pensioners, for instance. As for the right of Union citizens to public assistance, the non-discrimination principle as set out in article 22 of the law is of paramount importance and the Equality Body recommended that the authorities restore the public assistance benefit to the complainant. The Social Welfare Service has complied with the recommendation. On the basis of the above case, by analogy the same principles must apply to jobseekers. It is not clear how long jobseekers may stay without complying with formalities; presumably indefinitely so long as they do not seek recourse to public funds. There has been no case law to test whether the Collins type of social assistance benefits would be allowed.

According to the Czech rapporteur Czech legislation and practice continues to be in conformity with Collins judgment. In cases falling outside the scope of Regulations 1612/68 and 1408/71, national laws apply and a condition of previous stay can be applied mainly for the reason to avoid social benefits tourism.

In *Denmark*, two provisions of the Act on Active Social Policy should be considered against the background of Collins: Section 3(2), which is dealt with below under Trojani and Section 12 a. According to Section 12 a, EU/EEA citizens residing in Denmark as ‘first-time jobseekers’ on the basis of Community law, as well as persons with a right to stay until 3 months without administrative formalities, are entitled to no other economic assistance than coverage of costs related to the return to their home country. Nevertheless, there would seem to be situations in which certain benefits under the Act on Active Social Policy should be considered as facilitating access to employment, so that a strict application of Section 12 a on the basis of a wide understanding of ‘first-time jobseekers’ would not be compatible with EU law.

In the *Estonian* report Collins is mentioned, but not elaborated.

In *Germany* foreigners who are staying in Germany exclusively for the purpose of seeking labour are excluded from unemployment benefits as well as social assistance.

In the *Greek* report Collins is mentioned but not elaborated. More in general most social benefits in Greece do not depend on residence, but on employment.

Although the ECJ opened up in the Collins the possibility of discretion for Member States by declaring that a genuine link with the labour market of the host state can be required if a union citizen claims jobseeker's allowance, *Hungarian* law is not as much sophisticated as it would be allowed by the ECJ. It grants benefits for workers even if they have no real and sufficiently close links to Hungary.

The *Irish* jobseekers allowance is regarded as a social assistance payment which is subject to the habitual residence condition. There is a presumption under the relevant legislation that a person is not habitually resident where he or she has not been present in the State or any other part of the Common Travel Area for a continuous period of two years. However, notwithstanding this presumption, all the circumstances of the case are to be taken into account, in particular:

- length and continuity of residence in Ireland or in any particular country,
- length and purpose of any absence from Ireland,
- nature and pattern of employment,
- applicant's main centre of interest,
- future intentions of applicant as they appear from all the circumstances.

There are detailed published guidelines for Deciding Officers on the determination of habitual residence, which make it clear that "the onus is always on applicants to provide sufficient evidence to support their claims for a social welfare payment". A person coming to seek employment (rather than to take up an actual job offer) is unlikely to be habitually resident. The application of the condition in individual cases is opaque. It is clear that even long periods of residence (5 years or more) will not be regarded as habitual where the family of the individual seeking support remains outside Ireland.

Financial benefits equivalent to the one which was in question in the Collins and Vatsouras cases do not exist in *Italy* at national level.

In the *Latvian* report Collins and Vatsouras are mentioned but not elaborated while an analysis of the cases is considered as too hypothetical.

In *Malta*, to receive a jobseekers' allowance, any unemployed person must be registered with the Employment and Training Corporation (ETC) and be readily available to take up employment etc. The benefit is conditional upon a residence requirement.

With reference to the Collins-judgment a District Court in the *Netherlands* annulled the decision of the municipal social assistance office to deny a social assistance benefit to an applicant with dual nationality (Polish and German). The denial was based on the fact that the applicant did not possess a valid residence document. According to the court the municipal social assistance office has to assess independently whether the applicant resided lawfully in the country or not. The applicant was living in the Netherlands for more than 3 months and most probably even more than 5 years while she resided in the Netherlands since 2001 (with a short break in 2004). Due to her past employment market history there is a "genuine link" between the employment market and the applicant which is according to the ECJ in Collins decisive for her social assistance request.

In *Portugal* the Collins judgment shows that the prerequisite of the possession of a legal residence in Portugal established by Law 13/2003, should not be taken too literally in order to be consistent with EU law and namely with Article 45 of the TFEU. Although currently Portuguese law does not foresees jobseeker's allowances provided under a specific act, the persons in such conditions can be entitled to the social income for insertion granted by Law 13/2003. As the ECJ states, in view of the establishment of the citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by EU citizens, it is no longer possible to exclude from the scope of Article 45 of the TFEU a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.

In *Romania* there are no litigations or complaints related to jobseeker's allowances. There are no financial benefits of this type.

In *Slovakia* the Collins judgment was neither mentioned in judgments of the Supreme Court, nor with regard to draft legislation. There is no obligation for EU citizens (including job-seekers) to register their residence, but if they do register (they need to show a travel document and a proof of accommodation to obtain a registration certificate) their residence is considered as a first residence permit and on this basis it is possible to request social assistance.

In the *Slovenian* report Collins and Vatsouras are mentioned but not analyzed in depth while an analysis of the issues of habitual residence and real and genuine activity in the Slovenian context is considered as

too hypothetical. The Slovenian system of social assistance does not cover special benefits for job-seekers.

The Collins decision has not been implemented in *Spain*. Nevertheless, as consequence of the lack of transposition of working conditions in general, the situation of jobseekers has not been regulated. Although, jobseekers are treated equally except for some family members (ascendants and descendants over 21). In this sense, Article 3, 2 RD240/2007 explains that all persons to whom the RD is applicable with the exception of dependent descendants over the age of 21 and dependent direct relatives in the ascending line have the right to access to any work activity, studies, on the same footing as Spanish citizens.

In *Sweden*, if a union citizen is a job-seeker, he or she should not be entitled to social assistance during the period he or she is looking for a job. However, referring to the Collins case, in situations when a job seeker has a "sufficient connection" to the Swedish labour market, in the preparatory works to the legislation it is stated that the jobseeker very probably could have a right to equal treatment regarding social benefits. Exceptions should also be made in case of emergency.

Collins is the starting place for much of the current litigation in the *UK*. The 'habitual residence' test for access to social benefits was introduced in the UK in 1994 in response to fears concerning 'benefits tourism'. It is applied to persons who had recently come to the UK (or returned in the case of British nationals) and who claim means tested social benefits or housing. If a person fails the habitual residence test then he or she will be treated as a 'person from abroad' and thus ineligible for the benefit. In Collins the ECJ did not find the test incompatible per se with EU law. There are a number of classes of persons who are exempt from the test including workers under EU law or those who have a right to reside permanently in the UK under Directive 2004/38. EU8 nationals in registered employment and EU2 nationals in authorized employment are also exempt.

There is no definition in UK law of who is habitually resident. As a result of case law, it seems that the decision is made on the basis of the length and continuity of residence, the person's future intentions, their employment prospects, their reasons for coming to the UK and where the person's 'centre of interest' lies. The benefits to which the habitual residence test is applied are:

- Income support;
- Income-based job seekers' allowance;
- Pension Credit;
- Housing Benefit;
- Council Tax benefit;
- Access to local authority housing.

Since its introduction it has caused quite substantial teething troubles in many local authorities. The Department of Work and Pensions has issued a number of guidance notes and prepared training modules for local authority decision makers on how to apply the test. There is still a steady stream of cases going to the courts on the subject.

## 8. National reports on *Trojani*

The decision is not mentioned in the *Cypriot, German, Lithuanian, Luxembourg's, Maltese* and *Polish* reports.

The *Trojani* judgment was neither subject to public debate nor to academic discussion in *Austria*.

The follow-up of *Trojani* in Belgium is mainly about the right to social benefits for EU citizens who stay regularly on the Belgian territory. According to information received from the federal administration dealing with social security, any EU citizen with a residence permit in Belgium should be entitled to claim social benefit and obtain it. No case contesting a potential refusal given by a social assistance local centre has been found pending in front of industrial tribunals. Another question is the right to reside if the residence permit is based only on the EU citizenship.

The case of *Trojani* has not been referred by *Bulgarian* courts in 2009/10. The Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD) does not contain a definition of 'worker' and 'self-employed person'.

The *Czech* legislation and practice appears to be in conformity with the *Trojani* judgment, even though the judgment was not referred by any available judgments of the *Czech* courts yet, nor it has been mentioned in the *Czech* laws. In contrary to the situation of *Trojani*, the applicable *Czech* legislation on the basis of which minimum subsistence allowance for persons with inadequate resources is granted (Act No. 111/2006 Coll., on Assistance in Need Act), does not stipulate *Czech* nationality as eligibility precondition. Pursuant to Sec. 3 also EU citizens are entitled to benefits granted under this legislation under the precondition of their residence on the territory of the *Czech* Republic for more than 3 months; this applies in cases, in which the entitlement to benefits of the EU citizen is not based on a directly applicable EU legislation.

In *Denmark* Section 3 (2) of the Act on Active Social Policy makes it a precondition for entitlement to benefits of longer duration – defined as

more than half a year, cf. Section 3 (3) – that the recipient be either a Danish citizen or an EU citizen or a family member who has a right of residence under EU law, or have such entitlement under an international agreement. The decisive question is whether this provision and the provision of Section 12 a (dealt with under Collins) are administered on the basis of a correct understanding of the EU rules on residence right, in particular the criteria for acquiring the status of worker as elaborated in Collins, Trojani and Vatsouras. As the impact of these ECJ judgments on the application of the Act on Active Social Policy has not yet been considered in cases decided by the National Social Appeals Board, there may seem to be some need for clarification towards the municipalities in charge of the administration of the Act.

In *Estonia* the Trojani judgment could have an impact in determining the notion of worker. According to the Estonian Social welfare Act, a person who has obtained a right to stay in Estonia, has also right to claim the social assistance i.e. minimum subsistence allowance. Only the criterion is that a person should be registered in population register.

The case of Trojani was referred to in the *Finnish Government Bill 205/2006* for the Act amending the Aliens Act, the purpose of which was to transpose the provisions of the Directive 2004/38/EC to national legislation. According to the Government Bill, the amended section 167 of the Act corresponds to the requirements laid down in Article 14 of the Directive. The Bill explains that those who burden unreasonably the national system of social assistance shall not be regarded to have the right of residence, and if a person does not have the right of residence, her entry may be refused. According to the Bill, what constitutes an unreasonable burden to social assistance system shall be decided case by case. The Bill refers in this connection to the Preamble of the Directive. Furthermore, the Bill emphasizes the significance of Article 14 (3) of the Directive. It is further stated that the authorities are to use discretion when deciding whether to refuse an individual's entry on the ground that (s)he does not meet the requirement of not burdening unreasonably the Finnish social assistance system. Refusing the entry is, thus, not an automatic consequence of burdening the social assistance system. The Bill refers in this regard to Trojani and Grzelczyk (C-184/99). It is stated in the Bill that refusing an EU citizens entry on the grounds of lack of resources comes into question only in very rare cases. It is further reminded that it is not possible to exclude an EU citizen from Finland on this ground and, thus, the person concerned can enter the country again despite of the previous refusal of entry.

It should further be noted that regardless of the ground and duration of one's residence, and also whether the residence is regarded as lawful or not, each individual residing in Finland is entitled

to means-tested minimum social assistance if she has acute need for that.

In some decisions, the *French* Central Social Welfare Board (Commission Centrale d'Aide Sociale, CCAS) appears to be under influence of *Trojani* in recognizing the right to grant social welfare (Revenu minimum d'insertion, RMI) to Community nationals to whom a residence permit was refused, even though they do not have adequate resources.

In its Resolution No. 2010-74 of 1 March 2010 on claims relating to decisions taken by the Social Welfare Fund (Caisse d'Allocations Familiales, CAF) of Saint-Etienne to suspend payment of benefits for children of Romanian nationality, HALDE (the French anti-discrimination and equality body) applied *Trojani* as well. The CAF had conducted a review of the lawfulness of the residence of the claimants as if they had never previously received family benefits. But in the light of Community law, lawful residence for the benefit of services differs significantly depending on whether the parties have already been receiving benefits or not. Indeed, granting them in the past family benefits - benefits awarded on condition of lawful residence - CAF had in fact recognized their right to residence in 2007. This reasoning was based on the *Trojani* decision. Insofar legal residence of Community nationals is recognized by both the Prefecture and the CAF, the reasoning of the Court in *Trojani* is transferable to cases in which the CAF has itself recognized the right to stay by the payment of benefits. This is confirmed by the provisions of a Circular of the Directorate of Social Security of June 3, 2009: "entitlements to benefits (...) of families already on benefits to the date of publication of Circular cannot be challenged on the basis of lack of prove of the right to stay ". It is also confirmed in the circular of National Social Welfare Fund (Caisse Nationale d'Allocations Familiales, CNAF) of October 2, 2009 which reiterates the right to maintain family benefits to EU citizens.

HALDE recently received new complaints regarding the suspension of family benefits to Romanian nationals, after the circular of 2009. HALDE has asked CNAF the directors to invite all CAF directors to remember their agents to maintain family benefits already granted to EU nationals.

The Social Security Court of St Etienne in three judgments of 30 November 2009 applied the same analysis. The court condemned the CAF to pay damages for harm suffered as a result of the suspension of family benefits to Romanians.

In the *Greek* report *Trojani* is mentioned but not elaborated. More in general most social benefits in Greece do not depend on residence, but on employment.

*Hungarian* law acknowledges the importance of the concept of unreasonable burden stating that the state is required to endure a certain degree of social burdens in case of union citizens and their family members. Temporary need cannot lead to expulsion. According to statistics EEA nationals have never been subjected to expulsion procedures for social reasons.

There has been no express reference to the application of the *Trojani* case in *Ireland*. The question whether the type of activity in this case would amount to “real and genuine” activity in the normal labour market has not arisen in the Irish courts yet.

The benefits corresponding to the *minimex* are social assistance benefits subject to the Irish habitual residence condition. In 2009, the additional prior requirement of lawful residence in the State was introduced, so that a person who is not lawfully resident in Ireland cannot be habitually resident there. Once lawfully resident, the person concerned must satisfy the conditions for habitual residence (see the discussion in relation to the *Collins* and *Vatsouras* cases, above and below): notwithstanding the length of stay, one could not be certain that a person in Mr. *Trojani*'s position would qualify.

If the habitual residence requirement was satisfied, on the basis of lawful residence, the person in question would be entitled to receive social assistance in the same way as host nationals. If not, the individual concerned may be able to avail of the repatriation scheme introduced in order to avoid individuals falling into destitution as a result of failing to satisfy the condition.

How the case would be assessed in *Italy*, and in particular whether Mr. *Trojani* would be considered as a worker, is very difficult to assume. Neither legislative nor administrative provisions, nor case-law, can be quoted as a help, since they have not addressed a similar case. It may be recalled that the administrative authorities in charge of the registration of the residence of EU citizens enjoy a margin of discretion and are reported to use it, at least sometimes.

In the *Latvian* report *Trojani* is mentioned but not elaborated while an analysis of the case is considered as too hypothetical.

In the *Netherlands* a District Court relied directly on *Trojani*. Citizens of the European Union enjoy a right of residence by direct application of art 18(1) EC (new Article 21(1) Treaty on the Functioning of the EU), subject to the limitations and conditions there referred to.

In *Portugal* the *Trojani* judgment is particularly relevant to the interpretation of Law 13/2003, as amended by Law 45/2005, which establishes the social income for insertion. This is a social income that is equivalent to a minimum subsistence allowance. It follows from *Trojani*

that a EU citizen, who does not enjoy a right of residence in Portugal under Articles 45, 49 or 56 of the TFEU and therefore is not economically active, but who is in possession of a valid residence permit, has a right to the social income for insertion by virtue of the principle of non discrimination on grounds of nationality.

In this case, Article 6(1)(a) of Law 13/2003, which demands as a prerequisite for the granting of such allowance «the possession of a legal residence in Portugal», applies literally and without raising any problem. Moreover, as that ECJ judgment also mentions, although it remains open to the competent Portuguese authority to take the view that such a EU national, because of his recourse to social assistance, no longer fulfils the conditions of his right of residence, a measure to remove him taken by such authority may not automatically be based on the recourse to social assistance.

The *Romanian* regulation on the minimum subsistence allowance for persons with inadequate resources (Law no. 416/2001) conditions such allowance to Romanian citizenship. But the text also states that the families or single persons, foreign citizens or stateless persons who reside in Romania, under Romanian law benefit from this kind of allowance. According to the applicable rules on free movement, this kind of allowance must be granted to EU citizens too. The residence clause is imperative.

In *Slovakia* the *Trojani* judgment was not mentioned in judgments of the Supreme Court or in documents accompanying the draft laws in 2009. This judgment does not have an impact on Slovak legislation, as the legislation is in line with the judgment.

In *Slovenia* too the issue is not considered as problematic since the Aliens Act regulates the field of residence according to Directive 2004/38/EC.

Despite the *Trojani* decision, the *Spanish* authorities have been limiting the social benefits; so the assistance service for giving birth or adoption of children is subject to the requirement of two years of residence.

*Trojani* has been dealt with in *Swedish* preparatory works on law (in connection with *Collins*). Concerning EU/EEA citizens who are *not* workers or self-employees, or not a person in these categories having the right to stay after ceased activity, or not belonging to the family of a person in any of these categories, there are restrictions regarding social assistance. Hence, an EU citizen who is *not* a worker etc. should not have the right to assistance based on the Social Services Act during the first three months. However, if there is an emergency situation the person should be entitled to assistance. Concerning persons who *are* workers or self-employees, or persons from any of

these categories having the right to stay after ceased activity, or belonging to the family to a person in any of these categories, there are no correspondent restrictions.

The decision in *Trojani* has been referred to a number of times by UK courts. In 2008 the Asylum and Immigration Tribunal considered whether a third country national with three children, one of whom was an EU national was entitled to continuing residence. The appellant's marriage to an EU national had broken down and there was no indication where he was. The appellant sought permanent residence after five years residence in the UK. The judge found that the burden of proof was on the appellant to provide evidence that her estranged husband either was or was not in the UK. He considered that the appellant was more likely to know this than the UK authorities. Further, the judge held that as the appellant had not been a worker, self employed or self sufficient in the UK for five years, she and her children could not benefit from the right of permanent residence. The judge referred to *Trojani* but found it unhelpful. He found that the family had no right to reside in the UK as the EU national child was not self sufficient and his mother did not have the right to work. This case is of dubious consistency with the ECJ.

Also in 2008, a UK Social Security and Child Support Commissioners' Decision considered the *Trojani* judgment. There a Portuguese national had joined her son in the UK. She turned 60 years old and applied for state pension credit. The UK authorities determined that she was not to be treated as a person in the UK as she did not have a right to reside in the UK. The appellant claimed that she did have a right to reside as she lived with her son who was a worker and was dependent on him. The Commissioners determined that the appellant was not dependent on her son as she had not been dependent on him in her country of origin and it was questionable whether she was dependent on him in the UK (she had been claiming job seekers allowance before turning 60). The Commissioners considered whether *Trojani* was relevant but found it was not help to their specific case.

## 9. National reports on Vatsouras

The decision is not mentioned in the *Cypriot, Finnish, French, Lithuanian, Luxembourg's, Maltese and Polish* reports.

The *Austrian* report did not go into the details of Vatsouras.

Regarding Vatsouras, there is no financial benefit intended to facilitate access to employment in *Belgium*. There is only a social assistance benefit in the terms of article 24(2) Directive 2004/38. Consequently, a

financial benefit claimed by any job-seeker in Belgium could be denied.

Under the *Bulgarian* Law on Social Assistance allowances for job-seekers are considered 'social assistance', irrespective of the interpretation of the ECJ in the *Vatsouras* case that "benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24 (2) of Directive 2004/38". So far in the database of the Supreme Administrative Court of Bulgaria there are no related cases involving EU citizens and their family members.

It should be noted that there is no transposition in Bulgarian law of Article 14 (4) (b) of Directive 2004/38 providing that "Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged".

Under the *Czech* legislation, the level of remuneration and duration of the activity are not decisive for the status of a person as a worker; additionally the *Czech* courts would have to apply the EU understanding of the notion of the „worker“. As to the right to receive benefits in favour of job-seekers, under the law applicable to unemployment benefits (Act No. 435/2004 Coll., Employment Act), EU citizens and their family members are in general treated equally with *Czech* nationals (Sec. 3) and the provision stipulating concrete preconditions for receiving unemployment benefits (Sec. 39) does not contain any restrictions in this regard.

Against the background of the *Vatsouras* judgment there would seem to be situations in *Denmark* in which certain benefits under the Act on Active Social Policy should be considered as facilitating access to employment, so that a strict application of Section 12 a of the Act according to which 'first-time jobseekers' are not entitled to any other economic assistance than coverage of return costs would not be compatible with EU law.

As the *Trojani* judgment the *Vatsouras* decision could have an impact in *Estonia* in determining the notion of worker. The second impact concerns the interpretation of what a social assistance benefit is. If a benefit is intended to "facilitate" access to the employment market" these benefits should be excluded from the social assistance benefit. There could be cases where the local government can grant the different benefits also for providing a better access to the labour market. The *Vatsouras* judgment would lead to the situation where

such benefits are not any more viewed as social assistance benefits and should be granted to jobseekers too.

In *Germany* the *Vatsouras* judgment has not solved the diversity among German social courts on the issue whether unemployment benefits must be granted to Union citizens even though they fall under the exclusion clause whereby foreigners who are staying in Germany exclusively for the purpose of seeking labour are excluded from unemployment benefits as well as social assistance.

In the *Greek* report *Vatsouras* is mentioned but not elaborated. More in general most social benefits in Greece do not depend on residence, but on employment.

*Hungarian* law makes no distinction as regards the receipt of unemployment benefits on the basis of the legal status of the migrant. If the person had a legal employment and obtained the registration certificate, s/he is eligible for benefits.

With the *Collins* and *Vatsouras* cases, it has to be asked whether obtaining the jobseeker's allowance can be subject to a habitual residence condition in *Ireland*. If, as a matter of EU law, it is to be regarded as "a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State", any requirement that a "genuine link" or connection be established between the applicant and the Irish employment market can only mandate a waiting period long enough for the authorities to be sure that the applicant is genuinely seeking work. The question does not seem to have been raised in the national courts or otherwise addressed in Ireland.

Financial benefits equivalent to the one which was in question in the *Collins* and *Vatsouras* cases do not exist in *Italy* at national level.

In the *Latvian* report *Collins* and *Vatsouras* are mentioned but not elaborated while an analysis of the cases is considered as too hypothetical.

In the *Netherlands* the *Vatsouras* decision led to questions in Parliament. The Dutch benefit based on the Work and Social Assistance Act (*Wet Werk en Bijstand*, WWB) is seen as a social assistance benefit and not as a benefit to facilitate access to employment like the German benefit as disputed in *Vatsouras*. The government confirmed that an economic active EU citizen who has fulfilled effective and genuine activities and has become involuntary unemployed has a right to a WWB benefit during the six months period he holds his status as a worker (based on Art. 7(3)(c) Directive 2004/38). After that period

the Immigration and Naturalization Service (IND) decides on an individual basis whether an appeal on the WWB benefit gives rise to termination of the residence because the EU citizen has become an unreasonable burden.

Financial benefits equivalent to the one which was in question in the Collins and Vatsouras cases do not exist in *Poland*.

In *Portugal*, according to Article 20(3) of Law 37/2006, which transposes Article 24(2) of Directive 2004/38/CE, EU citizens and their family members are not entitled to solidarity allowances during the first three months of residence or during a longer period, if the EU citizen entered the Portuguese territory to seek employment. Since, on one hand, the Portuguese legal order does not specifically foresee jobseeker's allowances and, on the other hand, the allowances established by Law 13/2003 are globally considered as 'social assistance', although they can also be granted to jobseekers, it is not clear if Portugal, as the host Member State, is obliged to grant such allowances to jobseekers during the periods mentioned above. According to the rapporteur the fact that Article 6(1)(c) of Law 13/2003 also enumerates as prerequisite for the entitlement to such allowances 'the active availability to work' implicates that Portugal is obliged to confer entitlement to these allowances to EU nationals seeking employment during the first three months of residence or as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

The *Romanian* rapporteur is not aware of any litigation or complaint relating to benefits of a financial nature intended to facilitate access to the labour market.

The Vatsouras decision is not elaborated in the *Slovakian* report.

In the *Slovenian* report Collins and Vatsouras are mentioned but not analyzed in depth while an analysis of the issues of habitual residence and real and genuine activity in the Slovenian context is considered as too hypothetical. The Slovenian system of social assistance does not cover special benefits for job-seekers.

The Vatsouras decision has not been implemented in *Spain*. The report is unclear about the situation concerning unemployment benefits.

The crucial matter in the Vatsouras case if the applicants were considered to be entitled to benefits reserved for workers has not been commented on in the *Swedish* debate yet.

The decision in Vatsouras raises a number of interesting questions in the *UK* about EU nationals' access to social benefits. It has been generally

accepted that most UK non-contributory (means-tested) benefits come within the scope of social assistance. The least problematic benefits have been job-seekers allowance and income support. However, job seekers allowance is only available to people who are available for and actively looking for work. Income support is available for people in low income work and other categories of persons available for work as well as persons who are not deemed available for work. In so far as these benefits are designed to assist individuals to get into or back into work then under the Vatsouras doctrine they do not constitute social assistance. As a result claiming these benefits cannot be a ground for expulsion from the UK as an unreasonable burden on the social assistance scheme. But moving one step further, if these are benefits to which the right to equal treatment applies as Vatsouras seems to suggest then it may be that EU national job seekers should be eligible for them. At the moment, the intersection of the 2006 Regulations with the definition of 'qualified persons' together with the social security regulations which categorise as 'a person from abroad' EU nationals who do not have UK law 'right to reside' means that EU national job seekers are excluded from access to these benefits. This has not yet been challenged in the UK courts.

## 10. National reports on Raccanelli

The decision is not mentioned in the *Finnish*, *French* and *Luxembourg's* reports. The decision is referred to in the *Belgian* report but not elaborated.

According to the *Austrian* rapporteur the Raccanelli-decision doesn't cause problems in Austria. As a doctoral student you are either a student only or an employee of the university (as a researcher or lecturer). Maybe there might be some misuse in specific disciplines where doctoral students have to work close together with the professor (e.g. because of the need to use a laboratory); then the student should be employed as a "project staff": But usually doctoral students are not involved in university procedures in a way that calls for a qualification as "employee".

According to the *Bulgarian* rapporteur the ECJ judgment in the Raccanelli case has not brought any new legal developments in this regard yet. If a similar case arises in Bulgaria, general anti-discrimination legislation would apply. However it is hardly probable that even Bulgarian nationals who are PhD students are considered workers.

According to the *Cypriot* rapporteur the rules of the Research Promotion foundation (RPF) contain various discriminatory elements for

researchers to be funded as employed researchers of Cypriot institutions or other institutions based in Cyprus, as workers exercising the right to free movement in the EU. For instance in the categories of eligible persons the term 'researcher' is defined as "academic, scientists who work's permanently or has a contract of employment/cooperation with an institution" but the contract of employment/cooperation must be a contract of indefinite duration or a long duration that is not confined to a single task or research program". Such a provision amounts to (a) direct discrimination against workers of fixed term contracts, or even those on part-time contracts. (b) This provision is *prima facie* indirectly discriminatory against Union citizen researchers who would otherwise be allowed to exercise their right to be employed or contracted for services by an institution in Cyprus, when compared to Cypriots. The rapporteur assumes that the goal of the RPF rules would be to encourage 'local' research and infrastructural investment in 'developing' the institutions based in Cyprus, but such an aim in such means as provided in the provision is unlikely to be justifiable. Moreover, it is likely to be contrary to the ruling of *Raccanelli*, by both unduly restricting the definition of researcher as 'worker' and restricting free movement of workers. A complaint is pending before the Cypriot Equality body on the basis of this logic.

At the present, no concrete follow-up of this judgment could be found in the activities of Czech authorities or courts. As regards the eventual influence of the case, a situation similar to the *Raccanelli* case may occur also in the Czech Republic, i.e. a private association employs a researcher/provides a researcher with a grant enabling him to prepare a doctoral thesis on this bases. A researcher with an employment contract would be liable to income tax and social security contributions, whereas a grant recipient would be not affiliated to the social security and health insurance system, however, he would be liable to income tax. The Czech law, in general, does not contain any specific provisions on providing grants to students/researchers by private-law associations. In a case similar to *Raccanelli*, the Czech courts would be obliged to apply the Community law concept of a "worker" on the basis of direct applicability of Community law in order to asses, whether the grant recipient can be regarded as a "worker" under Article 45 TFEU (ex Article 39 TEC).

According to information obtained from the *Danish* Ministry of Employment, the judgment in *Raccianelli* did not require any changes to Danish legislation. The reasoning behind this is the fact that the general rules on interpretation of the concept of workers apply, as no rules on the interpretation of the concept of worker exist specifically to researchers and artists.

The case of Raccanelli does not have any implications to the practice and to the legislation concerned in *Estonia* too. There is no such practice that the same places of work for doctoral students are only reserved for domestic students and the other under the worse conditions are only meant for foreigners. On basis of the law the foreign and domestic doctoral students are treated equally.

In *Germany*, the Labour Court of Bonn by judgment of 19 November 2008 has rejected the claim of Mr. Raccannelli, since he has not been regarded by the Court as qualifying as a worker in the sense of EU legislation due to his particular contractual agreement with the Max-Planck-Society. Mr. Raccanelli has filed an appeal with the Labour Appeal Court. The appeal is still pending.

The Raccanelli judgment does not have particular influence in *Greece* as a special status of researchers does not exist. It depends on the research institution and the form of funding whether the researcher is in actually a worker or not.

In *Hungary* the granting of scholarships for young researchers falls within the competence of high-level educational and/or research institutions. A full time Ph.D. researcher has determined teaching and studying obligations, must obey the instructions of the appointed professor and gets remuneration as well. In this sense he would be a "Community worker" and would fall under the EC Treaty. Browsing the eligibility conditions of the ELTE University, Law Faculty (Budapest) we found that the Ph.D. candidate must have obtained his/her diploma in a Hungarian university in order to be eligible to apply. It means that students who obtained their diploma in another Member States are excluded from the possibility to apply and to become funded full time Ph.D. researchers.

According to the *Irish* rapporteur the issues as mentioned in the Raccanelli judgment have not come up in the Irish context.

The same applies to *Italy*. A case similar to the Raccanelli could hardly have taken place in Italy, since there is only one kind of contract that doctoral students can sign with Universities or research institutions.

In *Latvia* and *Lithuania* too the issues as analyzed in the Raccanelli judgment are not likely to arise in these countries.

In *Malta* the rapporteur is not aware of any particular action or follow-up taken by the Maltese authorities.

The judgment of the Supreme Court in the *Netherlands* in the case of a Dutch Ph.D. student working on a grant rather than an employment

contract like his co-workers seems in accordance with the Raccanelli ruling of the EC Court of Justice. In its judgment of 14 April 2006 the Supreme Court decided that Ph.D. students working on a grant should be considered as working on a labour contract according to the Civil Code. Three elements are decisive: work, remuneration and authority. Ph.D. research is part of the core business of a university and should therefore be considered as work. The Supreme Court qualifies a study grant as remuneration and according to Article 7:611a Civil Code (BW) the relationship should be considered as based on a labour contract when the work continues during three consecutive months weekly or for at least twenty hours a month.

The ruling of the EC Court of Justice and the judgment of the Supreme Court seem to prevent the intentions of the universities to attract in the future (foreign) Ph.D. students on study grants only.

In its decision 2008-106 the Equal Treatment Committee used the Raccanelli judgment to establish a labour relationship in a situation in which a labour contract according to civil law was lacking.

In *Poland*, there is no possibility to be both employed at a University and have a scholarship. However, employment concerns any employment taken by an individual. In the latter case, such a person, irrespective the fact of preparing a doctoral dissertation shall be treated as a worker, as opposed to a not working doctoral student.

In *Portugal* there are some private-law associations, equivalent to that at issue in case Raccanelli, which contract with researchers preparing their doctoral thesis or grant them subsidies for that purpose. According to this judgment, such private-law associations must observe the principle of non-discrimination in relation to workers within the meaning of Article 45 TFEU (ex Article 39 TEC). An infringement of such principle can entitle the worker in question to claim compensation pursuant to the national legislation applicable in relation to non-contractual liability.

According to the *Romanian* rapporteur similar problems as analyzed in Raccanelli could not be identified in the Romanian jurisprudence.

In *Slovakia* the provisions governing position of doctoral students in the Law on universities apply according to Article 113 of this Law equally to Slovak citizens and citizens of EEA countries. Therefore, Raccanelli judgment should not have any influence on Slovak legislation.

In *Slovenia*, in case of a dispute on the existence of the employment relationship it shall be assumed that an employment relationship exists, if the core elements of employment are dominant. The role of the court is therefore focused on assessment of the actual content of the contractual relation of the parties. The wording of neither the contract

nor the type of that contract has legal relevancy for the court's decision. In this respect it does not matter if the worker is a national of another Member State.

In *Spain*, legislation regarding researchers "in training" allows two different situations. The old system: four years of a grant as researcher in training (no labour contract) and a new system: two years of a grant as researcher in training (no labour contract) and two more years of a labour contract. In both models during the first two years there is not a recognised labour relation, with all the social security consequences of that situation.

According to *Swedish* law a criterion for being a worker is remuneration (wage), and a person having a scholarship should not be considered to be a worker. Further, it should be noted that scholarships granted to doctoral students are not contrary to Swedish law, even if there is for different reasons a strive to engage doctoral students as employees.

The *UK's* treatment of research students considered by the ECJ in *Raccanelli* varies considerably. This is because there is no standard form within which PhD students carry out their research. It depends on the university and the form of funding whether the student/researcher is in fact a worker or not. For the purposes of UKBA, while the term worker is not defined in the 2006 Regulations, the ECIs state that a worker is "someone who is in either full time or part time employment." The ECIs state that "a person who is doing vocational work and does not receive a wage may qualify as a self sufficient if (for instance) they have funds to support themselves or if a charity is meeting their living costs." It is not clear that this is strictly in line with the ECJ's case law on the subject. As regards UK employment law, it is for the student/researcher to claim he or she is a worker under TFEU in which case the relevant test is that of EU law. The rapporteur is not aware of any cases on this issue.